Federal Court  Cour fédérale

Date: 20240723

Docket: T-238-23

Citation: 2024 FC 1154

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 23, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

GILLES BUSSIÈRES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Canada Emergency Response Benefit ("CERB") is part of a series of measures introduced by the Government of Canada in response to the impacts of the 2019 coronavirus ("COVID-19") pandemic. It is a taxable benefit designed to provide financial support to Canadian employees and self-employed workers who are directly affected by the impacts of COVID-19 and who are ineligible for EI benefits.

[2] The applicant, Gilles Bussières, is seeking judicial review of the decision by the Canada Revenue Agency ("CRA") on January 6, 2023, finding that he was ineligible for the CERB. The applicant had received benefits under that plan in 2020. The CRA subsequently conducted eligibility reviews and found him ineligible.

[3] According to the applicant, the decision was unreasonable and there was a breach of procedural fairness in the processing of his claim.

[4] For the reasons that follow, I am of the view that the application for judicial review should be dismissed.

I. The facts

[5] The applicant applied for the CERB and consequently received payments from March 15, 2020, to September 26, 2020, for a total of seven periods. The CERB applications for periods 1 to 7 were initially accepted by CRA without review by a benefits validation officer.

[6] On May 4, 2022, a CRA compliance officer conducted a review of the applicant's eligibility and determined that he was not eligible for the CERB because he had not earned at least $5,000 of income (before tax) in 2019 or in the 12 months preceding the date of the first CERB application. This minimum income criterion is required to receive the CERB.

[7] On August 17, 2022, the CRA conducted a second eligibility review and reached the same conclusion. The CRA notified the applicant by letter that he was ineligible for the CERB because he had not met the two mandatory conjunctive criteria to be eligible for it: (1) having

earned an income of at least $5,000 in the 12 months preceding the date of the first application; and (2) having ceased work, or having had reduced hours as a result of COVID-19.

[8] On September 15, 2022, the applicant filed an application for judicial review of the decision resulting from the second eligibility review on August 17, 2022. As part of this judicial review, the CRA agreed to conduct a third review and issue a new decision. The applicant abandoned that application on December 1, 2022.

[9] Isabelle Perron, a validation officer (the "officer"), completed the third review of the applicant's eligibility. She played no role in the first two reviews.

[10] On January 6, 2023, after conducting a third review of the applicant's eligibility for the CERB, the CRA determined that the applicant was not eligible for the benefits he had received for the following reasons:

- The applicant had not earned at least $5,000 of income (before tax) in 2019 or in the 12 months preceding the date of the first CERB application.
- The applicant had left his job voluntarily.
- The applicant had not stopped working for reasons related to COVID-19, nor had his hours of work been reduced as a result of COVID-19.

[11] For the income criterion, the officer based her conclusion on the applicant's 2019 T4, which indicates that he earned $2,251 in that year, and the 2020 T4, indicating that he earned $1,439. As the first CERB application was made on March 15, 2020, the officer subtracted his

income after that date, which was $287.37, from the total on the 2020 T4. His income for 2020 was therefore $1,151.63. Adding his 2019 and 2020 income together, the officer found that the applicant had earned only $3,402.63. This amount is less than $5,000, contrary to the mandatory CERB criterion.

[12] The applicant's 2020 T4 indicates that he also earned $1,600 from self-employment for painting services, but the officer chose not to count that amount because she was not satisfied with the evidence submitted by the applicant in that regard. The applicant's total income at the time of his first CERB application was therefore less than $5,000.

[13] The officer also concluded that the applicant had left his job voluntarily. He had feared for his health and could not bear wearing a mask. He followed public health instructions indicating that he was at risk based on his age. However, the applicant did not provide a medical note recommending that he cease work. Moreover, the applicant did not seek other work and has not worked since that date.

[14] Lastly, the officer concluded that the applicant had not stopped working for reasons related to COVID-19, nor had his hours of work been reduced as a result of COVID-19. In reality, the applicant chose to cease work because he feared for his health and could not bear wearing a mask for long periods. Again, he did not provide a medical note attesting to his medical condition.

[15] The applicant is seeking judicial review of the decision dated January 6, 2023.

II. Issues and standard of review

[16] The applicant raises two issues:

(1) Was the decision dated January 6, 2023, reasonable?

(2) Did the decision-making process comply with the principles of procedural fairness?

