

Federal Court



Cour fédérale

Date: 20231214

Docket: T-2667-22

Citation: 2023 FC 1692

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 14, 2023

PRESENT: Madam Justice Azmudeh

BETWEEN:

XIAOZHI LIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, XiaoZhi Lin [the Applicant], has filed this application for judicial review of a decision of the Canada Revenue Agency [CRA] dated November 22, 2022, concluding that he was not eligible to receive payments under the Canada Emergency Response Benefit [CERB]. The grounds for the denial are related to the fact that the Applicant apparently did not earn at

least \$5,000 in employment income in 2019 or in the 12 months prior to the date of his first CERB application.

[2] The Applicant had initially received CERB payments in 2020 on the basis of claims submitted to the CRA. More specifically, the Applicant received CERB payments from March 15, 2020, to September 26, 2020, for a total of seven periods.

[3] On January 17, 2022, the CRA began an audit of the Applicant's eligibility for another benefit, the Canada Worker Lockdown Benefit, when the Applicant submitted additional documents on January 17, 2022, and February 14, 2022. These documents included pay slips from the employer, Le Lunch, dated November 10, 2021; November 25, 2021; December 9, 2021; December 23, 2021; January 6, 2022; and February 3, 2022, filed by the Respondent as Exhibit D.

[4] Around March 4, 2022, the CRA conducted an audit of the Applicant's eligibility for the CERB for which the Respondent sent additional documents on March 6 and 17, 2022. These documents were bank statements in the Applicant's name for the period of January 1, 2021, to March 15, 2022, filed by the Respondent as Exhibit F.

[5] The CRA's first decision, made on March 24, 2022, determined that the Applicant was ineligible for the CERB. During a second review of his eligibility in November 2022, the CRA again concluded that he did not meet the requirements.

[6] The Applicant filed his application for judicial review on December 20, 2022, with the Federal Court, contesting the CRA's November 22, 2022, decision to deny the CERB payments.

[7] For the 2019–2020 taxation years, the Applicant declared earning the following income:

Taxation year (filing date)	2019 (2020-04-21)	2020 (2021-03-29)
Employment income	\$81	\$4,270
Professional income	\$81	\$0

Taxable amount of scholarships, bursaries, fellowships and artists' project grants	\$11,836	\$5,114
Total deductions	\$5,125	\$2
Employment Insurance benefits	---	\$6,000
Other income		\$14,750
Net income	\$6,792	\$30,132

[8] For the reasons that follow, I dismiss this application for judicial review.

A. *Relevant legislation*

[9] The following legislation is relevant in the case at hand:

COVID-19 Emergency Response Act (SC 2020, c 5)

Definitions

2 The following definitions apply in this Act.

COVID-19 means the coronavirus disease 2019. (*COVID-19*)

Minister means the Minister of Employment and Social Development. (*ministre*)

week means the period of seven consecutive days beginning on and including Sunday. (*semaine*)

worker means a person who is at least 15 years of age, who is resident in Canada and who, for 2019 or in the 12-month period preceding the day on which they make an application under section 5, has a total income of at least \$5,000 — or, if another amount is fixed by regulation, of at least that amount — from the following sources:

- (a) employment;
- (b) self-employment;
- (c) 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*; and
- (d) 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.
(*travailleur*)

Eligibility

6 (1) A worker is eligible for an income support payment if

- (a) the worker, whether employed or self-employed, ceases working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in respect of which they apply for the payment; and
- (b) they do not receive, in respect of the consecutive days on which they have ceased working,
 - (i) subject to the regulations, income from employment or self-employment,
 - (ii) *benefits*, as defined in subsection 2(1) of the *Employment Insurance Act*,
 - (iii) allowances, money or other benefits paid to the worker under a provincial plan because of pregnancy or in respect of the care by the worker of one or more of their new-born children or one or more children placed with them for the purpose of adoption, or
 - (iv) any other income that is prescribed by regulation.

Exclusion

(2) An employed worker does not cease work for the purpose of paragraph (1)(a) if they quit their employment voluntarily.

Regulations

(3) The Minister may, by regulation,

(a) exclude a class of income from the application of subparagraph (1)(b)(i); and

(b) prescribe any other income for the purposes of subparagraph (1)(b)(iv).

