Federal Court Cour fédérale

Date: 20230803

Docket: T-2044-22

Citation: 2023 FC 1066

Ottawa, Ontario, August 3, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

ABDELRAHMAN MAHMOUD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Mr. Abdelrahman Mahmoud [Applicant] seeks judicial review of Second-Level review decisions [Decisions] made by Farmana Chowdhury, a benefits compliance officer [Officer] of the Canada Revenue Agency [Agency], all dated September 7, 2022. Based on three Second-Level reviews of the Applicant's eligibility for the Canada Emergency Response Benefit [CERB], Canada Recovery Benefit [CRB] and Canada Worker Lockdown Benefit [CWLB], the Officer determined the Applicant was not eligible to receive any benefits from those programs.

The Officer held that the Applicant must repay the amounts received from the CERB and CRB programs while being ineligible.

[2] During the hearing, the Applicant confirmed his earlier admission in his Memorandum (para. 6) to being ineligible to the CWLB program. As such, and since the Applicant did not receive any payments under the CWLB program, the Court's judgment will only relate to the Applicant's eligibility for the CERB and the CRB programs.

[3] The Applicant seeks a judgment from this Court confirming his eligibility to the CERB and CRB programs.

[4] The Court agrees with the Applicant that he experienced a breach of procedural fairness such as to invalidate the Officer's Decisions. However, the Applicant did not persuade the Court that the circumstances warranted any remedy other than the usual one of remitting the matter back to the Agency for redetermination. Accordingly, and for the reasons more fully described below, the Court grants the Applicant's application for judicial review and remits the matter for a redetermination by an Agency officer not previously involved in this matter.

II. **Background**

A. *Facts*

[5] The Parliament introduced the CERB and CRB programs as measures to respond to various repercussions caused by the COVID-19 pandemic. Those programs are taxable benefits introduced to offer financial support to employed and self-employed Canadians.

[6] In order to receive the CERB, a Canadian resident had to submit an application for each four-week period beginning on March 15, 2020 and ending on September 26, 2020. Eligible individuals would receive $2000 for each four-week period.

[7] In order to receive the CRB, a Canadian resident had to submit an application for each two-week period beginning on September 27, 2020 and ending on October 23, 2021. Eligible individuals would receive between $600 and $1000, before tax withholdings, for each two-week period.

[8] Upon arriving in Canada, the Applicant first lived in Vancouver for 4 months, then in Toronto for 30 months, and has lived in Montreal since September 2021. The Applicant has moved frequently holding various jobs during the COVID-19 crisis.

[9] On April 15, 2020, the Applicant applied for the CERB and received payments of $2000 for seven two-week periods between March 15, 2020 and September 26, 2020.

[10] On October 26, 2020, the Applicant applied for the CRB and received payments of $1000 for 21 two-week periods between September 27, 2020 and July 17, 2021 and payments of $600 for six two-week periods between July 18, 2021 and October 9, 2021.

[11] On or about December 24, 2021, the Agency selected the Applicant's CERB and CRB files for an eligibility review.

[12] On January 6 and March 28, 2022, the Applicant submitted several documents, more fully listed in the Officer's Affidavit, which are invoices and a Contracting Agreement.

[13] On April 8, 2022, the First Reviewer denied the applications to CERB and CRB for the same reason: *"the Applicant did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019 [or 2020] or in the 12 months prior to the date of his first application"*.

B. *Decisions under Review*

[14] On April 14, 2022, the Applicant applied for a Second-Level review of his eligibility for CERB and CRB, which reviews were assigned to a Second-Level review officer.

[15] On April 14 and August 26, 2022, the Applicant provided further documents as listed in detail in the Officer's Affidavit at paras 29 through 31.

[16] On August 10, 2022, the Global Case Management System notes used by immigration officers indicates that there were two calls between the Applicant and the Second-Level review officer. The notes reveal that the Applicant wanted to be sure that he had enough evidence to show that he earned more than $5000. Moreover, it is during that call that the Applicant told the Second-level review officer that Hudson Bay refused to give him documents as he had worked at their warehouse for a short period. The notes show the Applicant asked whether the officer could

call Hudson Bay for verification and the Second-Level review officer informed the Applicant that they do not communicate with third party for verification purposes “unless it is necessary”.

