Federal Court  Cour fédérale

Date: 20230721

Docket: T-1777-22

Citation: 2023 FC 997

Ottawa, Ontario, July 21, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

RACHEL-NOÉMI LEVESQUE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Canada Recovery Caregiving Benefit [CRCB] was a benefit program established by the Parliament under the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [*Act*] in response to the COVID-19 pandemic to give financial support to employed and self-employed Canadians unable to work because they must care for their child under 12 years old or a family member who needs supervised care. This applied if the school or other facility their child or family

member normally attended was closed or unavailable to them due to COVID-19, or because the child or family member requiring supervised care was sick, self-isolating, or at risk of serious health complications due to COVID-19. The CRCB was available to provide $500 CAD to an eligible person for any week falling within the period beginning on September 27, 2020 and ending on May 7, 2022. The maximum number of weeks of which the CRCB is payable to all of the persons residing in the same household is 44 weeks. The Canada Revenue Agency [CRA] administered the CRCB and in the context of this administration, certain applications were reviewed either before or after the CRCB was paid out.

[2] The Applicant, Ms. Rachel-Noémi Levesque, representing herself in this matter, seeks judicial review of the decision made by a benefits compliance officer [Officer] of the CRA dated August 2nd, 2022 [Decision]. Based on the Third-Level review of the Applicant's eligibility for the CRCB, the Officer determined she was not eligible to receive the CRCB, and that she must repay the amount received while being ineligible. After the Decision was rendered, the Applicant received a Notice of Redetermination, and was asked to pay back $2500 CAD, being the amount she received for the periods spanning from March 28, 2021 to May 1, 2021 (periods 27 to 31). The Applicant seeks an order from this Court that she is entitled to the CRCB payments for the periods spanning from May 2, 2021 to August 21, 2021 (periods 32 to 47) and not be required to repay the $2,500 CAD received for the aforementioned periods 27 to 31.

[3] For the reasons that follow, and in conformity with the role of this Court in a judicial review, I find that the decision of the Officer is not unreasonable.

II. **Background**

A. *Facts*

[4] The Applicant was on maternity leave as of September 2, 2020 and started receiving maternity benefits, which is a non-shareable benefit under the Quebec Parental Insurance Plan (QPIP), from October 25, 2020 to February 27, 2021. She received the parental benefit for 3 weeks from February 28, 2021 to March 20, 2021.

[5] The Applicant then decided to give all the remaining shareable parental benefit weeks to her husband and applied for CRCB on March 28, 2021, just 8 days after the end date of her QPIP. The Applicant received CRCB payments totalling $2500 CAD for the periods starting on March 28, 2021 and ending on May 1, 2021 (periods 27-31). The CRCB payments were issued initially without review.

[6] The Applicant also applied for the periods 32 to 47, starting on May 2, 2021 and ending on August 21, 2021. Payments were suspended for periods 32 to 47 as the Applicant's file was selected for review to determine her eligibility to the CRCB. The file was assigned to a First-Level review officer.

[7] During all periods for which the Applicant applied for CRCB (periods 27-47), the Applicant's husband was receiving QPIP and was at home full-time with their child.

[8] The First-Level review decision dated December 3, 2021 determined that the Applicant was not eligible because she did not meet the following two criteria:

- "Your scheduled work week was not reduced by at least 50% because you were caring for a family member for reasons related to COVID-19".
- "You received Quebec Parental Insurance Plan (QPIP) benefits for the same period".

[9] On December 7, 2021, the Applicant applied for a Second-Level review of her eligibility for CRCB, which review was assigned to a Second-Level review officer. The Second-Level review decision dated May 6, 2022 determined that the Applicant "received Employment Insurance (EI) benefits for the same period" and therefore was not eligible for CRCB.

[10] The Applicant filed for judicial review of the Second-Level review decision (Federal Court No. T-1165-22), which file was resolved by the filing of a Notice of Discontinuance, after the Applicant agreed with the Respondent’s proposal to return the CRCB application for a Third-Level review.