[17] The standard of review for the first issue is reasonableness, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[18] With respect to the issue of procedural fairness, it is common ground that correctness is the applicable standard of review: *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at paras 34–36. I adopt the clarifications of Justice Gascon in *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 16:

> In this particular setting, "correctness" simply means that a reviewing court must be satisfied that the duty to provide procedural fairness has been met. The Court stated that where the duty of an administrative decision-maker to act fairly is questioned, assessing a procedural fairness argument requires to verify whether the procedure was fair having regard to all of the circumstances (CPR at para 54), including the five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 25-26). It is up to the reviewing court to make that determination and, in conducting this exercise, the court is called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). In other words, it requires the court to determine whether the administrative process followed by the decision-maker achieved the level of fairness required by the circumstances of the matter (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 21). As the Federal Court of Appeal eloquently expressed it in CPR, "[n]o matter how much deference is accorded administrative

> tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56).

[19] The respondent raises another question in this case: Can the applicant submit documents at the judicial review stage that were not submitted to the decision-maker? This issue concerns the procedure followed in judicial review and, therefore, no standard of review applies to it.

III. Analysis

A. *New evidence*

[20] First, it must be determined whether the new evidence should be dismissed. As a general rule, the filing of new evidence is prohibited, subject to three limited exceptions: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 16; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97–98. The principle is based on respect for the differing roles played by reviewing courts and administrative decision-makers: *Access Copyright* at para 16.

[21] In judicial review, my role is to review the decision based on the facts before the decision-maker. It is not to consider new evidence that should have been before the decision-maker.

[22] The respondent argues that two of the documents attached to the applicant's affidavit were not before the officer. They are Exhibit A (a Record of Employment for his former

employer, Métro de la Plaza Laval), and Exhibit F (an excerpt from a document from the Institut national de santé publique du Québec entitled “Un employé de 70 ans et plus peut-il refuser de travailler?” [Can an employee aged 70 or over refuse to work?]).

[23] No exceptions apply to this case, so I cannot consider the new evidence.

B. *Was the decision reasonable?*

[24] To be eligible to receive CERB payments, applicants were required to demonstrate at least $5,000 of income earned from prescribed sources (which included income from self-employment) in 2019 or in the 12 months prior to their first application (the income requirement). In addition, applicants were required to have stopped working or had their hours reduced as a result of COVID-19.

[25] The applicant argues that the decision was unreasonable for two main reasons: (1) the officer based her decision on an erroneous finding of fact in relation to the assessment of his income; (2) the officer failed to consider that he had not left his job voluntarily but had instead followed the advice of public health authorities in Quebec.

(1) *Income*

[26] The applicant asserts that the determination of his income was unreasonable because the officer did not consider the income tax return (including the T4) he had filed. He contends that he had earned $1,600 of self-employment income as reported on his income tax return (“other employment income”).

[27] In examining the third review report, I note that the officer explained her assessment of the applicant's income. The case law is well established with respect to the principle that a validation officer's notes are an integral part of the decision (*Aryan v Canada (Attorney General)*, 2022 FC 139 [*Aryan*] at para 22). In this case, the officer's analysis shows that she considered the information submitted by the applicant but found it to be insufficient to establish his self-employment income.

[28] The officer explicitly noted that the applicant had filed an income tax return indicating that he had earned $1,600 in addition to his employment income. The officer's notes indicate that the applicant worked at a Métro grocery store stocking shelves and that he had worked there eight hours per week from August 2019 until the pandemic on March 15, 2020.

[29] With respect to his self-employment income, the officer made the following observations:

> [TRANSLATION]
>
> In addition, the taxpayer carried out a painting contract for a woman in his son's apartment building in 2020. Amount of work: $1,500. He explained to me that the woman asked him to add the bathroom. He charged her $100 more. Everything was paid in cash.
>
> Although we have an invoice for $1,500 in 2020 and the taxpayer reported $1,600 in other employment income, the taxpayer indicates that he has no invoice for the $100. He told me it was a "one-time contract". When I asked the taxpayer if he could provide other documents, he indicated that he had no other documents to provide. He also indicated that he had no written contract, that he had no other documents to provide. He also stated that he had no written contract and no bank statement because he was paid in cash and had no accounting. He also did not do any advertising.
>
> He has no history of self-employment since 2012.
>
> In light of this, the taxpayer did not provide sufficient documentation to show that the work was performed and [that the

> income] was earned. Moreover, he is unable to provide us with any other documents and has no advertising to promote the fact that he does painting work.
>
> It is therefore concluded that the self-employment income cannot be considered.
>
> [Typographical errors corrected.]

