

Federal Court



Cour fédérale

Date: October 28, 2024

Docket: T-2004-23

Citation: 2024 FC 1706

Vancouver, British Columbia, October 28, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KRISHAN LAL KOHLI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by an officer of the Canada Revenue Agency [the CRA] dated August 30, 2023 [the Decision], determining that the Applicant was not eligible for the Canada Recovery Benefit [CRB] payments the Applicant had previously received.

[2] As explained in further detail below, this application is allowed, because the Applicant was deprived of procedural fairness in the making of the Decision under review.

II. Background

[3] To be eligible for CRB during the COVID-19 pandemic, among other requirements, an individual must have earned, depending on the date of application, at least \$5,000 of qualifying income in 2019, 2020, or in the 12-month period preceding the day on which the individual applied (*Canada Recovery Benefits Act*, SC 2020, c 12, s 2 at paragraphs 3(1)(d)-(e)). In order to receive CRB payments during the pandemic, individuals only had to attest that they met the eligibility requirements. However, such attestations were subject to later verification by the CRA.

[4] The Applicant applied for and received CRB payments between November 8, 2020 and June 5, 2021. The CRA later selected the Applicant's account for review to verify that he was eligible for those payments. By letter dated July 27, 2022, the CRA requested the Applicant provide the CRA with supporting documents to validate the Applicant's income [the Initial Request]. In the Initial Request, the CRA provided examples of documentation that could validate an individual's income. The CRA also informed the Applicant in the Initial Request that if he did not provide the requested documentation within 45 days from the date of the letter, he might be required to repay CRB payments he had received.

[5] On January 18, 2023, a CRA officer [the First Reviewer] contacted the Applicant to follow-up on the Initial Request, as the CRA had received no response from the Applicant [the

Initial Call]. The CRA's notes state that the Applicant advised the First Reviewer that he was unaware of the Initial Request. The notes state the First Reviewer informed the Applicant that the Initial Request was a request for documentation regarding COVID-19 benefits received by the Applicant. The notes then state the Applicant confirmed his tax returns were accurate and denied that he had any additional income not listed on his tax return.

[6] The Applicant states he was unaware of the Initial Request until January 18, 2023, when he received the Initial Call, as he was in India on July 27, 2022, when the Initial Request was sent. The Applicant also asserts that he was concerned that the Initial Call was fraudulent and therefore answered the questions by the First Reviewer in the negative.

[7] However, following the Initial Call, the Applicant called the CRA again on January 18, 2023, and the CRA confirmed the Initial Call was genuine. According to the CRA's notes, the Applicant then informed the CRA officer on this call that he received payment in 2022 for work performed in 2019. The CRA officer informed the Applicant that a decision regarding his file had been made, and to gather supporting documentation for these payments. The Applicant also downloaded the Initial Request from the CRA's portal on January 18, 2023.

[8] By letter dated January 20, 2023, the CRA informed the Applicant that he was not eligible for 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 before the date of his first application [the First Decision]. According to the CRA's notes, the First Reviewer came to this finding based on the Initial Phone Call. The CRA informed the Applicant that he could request a second review of his account by a different CRA officer.

[9] The Applicant states he received the First Decision on January 23, 2023. The Applicant was leaving Canada on January 25, 2023, and therefore asked his accountant to submit to the CRA the supporting documentation for his 2019 income. On March 17, 2023, the accountant uploaded documentation to the CRA portal [the Submitted Documents]. The Submitted Documents included a letter in which the Applicant explained he did not file PST for 2019 for jobs done in 2019 because he did not receive payment for some of those jobs until 2022. The Submitted Documents also included a spreadsheet entitled “PST Calculation” identifying the 2019 invoices amounts, totalling \$7356.75. The parties disagree on whether the Submitted Documents included copies of the invoices themselves and some related banking documentation. This is a point to which I will return later in these Reasons.