B. *Decision under Review*

[11] The Third-Level review by the Officer, Mr. Jonathan Cousineau, dated August 2, 2022 is the Decision currently under judicial review. According to the Officer, the Applicant was not eligible to CRCB for the applied-for periods 27 to 47 because she did not meet the following criteria:

- "Your scheduled work week was not reduced by at least 50% because you were caring for a family member for reasons related to COVID-19".

- "You were not caring for your child under 12 years old or a family member because they were unable to attend their school, daycare, or care facility for reasons related to COVID-19. Or, the individual who usually provided care was not available for reasons related to COVID-19".

[12] The Officer's notes reproduced below are part of the reasons for the Officer's Decision (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 22) to refuse CRCB benefits, which is why the latter concluded that the application did not meet the requirements set out by the *Act*:

> [1] 50% criteria: In 2020, tp worked throughout the year until September 2nd, as she left on maternity leave. Tp received QPIP from October 25 2020 till March 20 2021. The parental benefits were then transferred to her husband, and the tp started applying for CRCB. As indicated in the letter dated 2020-11-19 by the 'Centre de services scolaire Marguerite-Bourgoys', and confirmed during the 2nd review phone conversation, the tp was only scheduled to return to work on August 23, 2021. However, tp applied for CRCB as soon as she stopped receiving QPIP, in March 2021. The tp did not have any work hours scheduled during all the periods for which she applied for CRCB, and therefore did not have a loss of at least 50% of her work hours to be a caregiver for reasons related to covid.
>
> [2] Tp not a caregiver for reasons related to covid: After leaving her job as a teacher in September 2020 to go on maternity leave, tp received QPIP from October 2020 till March 2021. Tp could have continued to receive QPIP, but decided to transfer the parental benefits to her husband in April 2021. This confirms that tp's husband was at home, and was not working during the periods for which the tp applied for CRCB. The tp said that she also needed to be at home because she is breastfeeding, and because her husband has health issues and cannot lift anything too heavy. However, the fact that the tp transferred QPIP to her husband was her choice, as

> she could have continued to receive the benefits. Being a federal public servant, her husband could have applied for an extended sick-leave if he was experiencing some health issues. The fact that the tp decided not to keep receiving QPIP and applied for CRCB instead does not mean that she was a caregiver for reasons related to covid. The pandemic is not the reason why the tp was a caregiver for a baby, as she was approved for maternity leave till August 23 2021.

III. **Issues**

[13] The main issue is whether the Decision is reasonable.

[14] The Applicant also had issues with the way her CRCB request was handled, which is dealt with in the Procedural Fairness section below.

[15] Finally, the Applicant submitted before the Court new evidence and new arguments not before the decision maker, which is a preliminary issue also dealt with separately below.

IV. **Standard of review**

[16] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[17] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem: *Vavilov* at para 83.

[18] The law is to the effect that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

[19] A reasonable decision is one based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[20] An allegation of procedural fairness is determined on the basis that approximates correctness review. Ultimately, the question comes down to whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, at para. 56.

V. **Procedural Fairness**

[21] The Applicant expressed issues with the way her CRCB request was handled.

[22] The Applicant alleged that the Officer misquoted the eligibility criteria in the legislation and left out key points of eligibility criteria relevant in her case. The points will be covered in section VII below, which may help to clarify why certain points were not part of the Officer's Decision and why other points were.

[23] However, it is apparent that the Applicant was apprised of the case to be met, had a call on July 27, 2022 with the Officer where questions were asked and answered before his Decision was rendered and the Applicant could have submitted additional documents to respond to the Officer's questions raised in advance of his August 2, 2022 Decision. That meets the requirement for procedural fairness.

[24] The Applicant alleges that, after the Decision was rendered, the Applicant called the CRA at the end of August 2022 and spoke with an agent. The agent tried to explain to her why she did not qualify for CRCB, and the Applicant indicated she wished to speak with a manager. Several days thereafter, another agent contacted the Applicant while she was working and she could not answer the phone. The Applicant indicates that she called back 3 times on different days, left messages and was never called back.