[17] On August 23 and 26, 2022, the Applicant provided further submissions and indicated, among other things, that the agency (Arrow Workforce) he worked for with Hudson Bay in 2019 had refused to send him proof of his earnings that amounted to $1930 and that he had difficulties in providing supporting evidence of same as it was his first year in Canada and he had moved.

[18] On August 31, 2022, the Global Case Management System notes indicates that there was a *“Call completed on 2022/08/31 at 1:10 pm EST as TP wanted to submit documents from Hudson Bay regarding $1900 earned in 2019. informed TP that we will wait today and tomorrow for docs to submit. TP understood.”*

[19] The Applicant states that he had asked for an extension of time to gather evidence that was in his ex-employer’s possession. The request was refused, and he was only granted one additional day to submit everything. The Respondent submits that the Applicant did not ask the decision maker for additional time to obtain and submit additional proofs of his income and the Applicant submitted no evidence supporting his claim. Instead, Respondent submits:

> *50. Rather, the Applicant told the decision maker, during a conversation dated August 31, 2022, that he “wanted to submit documents from Hudson Bay regarding $1900 earned in 2019”, and the decision maker replied that she would wait “today and tomorrow” to receive the documents and the Applicant said that he understood.*

[20] On September 2, 2022 at 11:15 a.m., less than 48 hours after the August 31, 2022 1:10 p.m. call, the Global Case Management System notes show that the Officer typed out her Decision notes including a note to the effect that *"Besides Adonis, he worked for "Door dash" and "Hudson Bay" in 2019. (...) No proof from Hudson Bay as they refused to provide him."*

[21] On September 7, 2022, the Officer issued her Second-Level Review Decisions that determined that the Applicant was ineligible for the CERB because the Applicant *"did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, or in the 12 months before the date of your first application."* and was ineligible for the CRB because the Applicant *"did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, in 2020, or in the 12 months before the date of your first application."*

[22] To support his application for judicial review, the Applicant submitted new evidence before this Court that was not before the Officer. The new evidence before the Court notably included an affidavit and a number of cheques dated December 2, 9, 16, 23 and 30, 2019 and January 1, 2020 from Arrow Workforce totaling $1930, which were retrieved when the Applicant communicated with his bank.

III. **Issues**

[23] In this case, there are two main issues:

(a) *Did the Officer breach the Applicant's right to procedural fairness?*

(b) *If no breach of procedural fairness, were the Decisions reasonable?*

[24] Finally, the Applicant submitted before the Court new evidence and new arguments not before the decision maker, which is a preliminary issue.

IV. **Standard of review**

[25] The Supreme Court of Canada has established that when conducting a 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.

[26] 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 [*Canadian Pacific*].

[27] Therefore, the allegation of procedural fairness will be determined under the correctness standard of review.

[28] If there is no breach to the procedural fairness duty, the Court will apply the *Vavilov* presumption to use the reasonableness standard of review. In that case, a court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. The reviewing court 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.

[29] 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.

[30] 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.

V. **Analysis**

(a) *Did the Officer breach the Applicant's right to procedural fairness?*

[31] The Applicant submits that there was a breach of the Officer's duty of procedural fairness on the basis that he asked for additional time to submit evidence to the Officer, and the latter only granted him one additional day that was not enough to gather and submit the required evidence.

[32] The Respondent submits that it is not a breach of procedural fairness because the Applicant did not ask and should have asked the Officer for more time or for another extension of time if he required it.

[33] The duty to act fairly comprises two components: the right to a fair and impartial hearing before an independent decision-maker and the right to be heard (*Fortier v Canada (AG)*, 2022 FC 374 at para 14 [*Fortier*]; *Therrien (Re)*, 2001 SCC 35 at para 82).

[34] In this case, there is an issue with the Applicant's right to be heard or the *audi alteram partem* principle. Indeed, every person has the right to "present their case fully and fairly" (Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 at para 28).