[10] The Applicant subsequently discovered that the Submitted Documents were missing information on additional 2019 invoices [the Additional Invoices]. The Applicant alleges that, in order to discuss updating his submission to include information on the Additional Invoices and to confirm the nature of the documentation CRA was seeking to confirm his CRB eligibility, he attempted to contact the CRA officer tasked with the second review of his account [the Second Reviewer]. The Applicant states that, between July 14, 2023 and August 25, 2023: (a) he attempted to contact the Second Reviewer multiple times without success and was not able to leave a voice message; (b) he called the Canada Emergency Benefit Validation Line multiple times; and (c) he attempted to contact, and on occasions spoke with, a CRA supervisor in an effort to reach the Second Reviewer.

[11] The Applicant states that, prior to the Decision now under review, he did not receive any calls or voice messages from the Second Reviewer on his cellphone and that he did not receive

any voice messages from the Second Reviewer on his landline. (The Applicant advises that he cannot confirm that there were no calls to his landline, because his provider does not make that information available.) In contrast, the Respondent submits based on the CRA's notes that the Second Reviewer attempted to call the Applicant numerous times and left numerous voice messages on both his cellphone and landline.

[12] In the absence of any more information from the Applicant, on August 30, 2023, the Second Reviewer released the Decision that is the subject of this application for judicial review.

III. Decision under Review

[13] In the August 30, 2023 letter conveying the Decision, the CRA again found that the Applicant was not eligible for CRB because the Applicant did not earn at least \$5,000 (before taxes) of employment and/or net self-employment income in 2019, 2020, or in the 12 months before the date of the Applicant's application.

[14] Entries in the CRA's notes by the Second Reviewer also inform an understanding of the reasons for the Decision (*Cozak v Canada (Attorney General)*, 2023 FC 1571 [*Cozak*] at paras 8-9, 24). In the Second Reviewer's notes dated August 1, 2023, and entitled "Second Review Report" [the Second Review Report], the Second Reviewer acknowledged the Submitted Documents (described as the Applicant's explanatory letter and his list of PST calculations for 2019) but found that further documentation was required to prove the Applicant's income, specifically, bank statements from 2019 and 2020, invoices, and receipts. The Second Review Report noted numerous dates between July 12, 2023, and August 1, 2023, on which the Second Reviewer unsuccessfully attempted to contact the Applicant to obtain further information and

documentation. As such, the Second Reviewer ultimately found the Applicant was ineligible for all CRB payments received.

IV. Issues

[15] The Applicant's arguments raise the following issues for the Court's determination;

A. Is the Decision reasonable?

B. Was the Applicant denied procedural fairness in the process leading to the Second Reviewer making the Decision?

[16] As is implicit in the articulation of the first issue, the merits of the Decision are reviewable on the standard of reasonableness. The second issue, involving procedural fairness arguments, is subject to a standard of review akin to correctness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, leave to appeal to SCC refused, 39522 (15 August 2021)).

[17] The Respondent also raises a preliminary issue, surrounding the admissibility of portions of the evidence included in an affidavit sworn by the Applicant on October 23, 2023 in support of this application for judicial review [the Affidavit]. The Respondent takes the position that certain portions of the evidence, and related exhibits, were not before the Second Reviewer when the Decision was made and therefore should not be considered by the Court.

[18] Finally, there is another preliminary issue to be addressed, related to the admissibility of new evidence that the Applicant appended to a reply memorandum of fact and law filed with the Court on the day of the hearing.

V. Analysis

A. *Preliminary Issues*

[19] On October 18, 2024, the self-represented Applicant wrote to the Registry of the Court, requesting leave to file a reply to the Respondent's memorandum of fact and law, explaining that the Applicant had advised the Respondent's counsel that he would serve his reply by October 19, 2024, and advising that the Respondent's counsel had consented to the request.

[20] On October 18, 2024, the Court issued a Direction granting the Applicant leave to serve and file a reply memorandum of fact and law by October 19, 2024. The Applicant missed that deadline, serving and attempting to file his reply memorandum on October 21, 2024, the date of the hearing. At the commencement of the hearing, the Respondent's counsel advised the Court that he did not take issue with the late service, and the Court directed that the reply memorandum be filed, with the following exception that the Court took under reserve.

