Federal Court  Cour fédérale

Date: 20241025

Docket: T-2518-23

Citation: 2024 FC 1702

Toronto, Ontario, October 25, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

ANDREW CLARKE

Applicant

and

ATTORNEY GENERAL OF CANADA
(CANADA REVENUE AGENCY)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Benefits Validation Officer ("Officer") of the Canada Revenue Agency ("CRA") dated October 27, 2023, that the Applicant was not eligible to receive the Canada Recovery Benefit ("CRB") for three (3) two-week periods, because the Applicant did not have a 50% reduction in average weekly income compared to the previous year due to the COVID-19 pandemic ("Decision").

[2] This application is a continuance of an Order of this Court in *Clarke v Canada (Attorney General)*, 2023 FC 924 [*Clarke*]. In *Clarke*, Madam Justice Susan Elliott remitted the Applicant's CRB application to a different decision maker after the Respondent "[conceded] that the Applicant was not given 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" (*Clarke* at paras 2–4).

[3] Similarly, in this case, the Respondent has conceded that the Decision was arrived at in a procedurally unfair manner because in the context of the second review of the Applicant's application, the Officer indicated that a final decision would not be made until the Applicant had an opportunity to submit new evidence for consideration, including a further revised record of employment ("ROE").

[4] This Application is governed by the *Canada Recovery Benefits Act*, SC 2020, c 12 [*CRB Act*], s 2. Pursuant to the *CRB Act*, eligible employed and self-employed individuals directly impacted by the COVID-19 pandemic could apply for income support for any two-week period beginning on September 27, 2020, and ending on October 23, 2021. The Minister of Employment and Social Development ("Minister") is responsible for the CRB (*CRB Act*, ss 2, 3, and 4); however, the CRB is administered by the CRA (*CRB Act*, s 41).

[5] Briefly, the Applicant applied for CRB for 24 two-week periods from October 11, 2020, to October 23, 2021. Following the decision in *Clarke*, a new officer with CRA commenced a second review of the Applicant's application on July 12, 2023. The second review focused on two conditions of CRB eligibility: (i) did the Applicant quit his job or reduce his hours

voluntarily on or after September 27, 2020; and (ii) did the Applicant have a 50% reduction in average weekly income compared to the previous year due to the COVID-19 pandemic.

[6] The original ROE submitted by the Applicant from a former employer, Acid League, contained a note at box 16 that stated the reason for issuance of the ROE was “Quit/Take another Job” and at box 18 stated “Took another job.” The Applicant submitted a revised ROE from Acid League on January 27, 2022, that stated “Shortage of work/End of contract or season” in box 16; however, the “Took another job” comment at box 18 was unchanged.

[7] On September 20, 2023, the Applicant advised that, for the purposes of reviewing his CRB application for periods 2–4, the ROE from Acid League was not accurate as box 11 indicated his last day of work was November 15, 2020. The Applicant advised that his employment with Acid League ended on September 18, 2020, and that any payments from September 18, 2020 – November 15, 2020, were payment for work completed, not “employment income.” In support of this assertion, the Applicant included a letter of support from his former employer.

[8] The Officer conducting the second review advised the Applicant that the evidence filed in support of his claim may not be sufficient to explain the contradictory information set out in the two ROEs submitted from Acid League and requested further documentation, such as timesheets. On October 2, 2023, the Applicant advised the Officer that he had spoken to his former employer. At that time, the Officer indicated that a further revised ROE may be an option. On October 17, 2023, the Applicant advised that further documents would be uploaded. Some new documents were uploaded to his application file, including paystubs and an email from his former employer, explaining the payments made to the Applicant after September 18, 2020.

[9] The Officer made their Decision on October 27, 2023. The Applicant submitted that the Officer was informed a further amended ROE would be provided and had agreed no decision would be issued before that document could be submitted and considered. The Respondent acknowledged that the Decision was made in advance of the provision of a further amended ROE and was in breach of procedural fairness owed to the Applicant.

[10] The Respondent submitted that this matter should be remitted back to the CRA for a third review by a new officer. The Applicant submitted that this Court ought to substitute its decision in this matter, or in the alternative, remit only the denial of CRB periods 2–4 of the Applicant's application back to the CRA for a third review.

II. Analysis

A. *Preliminary Issues*

[11] The Respondent submitted that the Applicant's supporting affidavit for this matter contravened contravene Rules 80(1), 80(3), and/or Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] because: (i) the affidavit was not drawn in the first person (Rule 80(1)); (ii) the exhibits were not "accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn" (Rule 80(3)); and (iii) the affidavit was not "confined to facts within the deponent's personal knowledge" (Rule 81(1)). The Respondent submitted that the entirety of the Applicant's affidavit should be struck due to the extent of the non-compliance and because there would be no prejudice to the Applicant.

[12] The Applicant is self represented. As this Court has noted, a self represented litigant is not excused from the application of this Courts' rules. Self-represented litigants have obligations

to be self-educated (*Rooke v Canada (Attorney General)*, 2018 FC 204 at para 23, citing *MacDonald v Canada (Attorney General)*, 2017 FC 2 at paras 2933).