[25] It was apparent at the hearing of the judicial review that the Applicant would have liked the assistance of a CRCB officer to advise/counsel her how to fall within the CRCB criteria. The Officer's role is to determine whether an applicant falls within the criteria of the CRCB program based upon the facts and documentary evidence submitted rather than to provide legal advice on how to meet the requirements. After the Decision was rendered, the fact that the Applicant had

an opportunity to speak to an agent at the end of August 2022 to explain the Decision rendered, further demonstrates that the procedure was open and transparent. The fact that a manager was not reached after the Third-Level Decision was rendered, while unfortunate, does not make the procedure unfair. The Applicant has provided no evidence of procedural unfairness.

VI. **New Evidence and Arguments**

[26] Before the Court can turn its attention to the Decision under judicial review, there is a preliminary issue as to whether this Court can consider new evidence and new arguments submitted by the Applicant that were not before the decision maker.

[27] The Applicant filed an affidavit and the following documents with the Court in this judicial review [New Evidence] that were not provided previously to the CRA during either the First-, Second- or Third-level reviews, and as such, were not before the decision maker:

- Canada Recovery Caregiving Benefit (CRCB) Eligibility criteria, CRA website pages, printed on September 18, 2022, served as Annex A;
- Parts of Canada Recovery Benefits Act, served as Annex D;
- Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer, CRA website pages, served as Annex E.

[28] I agree with the Respondent that the general rule is that only the evidentiary record before the administrative decision maker is admissible before the reviewing court such that materials that were not before the decision maker are not admissible on judicial review (*Aryan v. Canada*

(Attorney General), 2022 FC 139, para 42 citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Sigh v Canada (Citizenship and Immigration)*, 2009 CF 11, at paras 27-29).

[29] As submitted by the Respondent, the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras 97 and 98 reiterated that there are three recognized exceptions to the above rule: (i) when new evidence is necessary in providing general background in circumstances where that information might assist in understanding the issues relevant to the judicial review, (ii) in demonstrating court procedural defects or a breach of procedural fairness, and (iii) in demonstrating the complete absence of evidence before the decision maker when it made a particular finding.

[30] In this case, the New Evidence does not fall under any of these recognized exceptions (or similar ones) that would permit the Court to allow them.

[31] However, and as mentioned during the hearing, the Court does not agree with the Respondent that it cannot consider extracts filed by the Applicant of the *Canada Recovery Benefits Act* (Annex D of the New Documents), that they are facts and that they are irrelevant. Extracts of the *Act* are not facts that need proving but rather the law of which the Court can take judicial notice (articles 2806 and 2807 of the *Civil Code of Québec* and section 18 of the *Canada Evidence Act*). The *Act* is relevant to this case and the Court will consider same.

VII. **The Decision is Not Unreasonable**

[32] Subsection 17(1)(f) of the *Act* sets out the cumulative eligibility criteria for the CRCB. For the purpose of this application, the following eligibility criteria are relevant with the underlined passages being those central to the debate between the respective parties:

> An employee has been unable to work for at least 50% of the time they would have otherwise worked in that week because: (b) They cared for a child who was under 12 years of age on the first day of the week because the child could not attend the school, daycare or other facility because the child was in isolation on the advice of a public health authority for reasons related to COVID-19. Or, they cared for a child who was under 12 years of age on the first day of the week because the person who usually cared for the child was not available for reasons related to COVID-19.

[33] The Applicant's arguments concerning why the Decision was not reasonable address each of the two findings made by the Officer. The arguments are set out below, followed by my analysis.

(1) "Your scheduled work week was not reduced by at least 50%"

[34] The essence of the Applicant's submissions is that the language the decision maker used in the denial letter (i.e. "your scheduled work week was not reduced by at least 50%") is different from that of the legislation (i.e. "been unable to work for at least 50% of the time they would have otherwise worked in that week"). She submits that the first criteria relied upon mentioning "scheduled work week" refusing her application does not appear in the legislation or the CRA's webpage listing the CRCB eligibility criteria.