[21] The exception relates to the fact that the memorandum appended two pages of evidence, related to the Applicant's cellphone records. The Respondent objects to the filing of that evidence, both on the basis that it was not before the Second Reviewer when the Decision was made and on the basis that it was not accompanied by an affidavit.

[22] I agree with the Respondent that this evidence is not admissible in the form in which it was adduced, without any supporting affidavit (*Broughton v Canada (Attorney General)*, 2023 FC 1693 [*Broughton*] at para 22). Moreover, the Direction that granted the Applicant leave to file the reply memorandum of fact and law did not contemplate the introduction of any new evidence at that late stage in the proceeding. As such, the Court will disregard that evidence.

[23] Turning to the preliminary issue related to the Affidavit, the Respondent argues that the following portions of the Affidavit should be disregarded by the Court [the Disputed Evidence]:

- A. paragraph 4 and Exhibit “C”, which relate to the Additional Invoices;
- B. paragraphs 5 and 6 and Exhibits “D” and “E”, which relate to the Applicant’s October 11, 2023 filing of an amended tax return for the 2019 taxation year;
- C. paragraphs 9 and 10 and Exhibits “F” and “G”, which relate to the Applicant’s travel itineraries, intended to demonstrate his absence from Canada from May 20, 2022 to October 14, 2022 and from January 25, 2023 to June 27, 2023;
- D. paragraph 11 and Exhibit “H”, which relate to the Submitted Documents, including the receipts and invoices that the Respondent argues were not included with the Submitted Documents;
- E. paragraph 15 and Exhibit “M”, which relate to airtime records for the Applicant’s cellphone number from July 7, 2023 to August 15, 2023; and

- F. paragraph 17 and Exhibit “N”, which relate to the Applicant’s telephone communications with CRA and include a summary thereof.

[24] I accept the Respondent’s submission that, as a general rule, the evidentiary record before a court in judicial review is restricted to the evidentiary record that was before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19). However, as the Respondent acknowledges, there are exceptions to this general rule, including evidence that relates to issues of procedural fairness (*Access Copyright* at para 20).

[25] Other than Exhibits “M” and “N”, the Respondent takes the position that the Disputed Evidence does not fall within the procedural fairness exception, as the evidence relates to the merits of the Decision rather than the process that resulted in the Decision. I disagree. Consistent with this Court’s explanation in *Broughton* at paragraphs 17 to 22, the Respondent’s position relies on too narrow an interpretation of the procedural fairness exception. In advancing a procedural fairness argument, an applicant will sometimes wish to demonstrate the additional evidence that would have been adduced had it not been for the alleged procedural defect.

[26] I find the Disputed Evidence admissible under the procedural fairness exception, as it either relates to the Applicant’s arguments surrounding the administrative process followed in making the Decision or relates to evidence that the Applicant argues he would have provided to the CRA if he had been afforded an opportunity to contact the Second Reviewer.

[27] In so concluding, I have considered the Respondent's argument that, while Exhibits "M" and "N" (related to telephone airtime records and communication attempts) potentially fall within the procedural fairness exception, they are not reliable evidence of the Applicant's allegation that the Second Reviewer never attempted to contact him. However, consistent with this Court's approach in *Meer v Canada (Citizenship and Immigration)*, 2024 FC 1348 at paragraph 19, those arguments will be addressed not as a matter of admissibility of the evidence but rather when I consider the weight to be afforded to it.

B. *Is the Decision reasonable?*

[28] The Applicant argues that the Decision is unreasonable, because it does not display the transparency and intelligibility required by *Canada (Minister Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The Applicant submits that it is not possible to identify from the Decision the reason that the Second Reviewer concluded that he had not earned sufficient income to support CRB eligibility.

