

Federal Court



Cour fédérale

**Date: 20230523**

**Docket: T-1991-22**

**Citation: 2023 FC 713**

**Ottawa, Ontario, May 23, 2023**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**DEBBIE MAE RUSSELL**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] In this application for judicial review of a negative Canada Recovery Benefit [CRB] decision, the Respondent concedes that it should be granted but disputes the Applicant's claim for costs. She seeks \$2,500 for legal fees plus disbursements of \$1,227.13 for transcription costs. The Respondent offers to reimburse her for two Federal Court filing fees, i.e., \$50 x 2, and cites pre-hearing offers to settle the matter as reason not to award more.

[2] At the hearing, I indicated that the Applicant was entitled to costs at a level higher than what the Respondent proposed. For the reasons that follow, I have concluded that the Court should exercise its discretion to award a lump sum of \$1,500.00.

## II. Background

[3] The Applicant started a pet photography business in the fall of 2019. Her last invoice was issued in December 2019 before she took a break for the holidays. While driving back home to Vancouver in January 2020 from the United States with her husband, their trailer containing many of their belongings, including documents relating to the Applicant's business, was stolen.

[4] Dealing with the aftermath of the theft took a while and when the Applicant was preparing to work again in March 2020, the pandemic had begun and she had to cancel all scheduled photoshoots. The Applicant then applied for the CRB and received payments for two-week pay periods between September 2020 and May 2021. Throughout this period, it appears from an eligibility spreadsheet submitted as part of the Certified Tribunal Record that the Applicant was initially found to be ineligible for the benefit in each period and then eligible on secondary review.

[5] At some point, the Canada Revenue Agency [CRA] decided that it was necessary to assign a benefit validation agent to assess the Applicant's eligibility. This agent considered the income reported in the Applicant's 2019 Income Tax Return and 2019 business invoices submitted in support of the claims and determined that it was necessary to contact the Applicant for more information. Efforts to reach her by telephone and letter were not successful and a letter

was issued on November 24, 2021 denying the benefit. On November 30, 2021 the Applicant requested a second review, submitting additional information.

[6] A different agent conducted the second review and again concluded that it was necessary to contact the Applicant for additional information as she had not proved receipt of income of at least \$5,000 in 2019. The Applicant and the agent spoke on April 1, 2022. That agent advised the Applicant that proof of payment was required to confirm her 2019 income. Upon further review, the applicant was sent an ineligibility letter dated June 9, 2022.

[7] In response to that letter, the Applicant filed an application for judicial review. The Respondent agreed to conduct a fresh review and the application was discontinued on July 21, 2022. A third reviewer was assigned who contacted the Applicant on July 28, 2022 by telephone. During the course of that conversation, the Applicant advised the CRA agent that she had retained counsel and was recording the call.

[8] The Applicant submitted further information, including an affidavit, in August 2022. An automated redetermination letter was issued on August 18, 2022 which advised the Applicant that she owed \$15,000.00.

[9] On September 23, 2022, CRA wrote again to the Applicant. That letter stated once again that she was not eligible for CRB because she did not meet the criteria of having earned 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 her first application. This is the decision which is the subject of the present application for judicial review.

[10] The Respondent concedes that this decision is unreasonable. The facts are similar to those in *Yousof v Canada (Attorney General)*, 2023 FC 349 [*Yousof*] and *Sjogren v Canada (Attorney General)*, 2022 FC 951 where the Court found reviewable error. The agents in both cases, as here, had departed from the CRB Guidelines by requiring bank statements and in not explaining why invoices submitted by the Applicant were insufficient proof of income.

### III. Issues

[11] The Applicant initially requested in her Notice of Application that the Court make a determination that the Applicant qualifies to meet the eligibility requirements for the CRB. That request was opposed by the Respondent and was not advanced in the Applicant's written argument or oral submissions at the hearing. The Court would not have, in any event, entertained that request as the decision is one to be made by the Respondent. This is not such an exceptional case where the Court would have considered issuing directions for the reconsideration of the claim. It is not clear from the record that the Applicant had established her entitlement to the benefit based on her 2019 income.

[12] As a result, the application will be granted and the matter remitted for reconsideration by a different agent.

[13] In light of the Respondent's concession that the decision was unreasonable, the only issue to be determined is whether costs should be awarded to the Applicant.

IV. **Analysis**

[14] Rule 400(1) of the *Federal Courts Rules* SOR/93-22 provides that the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid." In awarding costs, courts attempt to strike an appropriate balance between three objectives: compensation, providing incentive to settle, and dissuasion of abusive conduct in litigation.

[15] There is no evidence of abusive conduct on the part of the Respondent in the record of this matter. For a variety of reasons, including the theft of her trailer and the lack of any banking records, the Applicant was unable to provide detailed information of her income and sources of revenue in 2019. She was also very difficult to contact, as the record of attempted communications with her by CRA agents indicates.

[16] That said, as I indicated at the hearing, she has succeeded on this application and I am satisfied that she is entitled to an award of costs.

[17] In support of her request for costs including fees and disbursements, the Applicant submits that she wasted time, money and energy in pursuing her claims for the benefit and that the process has caused her mental stress. The Applicant seeks a lump sum of \$2,500 for the time and effort expended in dealing with CRA and her legal costs.