II. Preliminary issue

A. *Can the new evidence submitted by the Applicant be accepted at the judicial review stage?*

[10] At the judicial review stage, the Applicant tried to file the following additional evidence with his affidavit dated February 7, 2023:

- Diploma from the University of Quebec at Trois-Rivières, in the name of XiaoZhi Lin, dated February 19, 2020, for the *Programme court de premier cycle d'apprentissage du français pour non-francophones II* [undergraduate short program in French language learning for non-Francophones II];
- Transcript from the University of Quebec at Trois-Rivières, in the name of XiaoZhi Lin, dated January 30, 2020, for the undergraduate short program in French language learning for non-Francophones II;
- Notice of Assessment for the Goods and Services Tax/Harmonized Sales Tax (GST/HST), in the name of XiaoZhi Lin, dated December 3, 2020, page 1/4;

- Notice of Assessment, in the name of XiaoZhi Lin, dated November 30, 2020, page 1/3;
- GST/HST and QST filing, in the name of XiaoZhi Lin, dated December 9, 2020, page 1/3;

[11] In his memorandum, the Applicant also alleges the following information for the first time:

- That he declared his tips in the “Other income” section in his 2020 tax return;
- The following elements about the restaurant called ISSHIN:
 - There were 60 seats;
 - The tables were used 3–4 times per night;
 - There was a long line up at the door;
 - The employees said to each other, [TRANSLATION] “There are no peak hours here because we are busy all the time”.

[12] It is known that, in principle, the only evidence that is admissible before the Court hearing the judicial review is that which was available to and brought to the attention of the administrative decision maker, such that evidence that was not before the decision maker is inadmissible on judicial review (*Lévesque v Canada (Attorney General)*, 2023 FC 997, at para 28 [*Lévesque*]). See also *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 42, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Association of Universities*]; *Singh v Canada (Citizenship and Immigration)*, 2009 FC 11 at paras 27–29).

[13] However, there are three exceptions to this rule, as noted by the Federal Court of Appeal in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*]:

- i) where new evidence is required to provide general background in circumstances where that information might assist in understanding the issues relevant to the judicial review;
- ii) to bring attention to procedural defects; and
- iii) to highlight the complete absence of evidence before the administrative decision maker when it made a particular finding (*Tsleil-Waututh Nation* at paras 97–98, cited in *Lévesque* at para 29. See also *Association of Universities* at paras 19–20).

[14] In two recent CERB-related decisions, the Court addressed this question. In *Lalonde v Canada (Revenue Agency)*, 2023 FC 41, at paras 19–23, Régimbald J. partially rejected new affidavit evidence filed by the applicant. In *Desautels v Canada (Attorney General)*, 2022 FC 1774 at paras 27 *et seq*, the filing of new evidence that was not before the officer was rejected, particularly because the applicant had this evidence in his possession and could have submitted it to the decision maker in a timely manner.

[15] The additional evidence the Applicant tried to submit does not assist in understanding the issues relevant to the judicial review or bring attention to procedural defects, nor does it highlight the complete absence of evidence before the decision maker when it made its findings. In addition, this evidence was available to the Applicant at the time of the second review by the CRA, and there is no reason alleged by the Applicant justifying his failure to submit it at that time.

[16] Considering that allowing this new evidence to be submitted would breach the principles established by the case law, I reject the submission of this new evidence by the Applicant at the judicial review stage.

B. *Issues and standard of judicial review*

[17] The issues in the case at hand are as follows:

- a. Is the CRA's decision reasonable?
- b. Was there a breach of procedural fairness?

III. Analysis

A. *Is the CRA's decision reasonable?*

[18] Although the Applicant did not provide any arguments on the applicable standard of review in the case at hand, I agree with the Respondent that the presumption of the reasonableness standard applies here (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras 23 and 25 [*Vavilov*]).

[19] In her affidavit, the second review officer, Sophie Gravel-Noël [the Officer], specified how she analyzed the Applicant's file before concluding that he was ineligible for the CERB.

[20] The Officer first explained the CERB program, its application period, the requirements for accessing this assistance program, and the CERB auditing process, particularly with respect to the steps that must be followed by audit officers during the first and second review.

[21] The Officer then explained how she assessed the totality of the evidence in the Applicant's file at the time of her review. She considered the following:

- a. A letter from Sylvie Demers, General Manager of "Le Lunch", dated March 31, 2022, filed as Exhibit H.
- b. Information in the Applicant's tax return for the 2019–2020 taxation years, filed as Exhibit I.
- c. The log of the shared notepad ("Notepad") of the CRA's systems for the Applicant's file, filed as Exhibit J.
- d. The log of the notes in the "Observations" file of the CRA's systems for the Applicant's CERB file, filed as Exhibit K.
- e. The documents submitted by the Applicant during his first eligibility review, namely:
 - i. his record of employment from "Le Groupe MMA Inc." for the period from October 13, 2021, to December 20, 2021 (Exhibit C);
 - ii. the Applicant's pay slips for his employment at "Le Lunch", dated November 10 and 25, 2021; December 9 and 23, 2021; January 6, 2022; and February 3, 2022 (Exhibit D);
 - iii. a letter addressed to the CRA signed by the Applicant on March 5, 2022;
 - iv. a tax summary for the 2019 UBER period (Exhibit E, in a bundle);
 - v. cheques for \$921.91 and \$528.07 payable to the Applicant from 9391-0057 Québec inc. Restaurant Ramen ISSHIN. dated