[29] I interpret the Applicant's argument as turning significantly on his position that the Submitted Documents included invoices and related banking documentation intended to support his claimed income. In other words, if the Second Reviewer was in possession of the Applicant's PST spreadsheet, that identified over \$5000 in invoices, along with copies of those supporting materials, the Applicant questions why that documentation was not sufficient to support a positive CRB eligibility determination.

[30] However, I agree with the Respondent's position that the record does not support a conclusion that the Submitted Documents included the supporting invoices or banking documentation. The Certified Tribunal Record [CTR] includes copies of the documentation that was before the decision-maker and identifies the documents submitted by the Applicant on March 17, 2023, as including only the PST spreadsheet and covering letter.

[31] Of course, the CTR need not be considered definitive if there were compelling evidence that the Applicant had included the supporting documentation with his March 17, 2023 submission. However, while the Affidavit includes that documentation (along with the letter and PST spreadsheet) in Exhibit "H", the Affidavit does not state that this material was all provided to the CRA. Moreover, it is the Applicant's evidence and submission that it was not he, but rather his accountant, who uploaded the Submitted Documents to the CRA in March 2023. As such, he would not be in a position to provide first-hand evidence as to precisely which documents were uploaded, and he has not adduced any evidence from his accountant.

[32] I therefore find that the Submitted Documents included only the Applicant's letter and PST spreadsheet, not the supporting invoices and banking documentation. With that understanding of the evidentiary record that was before the Second Reviewer, the reasoning underlying the Decision is apparent from the following extract from the Second Review Report:

... He is talking about PST, and submitted a list for 2019 for PST calculation. In order to prove income, the taxpayer is required to submit 2019-2020 bank statements to show that they indeed received the payments. And also, invoices, receipts for services provided. ...

[33] In short, with the benefit of only the PST spreadsheet, unsupported by any other documentation, the Second Reviewer was not satisfied that the Applicant had established that he had earned sufficient income to support CRB eligibility. The Second Reviewer's reasoning is transparent and intelligible, and the Decision easily withstands reasonableness review.

C. *Was the Applicant denied procedural fairness in the process leading to the Second Reviewer making the Decision?*

[34] In my view, the analysis of the Applicant's procedural fairness arguments is more complex. As identified in the summary of his telephone communications with the CRA attached as Exhibit "N" to the Affidavit, the Applicant submits that he made numerous attempts to reach the Second Reviewer by telephone, including calls to the Second Reviewer directly, calls to the Canada Emergency Benefit Validation Line, and calls to supervisors, all with a view to updating his submission and confirming with the Second Reviewer the nature of the documentation the CRA was seeking to confirm his CRB eligibility. The Applicant asserts that those calls included a call in which a supervisor advised the Applicant that he would receive a call back to discuss his file before the Second Reviewer finalized the decision. However, despite those efforts, the Applicant was not able to establish contact with the Second Reviewer before the Decision was made.

[35] I do not understand the Respondent to dispute that the Applicant made those efforts to contact the Second Reviewer. However, the parties otherwise offer irreconcilable versions of these events. Based on the CRA's notes contained in the CTR, the Respondent identifies 13 attempts by the Second Reviewer to contact the Applicant by telephone, on 9 different dates between July 12, 2023 and August 14, 2023, including messages left on the Applicant's

voicemail. In contrast, the Applicant states in the Affidavit that he never received any call or voice message on his cellphone from the Second Reviewer and that, while he cannot confirm that no call was received on his landline from the Second Reviewer (because his provider cannot furnish records speaking to that point), he can confirm that he never received any voice message on his landline from the Second Reviewer.

[36] To corroborate his position, the Applicant relies on the cellphone airtime records attached as Exhibit “M” to the Affidavit, which he argues demonstrate no incoming calls from the phone number that he understands to have been used by the Second Reviewer. The Respondent argues that these records have little probative value, as they simply track the duration of calls that were connected and do not reflect any calls missed by the Applicant. The Court does not have the benefit of any explanatory evidence, for instance from the cellphone provider, identifying the information that can be derived from these records. However, I agree with the Respondent that it is not apparent from the face of the records that they capture either missed calls or calls that resulted in a voice message being left for the Applicant.