[18] Generally speaking, a party is not entitled to claim costs for the time and effort they have personally expended in litigation unless they can demonstrate an opportunity cost in foregoing remunerative activity. There is no evidence of that in this matter. Moreover, this was not a complicated case and no bill of costs has been submitted to establish how much time and effort the Applicant's counsel devoted to the matter.

[19] The Applicant submitted an invoice received from Veritext Litigation Solutions Canada Inc., in the amount of \$1,002.32, dated August 2, 2022, and a Visa Card statement indicating a payment on September 30, 2022 to a transcription service in the amount of \$124.81.

[20] It is not clear why the Applicant considered it necessary to record her conversations with CRA agents. But I am not satisfied that the transcripts of those calls were necessary to support her application for judicial review. The first conversation recorded and transcribed, as evidenced by the \$124.81 payment, was on June 15, 2022. This does not appear to have had any bearing on the outcome of the 3rd review as the transcript was ordered and produced into the file in October 2022. It wasn't in the hands of the 3rd reviewer when the decision to deny the benefit was made. As for the July 28, 2022 phone call, the Applicant argued that this transcript was instrumental in proving that the decision was unreasonable. However, as reproduced in the Applicant's record, the agent's notes which serve as the reasons for the decision demonstrated the reviewable error without any need to refer to the transcript. As the notes indicate, the agent did not explain why the invoices were not sufficient proof of income based on the CRA guidelines. The transcript of the July 28 call was not required to prove that error.

[21] In my view, therefore, the Applicant is not entitled to recover the two transcription costs as disbursements on this application.

[22] One of the factors which may be taken into consideration in determining cost awards is whether there were any written offers to settle. In the present matter, the Respondent offered to send the matter back for a fresh review and to refund the filing fee in November 2022 prior to the dates the parties' records were due. The Respondent conceded that the decision was unreasonable in its Memorandum of Fact and Law filed on January 16, 2023.

[23] Both parties sought to settle the matter prior to the hearing. The Respondent offered to send the matter back in November 2022 for a redetermination, 5 months before the hearing, which would have saved the Applicant time and money in legal fees. The Applicant also offered to discontinue the judicial review application on several occasions. On January 20, 2023, counsel submitted an offer by email for \$1,500 in costs without seeking to have the CRB eligibility re-assessed by another officer. That was declined by the Respondent in a letter dated March 24, 2023. A further offer to settle was made on April 5, 2023 for \$800 in costs with a fresh redetermination. That was declined by the Respondent on April 12, 2023 with a counter offer of \$50 and reconsideration of eligibility.

[24] Several similar matters have been heard by the Court recently and in which costs were awarded to the applicant. In *Kotowiecki v Canada (Attorney General)*, 2022 FC 1314, only disbursements before the Court were awarded to the self-represented applicant as the applicant

had “not demonstrated any lost opportunity cost in the sense of foregoing remunerative activity to prepare and present her case”: at para 40.

[25] In *Crook v Canada (Attorney General)*, 2022 FC 1670, a matter with a similar factual scenario, the parties agreed to award \$1,120 in costs to the self-represented Applicant. Similarly, the parties agreed to \$1,875 in costs in *Sid Seghir v Canada (Attorney General)*, 2022 FC 466 where the applicant was represented by counsel.

[26] In *Yousof*, another case concerning a similar factual scenario, the Applicant was awarded \$800 after the Respondent asked for reduced costs due to the Applicant refusing to accept their offer to settle twice.

[27] Significantly higher costs were awarded by the Court in *Richardson v Canada (Attorney General)*, 2023 FC 548, in the sum of \$3,000, where the Court found the CRA’s approach lacked procedural fairness, “given the protracted nature of these proceedings” and the considerable effort by the Applicant to obtain a remedy.

## V. Conclusion

[28] This was not a complex matter and did not require a great deal of effort on the part of counsel. Given the Respondent’s early recognition that the decision was not reasonable the matter should have been settled without proceeding to a hearing. The Respondent’s offers of a reimbursement of the filing fees were not sufficient. While resolution of the controversy between



the parties took a considerable amount of time, much of that was due to the difficulty the Respondent's agents had in contacting the Applicant.

[29] The application will be granted and remitted for reconsideration by a different agent.

[30] I consider that a reasonable amount to be awarded in a lump sum for costs inclusive of disbursements is \$1,500.00.

**JUDGMENT IN T-1991-22**

**THIS COURT'S JUDGMENT is that:**

1. The application is granted;
2. The matter is remitted for reconsideration by a different agent; and
3. The Applicant is awarded costs of one thousand and five hundred dollars (\$1500.00) inclusive of disbursements.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1991-22

**STYLE OF CAUSE:** DEBBIE MAE RUSSELL v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** APRIL 17, 2023

**JUDGMENT AND REASONS:** MOSLEY J.

**DATED:** MAY 23, 2023

**APPEARANCES:**

Ravneet Rakhra FOR THE APPLICANT

Aleksandra Djordjevic FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Buckley Hogan Law Office FOR THE APPLICANT  
Surrey, British Columbia

Attorney General of Canada FOR THE RESPONDENT  
Vancouver, British Columbia