[35] The Applicant is correct that the Officer used the word "scheduled" in his Decision, and that this word is not in subsection 17(1)(f) of the *Ac*t. The Officer's affidavit confirms that he did not have the *Act* before him when he rendered his decision:

> *"**17 (1)*** A person is eligible for a Canada recovery caregiving benefit for any week falling within the period beginning on September 27, 2020 and ending on May 7, 2022 if
>
> ***[…]***
>
> ***(f)*** *they have, as an employee,* ***been unable to work*** *for at least 50%* ***of the time they would have otherwise worked in that week*** *— or they have, as a self-employed person, reduced the time devoted to their work as a self-employed person by at least 50% of the time they would have otherwise worked in that week"*

[36] The key words in the subsection is "would have otherwise worked". The online Cambridge Dictionary defines the word "s*cheduled*" used by the Officer, as something "*planned to happen at a particular time*" (https://dictionary.cambridge.org/dictionary/english/scheduled).

[37] The relevant wording of the *Act* and the words used by the Officer have a similar meaning. In order for someone to have otherwise worked, they would have necessarily planned to work or had a scheduled work week.

[38] To determine whether the Officer's Decision was reasonable, we have to look at the evidence before the Officer to determine whether the Applicant "would have otherwise worked" as per the *Act* or whether she "was scheduled to work" as per the language of the Decision.

[39] The Officer's Decision that "her scheduled work week was not reduced by 50%" arises from, *inter alia*, the following evidence:

- On July 27, 2022, during a telephone conversation between the Applicant and the decision maker, the Applicant confirmed that she stopped working on September 2, 2022 because she left on maternity leave and she was not scheduled to return to work until August 23, 2021;

- The Applicant submitted a Letter of employment from the '*Centre de services scolaire Marguerite-Bourgoys'* dated November 19, 2020, which indicates "*Maternité avec traitement*" and that the Applicant "*saura de retour au travail le 23 août 2021*"*;*

Based on this, the Officer held the Applicant was only scheduled to return to work on August 23, 2021.

[40] The Court agrees with the Respondent that it was not unreasonable for the Officer to conclude that the Applicant did not have her scheduled work week reduced by at least 50% as the evidence shows she was not scheduled to return to work until August 23, 2021, which is a date after all of the aforementioned claimed periods. Said otherwise to fit the wording of the *Act*, the Applicant was not "unable to work for at least 50% of the time they would have otherwise worked in that week" as the evidence shows she had at all material times planned to return to work only on August 23, 2021. The Officer's Decision that her scheduled work week was not reduced by 50% followed a coherent, logical thought pattern: "***As indicated in the letter dated 2020-11-19 by the 'Centre de services scolaire Marguerite-Bourgoys', and confirmed during the 2nd review phone conversation, the tp was only scheduled to return to work on August 23, 2021***. *However, tp applied for CRCB* ***as soon*** *as she stopped receiving QPIP, in March 2021*."

[41] Had the Applicant returned to work for a period of time after she stopped receiving QPIP (during the time her husband was claiming QPIP) and after some weeks of employment then claimed CRCB, maybe the Officer's finding on the "scheduled work week being reduced by at least 50%" criteria would have been different. However, this is not the case. There is no evidence that the Applicant returned to work before August 23, 2021.

[42] For the foregoing reasons, I have not been persuaded that the Officer's finding was unreasonable. Indeed, the Applicant did not have her scheduled work week reduced by at least 50% (or as worded in the *Act*, the Applicant has not been unable to work for at least 50% of the time she would have otherwise worked). It follows that the Officer's finding was not unreasonable.

[43] This ground alone is enough to dismiss the application since to be entitled to CRCB the Applicant must satisfy each and every one of the criteria under subsection 17(1)(f) of the *Act*. However, as the Applicant is a self-represented litigant, I will very briefly consider the second finding of the Officer, namely the Applicant not being the caregiver for the child and the lack of linkage with COVID-19.

(2) "Not caregiver for reasons related to COVID-19"

[44] The evidence clearly shows (and as referenced by the Officer's aforementioned notes) the Applicant was not the caregiver of the child as it was the Applicant's husband who was receiving QPIP benefits to take care of the child (i.e. who would have been the caregiver of the child)

during all those same relevant periods 27 to 47. The moment the Applicant gave QPIP benefits to her husband, he (not she) was the one deemed to be caring for the child.