[37] While I do not understand the Respondent to be casting any particular aspersions upon the Applicant’s credibility, and I make no findings in that regard, I also find no basis to conclude that the CRA’s notes, which appear to have been made on a contemporaneous basis, are not a reliable records of calls placed to the Applicant.

[38] Consistent with those calls having been made, it is apparent from the Second Review Report that it was the Second Reviewer’s intention to contact the Applicant, in order to obtain more information and documentation related to his income, but that the Second Reviewer was

unable to do so despite multiple efforts. Immediately following the extract from the Second Review Report quoted above in these Reasons, identifying the dearth of documentation provided by the Applicant, the Second Reviewer states as follows:

... Therefore, the taxpayer is to be contacted in order to obtain more information about their work situation and additional documentations.

The taxpayer has been contacted numerous times on different dates and times, and as per their request at specific times as well, there was never answer; but left numerous messages for the TP to call back and discuss their case.

[39] Against that factual backdrop, the question for the Court's determination is whether the Applicant was denied procedural fairness when the Second Reviewer abandoned the efforts to reach the Applicant to obtain additional information and documentation and proceeded to make the Decision based on the limited information previously provided.

[40] As the Respondent correctly submits, procedural fairness review requires the Court to consider whether the procedure was fair, having regard to all of the circumstances, focusing upon whether the applicant knew the case to meet and had a full and fair chance to respond (*Ntuer v Canada (Attorney General)*, 2022 FC 1596 at para 15). I also note that, in matters such as the application now before the Court, the procedural fairness obligations of CRA officers are generally on the low end of the spectrum (*Cozak* at para 17).

[41] Applying that framework, the Respondent argues that, notwithstanding the absence of a telephone conversation between the Applicant and the Second Reviewer, the Applicant knew the type of evidence that the CRA required to verify his CRB eligibility. The Respondent relies upon

the Initial Request, which identified acceptable forms of proof of income including invoices and receipts for services provided, as well as the CRA's notes of the Initial Call, in which a CRA officer advised the Applicant to obtain letters from those he worked for and bank statements showing corresponding deposits. The Respondent also notes that the letter conveying the First Decision also informed the Applicant that the CRA was not satisfied that he met the CRB income requirement and invited him to submit additional documents should he request a second review.

[42] The Respondent also argues that, notwithstanding the absence of a telephone conversation between the Applicant and the Second Reviewer, the Applicant had the opportunity to respond to the case he had to meet, as he knew how to submit supporting documents to the CRA, having done so (through his accountant) in March 2023.

[43] The Respondent's arguments are not without merit, and I would not be prepared to conclude that procedural fairness requirements necessarily oblige the CRA to establish telephone contact with a taxpayer before proceeding to make a decision on the taxpayer's CRB eligibility. However, as explained below, in the case at hand the substance and timing of particular communications between the CRA and the Applicant gave rise to such an obligation.

[44] In his written and oral submissions, the Applicant referenced the doctrine of legitimate expectations, pursuant to which the contents of the duty of fairness owed to an individual affected by an administrative decision may be influenced by the individual having a legitimate expectation that a certain procedure will be followed in arriving at the decision. As identified in

Ramanathan v Canada (Attorney General), 2023 FC 1029 [*Ramanathan*] at paragraph 47, legitimate expectations represent one of the factors identified in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), as potentially determining the procedures that must be followed in order to achieve procedural fairness.

[45] Consistent with the Respondent's submissions, expectations that the Applicant may have arising from the CRA's conduct may only affect the process to be followed and cannot give rise to a right to any substantive outcome (*Ramanathan* at para 47). However, in the case at hand, it is only a procedural right that the Applicant seeks, *i.e.*, a right, based on the CRA's conduct and representations, to have had an opportunity to speak with the Second Reviewer before the Decision was made.