[13] I agree that the affidavit is not compliant with the *Rules*. Further, it is generally accepted that a judicial review is to proceed based on the record before the original decision-maker. It is not an occasion to supplement the record with fresh evidence, except in very limited circumstances, none of which are applicable in this case. Accordingly, I will strike the affidavit and disregard its contents (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 305; *Watts v Canada (Citizenship and Immigration)*, 2020 FC 158 at paras 12–13).

[14] In addition, the Respondent submitted that paragraphs 1–6 of the Applicant's Memorandum of Fact and Law contravene Rule 70(1) and should be struck. The Respondent submitted that these paragraphs introduce statements of "fact" that are not substantiated by evidence and/or are inherently the Applicant's legal arguments. I agree—accordingly, these paragraphs are struck and disregarded.

B. *Remedy*

[15] The Respondent conceded a breach of procedural fairness in this matter; however, the parties have not come to an agreement as to the appropriate remedy.

[16] The Applicant seeks an order from this Court directing the CRA that he is eligible for the CRB for periods 2–4. Alternatively, the Applicant submitted that this Court should only remit his eligibility for CRB for periods 2–4 back to the CRA for redetermination. The Respondent argued that this Court ought to remit the whole application back to the CRA for redetermination.

C. *Substitution of Court's Decision on the Merits*

[17] The Applicant argued that "[s]ince a particular outcome is inevitable, remitting the case would serve no purpose, and this justifies the Court's stepping into the role of the Decision Maker in this context to prevent an 'endless merry-go-round' of judicial reviews and subsequent reconsiderations."

[18] As stated by my colleague Madam Justice Allyson Whyte Nowak, "[w]hile this Court has the power to substitute its own decision on the merits, it is in very limited scenarios where, for example, a particular outcome is 'inevitable' or where remitting the matter would prevent the effective and timely resolution of the matter" (*Novakovic v Canada (Attorney General)*, 2024 FC 1252 [*Novakovic*] at para 4, citing *Vavilov* at paras 140–142; see also *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 [*Tennant*] and *Abdul v Canada (Attorney General)*, 2023 FC 1501 [*Abdul*] at para 10).

[19] The CRA has the necessary expertise to determine eligibility for the CRB and is the entity chosen by Parliament to make these determinations. Generally, reviewing courts should respect the administrative decision-makers' domain (*Abdul* at para 9, citing *Vavilov* at paras 139–142; *Northern Inter-Tribal Health Authority Inc v Yang*, 2023 FCA 47 at para 82; *Tennant* at paras 79–82; see also *Novakovic* at para 4).

[20] This is a very high threshold to meet, and, in my view, the Applicant's claim does not fit within these limited scenarios. I do not agree with the Applicant that the outcome of his claim is "inevitable," nor do I agree that a further review of the application would "serve no useful purpose." The documentary evidence in support of the application is not clear and does not lead

to one obvious outcome. Accordingly, this matter shall be remitted back to the CRA for a redetermination.

D. *Remission of the whole or part of the matter?*

[21] The Applicant submitted that only part of the Decision ought to be remitted back, relying on this Court's decision in *Polonyova v Canada (Attorney General)*, 2024 FC 54 [*Polonyova*] at paragraphs 13 and 36 for support.

[22] I agree with the Respondent that *Polonyova* is distinguishable from the present case. The Respondent submitted that both the original and second review of the Applicant's CRB application focused on two elements for CRB eligibility. Did the Applicant quit his job or reduce his hours voluntarily on or after September 27, 2020? Did the Applicant have a 50% reduction in average weekly income compared to the previous year due to the COVID-19 pandemic? The documentary evidence filed in support of the application is not clear and, in the course of the second review, a number of discussions were had with the Applicant concerning the evidence in support of his application.

[23] The Respondent submitted that pursuant to the scheme set out at paragraphs 3(1)(a)–(d) of the *CRB Act*, and as confirmed by this Court, it is the CRA who is mandated to assess the evidence submitted in an application for CRB, not the Court (*Hommersen v Canada (Attorney General)*, 2023 FC 800 at paras 32, 41; *Soucy v Canada (Attorney General)*, 2023 FC 723 at para 55).

[24] Finally, the Respondent noted that section 30 of the *CRB Act* permits the Minister to reconsider applications for CRB (a) within 36 months of payment; and (b) within 72 months where there are concerns of misrepresentation.

[25] I agree with the Respondent's submissions. Accordingly, the Applicant's application will be remitted back to the CRA in its entirety for review by a different officer.

III. Costs

[26] The Applicant and the Respondent seek their costs in this application. However, given the circumstances of this application and in light of the considerations at play in awarding costs, in my view this is not a matter where it would be appropriate to award costs to either party.

JUDGMENT in T-2518-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Applicant's application shall be remitted back to the CRA for a new officer to review the application in its entirety.

3. No award of costs.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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