- January 29, 2020, and February 12, 2020, respectively (Exhibit E, in a bundle);
- vi. cheques for \$450.80, \$732.82, \$718.46, \$222.52 from Foo Lay Food (3764605 Canada Inc) dated February 14, 2020; February 28, 2020; March 13, 2020; and March 20, 2020 (Exhibit E, in a bundle);
 - vii. the Applicant's record of employment entitled "Record of Employment" for 3764605 Canada Inc for the period from February 10, 2020, to March 18, 2020 (Exhibit E, in a bundle);
 - viii. a statement for one of the Applicant's TD Canada Trust accounts for the periods from January 31, 2020, to February 28, 2020; and February 28, 2020, to March 31, 2020 (Exhibit E, in a bundle); and
 - ix. a document with a bank statement in the Applicant's name for the period from January 1, 2021, to March 15, 2022 (Exhibit F).

[22] In light of this information, the Officer concluded that the Applicant did not earn at least \$5,000 in employment income in 2019 or in the 12 months prior to the date of his first application.

[23] As the Officer notes in her report, in 2019, the Applicant was studying French full time. His only source of income was from his employment with Uber, for which he did not work much. His total income was therefore \$81 in 2019. The Applicant applied for the CERB on March 7, 2020. However, the Officer reviewed his income for the 12 months prior to his application and concluded that he had received an income of less than \$5,000, as shown by his 2020 tax return, which indicates an income of \$4,270.

[24] The Applicant declared \$2,385 in income from Foo Lay Food and \$1,885 from Ramen Isshin, the restaurant where he worked from January 2020 to March 2020, all for a total of \$4,270 for 2020. While the Applicant stated in his first letter, dated January 17, 2022, that he had received \$800 in tips, he changed this amount to \$750 in his second letter before finally admitting that he could not confirm the exact amount because the amounts had been received in cash and he had never deposited them in a bank.

[25] I consider that once the Officer was confronted with contradictory statements on the exact amounts of tips that were never deposited in the Applicant's bank account and that were therefore untraceable, she gave him the opportunity to explain the discrepancy between the amounts. The Applicant could not confirm the exact amount because he was relying on an estimate. The Officer then asked him whether he could explain how the restaurant calculated the distribution of the total tips among the various staff members, including with the cooks, as the Applicant was one of these cooks. Again, the Applicant could not give an answer. Then, according to her notes, which are also an integral part of her reasons, the Officer estimated that a tip making up about 50% of a person's income was too high to be reasonable. For these reasons, the Officer did not consider the tips in the Applicant's total income.

[26] For these reasons, the Officer determined that the Applicant's income did not amount to \$5,000, making him ineligible to receive the CERB.

[27] I consider that the Officer gave the Applicant sufficient opportunity to justify his income, including tips. When she received suspicious evidence concerning the tips, she inquired further and made a reasonable decision in light of the evidence submitted. She explained her decision

intelligibly and transparently, and we can clearly see the chain of reasoning. I therefore consider that the Officer made a reasonable decision.

B. *Was there a breach of procedural fairness?*

[28] Considering the above analysis, there is no need to address the issue of procedural fairness. However, in light of the facts on the record, I am of the opinion that there was no breach of procedural fairness in this proceeding.

[29] The Applicant argued that the injustice suffered was how his professional situation suddenly changed because of COVID-19. One day in mid-March 2020, he was asked to stay home without any income. While I can understand the difficulties related to this stoppage of work, and therefore of income, this is not a factor supporting the conclusion that the decision is unfair.

IV. Costs

[30] Section 400 of the *Federal Courts Rules* [the Rules] gives the Court full discretion regarding the amount of costs and their distribution, as well as regarding the determination of the person who must pay them. After considering all the factors listed in subsection 400(3) of the Rules, as well as the Respondent's submissions and the other circumstances in this matter, I consider that there is no need to award costs in the case at hand.

V. Conclusion

[31] The application for judicial review is dismissed.

[32] No costs are awarded.

JUDGMENT in T-2667-22

THIS COURT'S ORDER is as follows:

1. The application for judicial review is dismissed, without costs.

“Negar Azmudeh”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2667-22

STYLE OF CAUSE: XIAOZHI LIN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: MONTRÉAL, QC

DATE OF HEARING: DECEMBER 12, 2023

JUDGMENT AND REASONS: AZMUDEH J.

DATED: DECEMBER 14, 2023

APPEARANCES:

Xiaozhi Lin

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Claudia Desgroseilliers

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Montréal, Québec

FOR THE RESPONDENT