[46] In this regard, the Applicant emphasizes his discussions with a CRA supervisor in early August 2023. In Exhibit "N" to the Affidavit, the Applicant states that, on August 2, 2023, he received a call from a supervisor [the Supervisor], updated her as to the issue about his pending CRB case including his wish to provide an update with important information, and requested a call back from the Second Reviewer. The Applicant states that the Supervisor confirmed that the case was open and that she would contact the Second Reviewer for a call back to the Applicant to discuss and clarify the issue before the Second Reviewer finalized the decision.

[47] On August 3, 2023, the Supervisor again telephoned the Applicant, learned that the Second Reviewer had not called the Applicant, and confirmed that she would contact the Second Reviewer and ask them to call the Applicant within a couple of hours. The Applicant states that

the Second Reviewer did not call him and that, despite further calls to explain this to the CRA on August 3, 2023, August 9, 2023, August 15, 2023, and August 25, 2023, he was unable to reach the Second Reviewer.

[48] The CRA's notes reflect that the Second Reviewer attempted to reach the Applicant on August 2, 2023, was then off work until August 14, 2023, and attempted to reach the Applicant again on that date. Having not succeeded, the Second Reviewer proceeded to release the Decision on August 30, 2023.

[49] As with earlier communication efforts, the record before the Court does not allow reconciliation of the inconsistency between the CRA's notes and the Applicant's evidence, particularly surrounding efforts to reach the Applicant on August 2, 2023. However, regardless of the explanation, it is clear that no contact was made. In that context, as the Applicant was advised by the Supervisor on August 2, 2023 (and reinforced by the call with the Supervisor on August 3, 2023) that he would be afforded an opportunity to discuss his case with the Second Reviewer before the decision was finalized, the Applicant submits that it is not compelling for the Respondent to argue that the Applicant should have forgone that opportunity to speak further with the CRA and instead should have submitted additional documents electronically without further guidance.

[50] I agree with the Applicant's position. Again, I would not conclude that the Second Reviewer was obliged to make endless efforts to reach the Applicant. Such a conclusion would hamstring the CRA in its efforts to adjudicate CRB eligibility matters in circumstances where contact with the taxpayer proved not to be achievable. However, as the CRA represented to the

Applicant in early August that he would receive such contact before the Decision was made, I find a breach of procedural fairness resulting from the Second Reviewer making unsuccessful efforts to contact the Applicant on two dates following that representation and (notwithstanding further efforts by the Applicant to reach the Second Reviewer over the course of that month) then proceeding to issue the Decision before the end of the month.

[51] These circumstances are not dissimilar to those in *Ramanathan*, in which Justice Andrew Little relied on the doctrine of legitimate expectations to find a breach of procedural fairness where the CRA agreed to contact a taxpayer during the second review, was unable to do so, and made a decision three weeks later without hearing from the taxpayer (at paras 47-50).

VI. Remedies

[52] By way of remedies, the Applicant asks that the Court return this matter to the CRA for another review by another officer. The Applicant also asks that the Court order that he is not obliged to return to the CRA the CRB benefits he received; that the CRA should not be permitted to commence any legal action against him; and that any interest charged to his account be waived pending the further review.

[53] I agree with the Respondent that this latter set of remedies is not within the Court's usual purview. The usual remedy in a successful application for judicial review is to quash the decision and refer the matter back to another decision-maker for re-determination (see *Mahmoud v Canada (Attorney General)*, 2023 FC 1066 at para 42). I find no basis in this case to depart from the usual remedy, and my Judgment will so provide.

VII. Costs

[54] Neither party has sought costs from the other. While the Applicant has prevailed in this application, he is self-represented and has not identified any out-of-pocket costs incurred in his pursuit of this application. In these circumstances, I decline to make any award of costs.

JUDGMENT IN T-2004-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to another decision-maker for redetermination.
2. No costs are awarded.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2004-23

STYLE OF CAUSE: KRISHAN LAL KOHLI v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: OCTOBER 21, 2024

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: OCTOBER 28, 2024

APPEARANCES:

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