[30] The officer's findings demonstrate that she conducted a full review of the documents submitted by the applicant. I understand that the applicant does not agree with the assessment in the decision, but I find no shortcomings or flaws that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[31] The respondent acknowledges that the officer incorrectly determined that the first application date was March 15, 2020, when in fact it was April 25, 2020. I am of the view that this minor error is not so "central or significant" as to render the decision unreasonable. Even if this error is corrected, the applicant's total employment income for 2019 and 2020 was $3,690 (i.e., $2,251 plus $1,439).

[32] The fact that the applicant filed a tax return indicating that he also earned $1,600 from self-employment is not determinative (see for example *Hayat v Canada (Attorney General)*, 2022 FC 131 at para 20; *Aryan* at paras 35–41). The officer carefully examined his return and explanations but found them to be unconvincing. It is not the role of a reviewing court to reassess the evidence considered by the decision-maker and interfere with its factual findings, absent exceptional circumstances (*Vavilov* at para 125). Such exceptional circumstances do not exist in this case.

(2) *Reason for stopping work*

[33] The applicant states that he stopped working as a result of government measures related to the pandemic. He argues that the Quebec government has recognized the right of people aged 70 and over to stop working due to their great vulnerability.

[34] The evidence on the record shows that the applicant himself told the officer that he had left his job voluntarily because of the risks to his health. He feared COVID-19 and could not wear a mask. He cited the right of people aged 70 and over to stop working. However, there was no law conferring such a right on such individuals. Even assuming that public health authorities indicated at that time that there was a risk for people aged 70 and over and that they advised them to limit contact with the public, I note that the applicant did not produce a medical note recommending that he stop working.

[35] In light of the evidence on the record, while I can understand why the applicant decided to leave his job, I agree that the officer's finding that he had left his job voluntarily was not unreasonable. The applicant stated this in a telephone call with the officer and there is no other evidence to contradict this. In light of this evidence and the absence of evidence to the contrary, the officer's conclusion was reasonable.

C. *Breach of procedural fairness*

[36] The applicant submits that there was a breach of procedural fairness on two grounds. First, he notes that the fact that the same person signed the second and third review letters confirms that there was no new independent review of his file. This argument does not hold up because the respondent's affidavit explains that the person who signed the letters was the

manager of both decision-makers, and the notes in the system confirm that the decision under review was made by a different officer than the one who made the second decision.

[37] The second argument raised by the applicant relates to the criteria mentioned in the decision. According to the applicant, the third decision cites a new factor, which he did not have an opportunity to review or make submissions on. He argues that adding an additional criterion regarding his eligibility for the CERB program, after he was informed that he had to prove he had earned more than $5,000, constitutes an abuse of authority.

[38] The applicant's argument rests in part on the progression of the three decisions made in his case. In the first decision, the applicant was found to be ineligible on the ground that he had not earned at least $5,000 of income in 2019 or in the 12 previous months. After the second review, it was determined that he did not meet the eligibility criteria, including the income requirement, and that he [TRANSLATION] "had not ceased working due to COVID-19, nor had his hours of work been reduced due to COVID-19". The decision of the officer who conducted the third review is also based on these two criteria, in addition to the fact that the applicant had left his job voluntarily.

[39] The fact that the decision under review in this case (i.e., the third decision) is based on three factors is not unreasonable, given that these factors are listed in the *Canada Emergency Response Benefit Act*, SC 2020, c 5, and the applicant must satisfy the officer that he meets all of the applicable criteria. Section 6 of that Act sets out the eligibility criteria for the CERB, and subsection 6(2) explicitly states that a person who voluntarily quits his or her employment is not eligible for an income support payment. The officer therefore had not only the right but the duty to consider this factor, and she had no duty to notify the applicant of it.

[40] I therefore cannot agree with the applicant's argument and am of the view that there was no breach of procedural fairness.

IV. Conclusion

[41] For all of these reasons, the application for judicial review will be dismissed.

[42] The applicant sought costs in the amount of $250. In light of all the circumstances in this case, there will be no award as to costs.

JUDGMENT in T-238-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Each party shall bear their own costs.

"William F. Pentney"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-238-23
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