[45] The evidence also shows that COVID-19 was not the reason why the Applicant was a caregiver for her baby as she had previously been approved for maternity/paternity leave benefits until August 23, 2021. The Officer's notes state *"The pandemic is not the reason why the tp was a caregiver for a baby, as she was approved for maternity leave till August 23, 2021."*

[46] The Officer's Decision that the Applicant was not a caregiver of the child and that the caregiving was not for reasons related to COVID-19 followed a coherent, logical thought pattern and was intelligible and justified on the evidence before him.

[47] While the Officer did not reference the Public Health Agency of Canada (PHAC) in his Decision or notes as the Applicant would have liked, his notes specifically list the "Covid-19 guidelines for Mothers" and "Letter from tp stating that guidelines for mothers during the pandemic have changed" in "What documents were provided". In addition, the Officer confirmed in his Affidavit dated November 9, 2022 that these documents were in the Applicant's file (Exhibit G) at the time of his Decision. As such, these documents were before the Officer and he decided, for other provided reasons, that she was not eligible.

[48] In not including these documents in his reasons, the Officer may have decided that the language of the PHAC document were merely guidelines and/or did not qualify as a public health authority advisory pursuant to section 17(1)(f) of the *Act*. The PHAC's Covid-19

document entitled “Coronavirus Disease (Covid-19) Pregnancy, Childbirth and Caring for Newborns: Advice for Mothers During Covid-19” indicated, *inter alia, “**If possible**, you and your baby should not leave home unless medically necessary” and “Breastfeeding is recommended, **when possible**, as it has many health benefits and offers the most protection against infection and illness through any infancy and childhood”*. “If possible” and “when possible” are phrases people use to make a request only in a situation in which something is possible. In other words, it is contingent upon the possibility or convenience of the request.

[49] The Applicant submits that had she not given birth during the COVID-19 pandemic and had the public health advisory not been issued, the Applicant would have been working and her daughter would have been with her father. I remain unconvinced given the letter of employment from the ‘*Centre de services scolaire Marguerite-Bourgoys’* dated November 19, 2020, which indicates *“Maternité avec traitement”* and that the Applicant will be back at work on August 23, 2021. This letter was issued during the COVID-19 pandemic and was evidence before the Officer and central to his reasoning that COVID-19 was not the reason why the Applicant was a caregiver for her child as she had previously been approved for paternity leave until August 23, 2021.

[50] The Applicant’s arguments, if accepted by this Court, would result in two parents doubling up on QPIP and CRCB benefits for the same child.

[51] The Respondent submits that the Applicant has not identified any serious defects in the Decision in that she simply argues that if COVID-19 never existed, she could have worked

during her paternity leave and has failed to show that the Decision was unreasonable. I must agree.

[52] The Applicant bears the burden of showing that there are sufficiently serious shortcomings in the Decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov*, at para 100). As established by the Supreme Court in *Vavilov*:

> […] "*Any alleged flaws or shortcoming must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relief on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable*."

[53] Despite the fact that her arguments were unable to carry the day, I commend the Applicant for her poise and professionalism as a self-represented litigant.

VIII. **Conclusion**

[54] Based on a review of the underlying *Act* and the documents in the underlying record, and after considering the arguments of both parties, I find, for all the forgoing reasons, that the Decision is not unreasonable. It meets the requirements of being internally coherent as well as being transparent, justified and intelligible. It contains no circular reasoning or fatal flaws.

[55] The application for judicial review is dismissed.

IX. **Costs**

[56] In its oral submissions, the Respondent asked the Court to award $500 CAD of costs in this matter citing another decision rendered under the *Act* (*Lussier v. Canada (AG)*, 2022 FC 935, para 25).

[57] In the exercise of my discretion, and given the procedural history of three reviews with varying reasons for refusing the Applicant's CRCB requests and two judicial reviews, I do not find this is an appropriate case to award costs.

JUDGMENT in T-1777-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed and the Applicant is ordered to pay back the amount of $2500 CAD (periods 27 to 31), which is the amount the latter received while being ineligible to CRCB.

2. No costs are awarded.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Rachel-Noémi Levesque	FOR THE APPLICANT (SELF-REPRESENTED)
Me Felix Desbiens Gravel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT