

Federal Court



Cour fédérale

Date: 20240111

Docket: T-2651-22

Citation: 2024 FC 44

Ottawa, Ontario, January 11, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

EVA LATOURELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Eva Latourell [Applicant], self-represented, seeks judicial review of two decisions [Decisions] of the Canada Revenue Agency [CRA] dated September 16, 2022, finding the Applicant ineligible for the Canada Recovery Benefit [CRB] [CRB Decision] and the Canada Worker Lockdown Benefit [CWLB] [CWLB Decision]. The basis of the CRB Decision was that the Applicant had not earned at least \$5,000 (before taxes) of employment or net self-

employment income in 2019, 2020, or the 12 months before the date of her first application. The basis of the CLWB Decision was that the Applicant did not earn at least \$5,000 (before taxes) of employment or net self-employment income in 2020, 2021, or the 12 months before the date of her first application.

[2] The Applicant submits that the Decisions are unreasonable because CRA, using the same financial information, denied her CRB and CWLB benefits but paid her the Canada Emergency Response Benefit [CERB] and because the Decisions did not factor in the reassessment of her 2019 taxation year.

[3] The application for judicial review is dismissed. The Applicant has not satisfied her onus of establishing any errors with the Decisions.

II. Background

[4] From January 1, 2019 to December 31, 2019, the Applicant worked as a self-employed tutor. She applied for CRB for 27 two-week periods from September 27, 2020 to October 9, 2021, CWLB for 11 one-week periods from December 19, 2021 to March 5, 2022, and CERB for an unknown period. The CRA initially accepted without review and paid the Applicant for 27 periods of the CRB applications and 4 periods of the CWLB applications. The CRA then selected the Applicant for a first review of her eligibility for CRB and CWLB.

[5] On March 8, 2022, a CRA officer instructed the Applicant to send in documentation proving that she earned at least \$5,000, which could include the amount received for other COVID-19 benefits.

[6] On March 14, 2022, the Applicant submitted a photo of her T4A form for 2021, indicating that she received \$18,600 for CRB.

[7] The first reviewer [First Reviewer] called the Applicant three times. During the third call, the Applicant answered questions regarding her self-employment work. She explained that for 2019 she reported a net negative income because of her expenses, including gas bills, car maintenance, and tutoring resources.

[8] On May 18, 2022, the First Reviewer issued three decision letters, finding the Applicant ineligible for CERB, CRB and CWLB. For the two Decisions at issue, the First Reviewer concluded that the Applicant did not earn at least \$5,000 (before taxes) of employment or net-self employment income in 2019, 2020, 2021, or in the 12 months before the date of her first application.

[9] On May 29, 2022, the Applicant requested a second review of the May 18, 2022 decisions. The Applicant attached a CRA news release dated February 9, 2021 regarding CERB and explained that she would adjust her 2019 Income Tax and Benefit Return for inadvertent expenses claimed. The Applicant would instead claim nil as her expenses, as she did not have the receipts. Accordingly, the Applicant's gross and net income would be \$6,010. The Applicant

also explained that someone at CRA advised her that she could claim CWLB if her COVID-19 related benefits were over \$5,000 in 2020 or 2021.

[10] The initial second reviewer attempted to call the Applicant three times between August 10 and August 12, 2022. Having received no answer, the agent left a voicemail with their name, phone and badge number. The agent advised that further documents, such as bank statements or other documents, were required to confirm the Applicant's income. The second review of the Applicant's eligibility was then transferred to a different agent [Second Reviewer].

[11] At the time of the second review, the CRA assessed the Applicant's business income for the 2019 to 2021 taxation years as follows:

Taxation Year	Net Business Income (\$)
2019	-2,266
2020	-2,100
2021	-1,470

[12] On September 16, 2022, the Second Reviewer issued the Decisions denying the Applicant's eligibility for CRB and CWLB. However, the Applicant asserts that the CRA confirmed the Applicant's eligibility for CERB based on the fact that she earned \$5,000 in net self-employment income in 2019. This letter is not before the Court.

[13] Following receipt of the Decisions, the Applicant contacted the CRA requesting an adjustment for the 2019 taxation year. On December 12, 2022, almost three months after the Decisions, the CRA issued its notice of reassessment [Notice of Reassessment] resulting in the

Applicant's net business income increasing by \$8,276, from a loss of \$2,266 to a net business income of \$6,010.

III. The Decisions

[14] The CRB Decision and the CWLB Decision confirmed the Applicant's ineligibility for benefits. The Second Review Report forms part of the reasons for the Decisions (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 22 [*Aryan*]). The Second Review Report is identical for both Decisions, although they were produced nearly two weeks apart.

[15] The Second Review Report notes that the Applicant had negative self-employment income for 2019, 2020, and 2021. The Applicant has not included any documents to show that she met the \$5,000 income requirement during the respective timeframes.

IV. Issues and Standard of Review

[16] Only the Respondent set out the issues for consideration in this application. I agree that the sole issue for determination is whether the Decisions were reasonable.

[17] The Applicant made no submissions on the applicable standard of review. The Respondent submits that the standard of review is reasonableness, emphasizing that the Applicant bears the burden of satisfying this Court that there are sufficiently serious shortcomings in the Decisions such that they cannot be said to exhibit the requisite degree of

justification, intelligibility, and transparency (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100 [*Vavilov*]).

[18] I agree with the Respondent that the standard of review is reasonableness. This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov* (at paras 16-17). Therefore, the presumption of reasonableness is not rebutted. A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 13, 15, 99). A decision will be reasonable where the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes (*Vavilov* at paras 85-86). Conversely, a decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). The Applicant bears the onus of demonstrating the unreasonableness of the decision (*Vavilov* at para 100).

V. Preliminary Issue

[19] The Respondent submits that the evidentiary record before the Court on judicial review is restricted to the record before decision-maker (*Aryan* para 42, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]). Accordingly, certain documents included in the Applicant's application record, including email correspondence regarding motor vehicle expenses, the Notice

of Reassessment, and the 2019 Income Tax and Benefit Return are inadmissible. The allegations of fact in the Applicant's affidavit that pertain to events occurring after the Decisions are also inadmissible, as they were not before the Second Reviewer in rendering the Decisions.

[20] I agree with the Respondent that the evidentiary record before a reviewing court is restricted to the record before the decision-maker. However, there are non-exhaustive exceptions to this general rule (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 483 at para 20, citing *Perez v Hull*, 2019 FCA 238 [*Perez*]; *Access Copyright*):

[20] ... (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary records of the administrative decision-maker, to enable the court to fulfill its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional exceptions, as the list is not closed.

[Citations omitted.]

[21] In my view, these exceptions do not apply. The Second Reviewer attests that the email correspondence, Notice of Reassessment, the 2019 Income Tax and Benefit Return, and the allegations of fact in the Applicant's affidavit were not before her in conducting the second review (*Aryan* at para 42). I note that it is impossible to discern the date of the email correspondence regarding the motor vehicle expenses to determine whether this evidence was available at the time of the second review (*Perez* at para 17). Further, the Notice of Reassessment and the statements in the Applicant's affidavit of events occurring after the Decisions go directly to the merits of the Decisions (*Access Copyright* at paras 19-20; *Delios v Canada (Attorney*

General), 2015 FCA 117 at para 42; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at paras 17-23). Lastly, the first and second level Decisions already factored in the gross business and net self-employment income within the Income Tax and Benefit Return.

[22] Accordingly, the Court will not consider the above-noted evidence.

VI. Analysis

A. *Were the Decisions reasonable?*

(1) Applicant's Position

[23] The Decisions were unreasonable. The Applicant used the same 2019 Income Tax and Benefit Return for the CRB, CWLB and CERB applications, yet the Second Reviewer only approved the Applicant for CERB. This inconsistent practice is highly unreasonable.

[24] Further, the Decisions are inconsistent with the Notice of Reassessment, which correctly adjusted the Applicant's expenses.

[25] Lastly, since the Applicant wrote to CRA, she assumed that the CRA would contact her by letter with a contact number to discuss the issue. The Applicant was hesitant to accept calls from the CRA due to telephone scamming.

(2) Respondent's Position

[26] The finding in the Decisions that the Applicant had not met the minimum financial threshold of \$5000 (before tax) in 2019 was reasonable based on the record.

[27] The Applicant's submission that it is unreasonable to meet the \$5,000 income requirement for CERB but not CRB and CWLB is without merit. It is possible for an applicant to receive CERB payments and not have to pay it back while also being ineligible for CRB and CWLB. Eligibility for CERB, like CRB and CWLB, is based on net self-employment income. Subsection 12(1) of the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 empowers the Minister of Employment and Social Development [Minister] to seek reimbursement of any CERB payment to which an individual was not entitled. However, pursuant to the *Canada Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order*, SI/2021-19 [Remission Order], self-employed individuals who would have been eligible for CERB based on their gross self-employed income are exempt from the operation of this provision. The Remission Order applies only to CERB. As such, the Second Reviewer was bound to apply the net self-employment income requirement in the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRB Act] and the *Canada Worker Lockdown Benefit Act*, SC 2021, c 26, s 5 [CWLB Act] (*Flock v Canada (Attorney General)*, 2022 FC 305 at paras 19, 23 [*Flock*], *aff'd* 2022 FCA 187).

[28] Further, the Notice of Reassessment is irrelevant to the present matter for three reasons. First, it is inadmissible. Second, post-decision events cannot affect the reasonableness of the Decisions (*Showers v Canada (Attorney General)*, 2022 FC 1183 at paras 19, 24). Third, the

reassessment would not have affected the outcome of the Decisions. There is no obligation for the CRA to accept a person's tax return and subsequent assessment as conclusive proof of income, even where the assessment occurs prior to the contested decision (*Aryan* at paras 29, 35, 40; *Walker v Canada (Attorney General)*, 2022 FC 381 at paras 27, 30-33 [*Walker*]).

[29] The Applicant provided contradicting information as to whether or not expenses were incurred. This information was before the Second Reviewer. Namely, during a phone call with the First Reviewer on May 11, 2022, the Applicant indicated that her expenses were greater than her income because she paid for gas bills, car maintenance, and tutoring resources. However, in her letter dated May 29, 2022, the Applicant indicated that she would amend her 2019 Income Tax and Benefit Return for expenses claimed, as she did not have receipts to support the expenses declared. In removing these expenses, both her net and gross self-employment income would be \$6,010. In this context, it was reasonable for the Second Reviewer, as requested by a CRA agent, to require bank statements, invoices and receipts to prove the Applicant's net self-employment income. The Applicant failed to do so.

[30] The decision-maker reasonably concluded, based on the available evidence, that the Applicant did not meet the income eligibility requirement for CRB and CWLB. At that time, the Applicant reported negative net self-employment income for the 2019, 2020, and 2021 taxation years. The Applicant's T4A form reflecting CRB payments did not count towards the \$5,000 income requirement for CRB (*CRB Act*, s 3(1)(d)). While CRB payments are an acceptable source of income for CWLB if the individual was entitled to the CRB payment, the CRB payments she received did not support her eligibility for the CWLB because she was found

ineligible for CRB (*CWLB Act*, s 4(1)(d)). Moreover, the Applicant's May 29, 2022 letter contesting inadvertent expenses was not supported by further documentation, despite the initial second reviewer's various attempts to contact the Applicant. Over one month passed without the Applicant returning the agent's calls or providing this documentation (*CRB Act*, s 6).

(3) Conclusion

[31] The Decisions were reasonable.

[32] As noted above, the CERB decision is not before this Court and is not the subject of this application for judicial review. The Court is unable draw conclusions regarding the CRA's assessment of the Applicant's eligibility for CERB at the time of the second review.

[33] However, generally speaking, I accept that the Applicant could receive CERB payments while also being ineligible for CRB and CWLB. As explained by Justice Fothergill in *Flock*:

[17] ... Subsection 6(1) of the CERBA limited eligibility for the CERB to "a worker" as defined in s 2 who, among other criteria, had a "total income of at least \$5,000.00" from employment, self-employment, benefits, or allowances under pregnancy or parental leave plans.

[18] Subsection 12(1) of the CERBA empowers the Minister to seek reimbursement of any payment to which an individual was not entitled. However, self-employed individuals who received the CERB based on their gross self-employment income are exempted from the operation of this provision by virtue of the *Canada Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order*, SI/2021-19 [Remission Order]. Section 1 of the Remission Order applies to any person who: (a) collected CERB if that person would have been eligible based on their gross self-employment income; and (b) filed their 2019 and 2020 tax returns at the specified times.

[19] The Remission Order is limited to the CERB, and has never been extended to the CRB. While the Remission Order ensures that Mr. Flock will not be subjected to a “claw back” for his receipt of the CERB, it has no bearing on his eligibility for the CRB.

[Emphasis added.]

[34] Therefore, while the Applicant will not be subjected to a “claw back” for her receipt of CERB, it has no bearing on her eligibility for CRB or CWLB (*Flock* at para 19). The Second Reviewer was bound to apply the net self-employment income required in section 3 of the *CRB Act* and section 4 of the *CWLB Act*.

[35] Overall, the Second Reviewer reasonably concluded, based on the available evidence, that the Applicant did not meet the income requirements for CRB and CWLB. As stated earlier, the Notice of Reassessment is inadmissible in the present matter for the reasons articulated in paragraphs 19 to 22, above.

[36] The Second Reviewer was not required to accept the Applicant’s assertions that her 2019 income was \$6,010 for both gross and net self-employment income due to inadvertent expenses claimed (*Aryan* at paras 29-34). Section 6 of the *CRB Act* and section 7 of the *CWLB Act* state that an applicant must provide the Minister with any information that the Minister may require in respect of an application. Further, the guideline entitled “Confirming, CERB, CRB, CRSB, CWLB Eligibility” [Guideline] states that “[i]f the 2019 or the 2020 income cannot be validated, proof must be provided” [emphasis in original]. The Guideline also provides that “[i]f you determine that documentation is required, advise the applicant what needs to be provided to

show they made at least \$5,000 in the last 12 months.” Acceptable proof is set forth in the Guideline.

[37] Attempts were made to obtain the acceptable proof on August 10, 11 and 12, 2022, as indicated in the Second Reviewer report.

[38] It was open to the Second Reviewer to request additional documentation from the Applicant to establish a net self-employment income of \$5,000 (*Aryan* at para 34; *Walker* at paras 33-35). The Applicant was required to provide this requested information but failed to do so.

[39] The Second Reviewer considered the Applicant’s documentation, including her May 29, 2022 letter, but found that none of the documents demonstrated that the Applicant met the net self-employment income eligibility requirements for CRB. Nearly two weeks later, the Second Reviewer arrived at the same conclusion regarding the Applicant’s eligibility for CWLB. These conclusions are consistent with the *CRB Act* and *CWLB Act* (*CRB Act*, s 3(1)(d); *CWLB Act*, s 4(1)(d)). While the Respondent attempts to supplement the Second Reviewer’s Decisions, I agree that when read holistically in light of the legal and factual constraints that bear on the decision-maker, the Decisions are reasonable (*Vavilov* at para 103, 105-07).

VII. Conclusion

[40] For the above reasons, the application for judicial review is dismissed.

[41] The Applicant does not seeks costs, while the Respondent does. Under the circumstances, I am exercising my discretion not to award any costs to the Respondent, despite its success on this application.

JUDGMENT in T-2651-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2651-22

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