[35] In the words of the Federal Court of Appeal (*Canadian Pacific* at para 56:

> *[56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.*

[36] In a similar case, the Honorable Mr. Justice Lafrenière concluded that there was no evidence that the Officer had breached principles of procedural fairness (*Cantin v Canada (AG)*, 2022 FC 939 at para 18 [*Cantin*]) because in that case, the applicant had the opportunity to submit additional documentation and information.

[37] By granting the Applicant only one (1) additional day (while the original delay was 20 days), when the Applicant had sought additional time to submit evidence not in his possession (and in the possession of a third party with whom the Applicant would have to engage with in

order to obtain same or find alternative means to locate that information), is a breach of the Officer's duty of procedural fairness.

[38] The Court disagrees with the Respondent that it is not a breach of procedural fairness because the Applicant had 20 days to obtain the information and should have asked the Officer for more time or asked for another extension of time. Parties (especially self-represented litigants) who are not given adequate time by an Officer, do not know that they can insist and ask for additional time when they are initially refused such an extension of time or given little time to do so. To turn that onus on a party who is unfamiliar with the administrative and/or justice system is unfair.

[39] Every situation will depend on the facts. The Court is not saying that granting only one additional day to provide evidence will always be unfair, but on the facts of this case, it was unfair. The Applicant did various odd jobs and had to prove earnings in excess of $5000 in 2019. The work he alleged he had done for Arrow Workforce/Hudson Bay totaled $1900 and the evidence of that work had not been provided to him by Arrow Workforce/Hudson Bay and was in their possession. Certainly, the Applicant had no control of the evidence he intended to submit. He needed adequate time to obtain that evidence from his prior employer or by alternate means (in this case, from the files of his bank). By granting the Applicant just one additional day or a little over a day, the Officer did not give the Applicant a reasonable amount of time to gather the necessary evidence from third parties and file same with the Agency for her review. As such, the Applicant did not have "a full and fair chance to be heard" (*Canadian Pacific* at para 56) and the Applicant was not accorded his right to be heard.

[40] The Officer could have tried to understand the Applicant's situation, and could have asked the Applicant how many days he would reasonably require to obtain and submit the evidence, but he did not. The Officer could have given the Applicant half the original time (i.e. 10 days) or a quarter of the original time (i.e. 5 days) rather than one day. Instead, the Officer gave the Applicant *"today and tomorrow"*. And, less than 2 days later, on September 2, 2022, she typed out her "Decision notes" and on September 7, 2022, the Decisions were sent out to the Applicant.

[41] The Court cannot accept the Respondent's argument saying that the Applicant should have told the Officer that he needed more time after the August 31, 2022 phone call. Accepting that argument would mean excusing the Officer who knew or should have known that the evidence would take some time to obtain and submit. Why? The evidence was in a third party's possession, this third party had previously refused to provide the information, the Applicant had little time to obtain same given the time of the call with the officer (early afternoon) and usual business hours are from 9 to 5.

[42] Thus, in the words of the Honorable Madam Justice St-Louis, "in the case of procedural or substantive errors, the usual remedy where the Court cannot uphold an administrative decision is to set it aside and send it back to the decision maker for reconsideration" (*Fortier* at para 18).

(b) *Are the Decisions reasonable?*

[43] Since there was a breach to the duty of procedural fairness, the Court does not need to evaluate if the Decisions were reasonable or not. Indeed, when there is a breach of procedural

fairness, the decision itself is irrelevant, and will be set aside regardless of its merit (*David v Canada (Attorney General*), 2014 FC 358 at para 62).

[44] Similarly, since there was a breach of the duty of procedural fairness, the Court need not determine how to treat the new evidence filed by the Applicant before this Court.

VI. **Costs**

[45] At the hearing, the parties agreed that the unsuccessful party will pay costs in the amount of $500.

VII. **Conclusion**

[46] The application for judicial review is allowed. The CERB and CRB matters will be remitted for redetermination by an Agency officer not previously involved in these matters.

JUDGMENT in T-2044-22

THIS COURT'S JUDGMENT is to:

1. ALLOW the application for judicial review;

2. SET ASIDE the Decisions of the Officer dated September 7, 2022;

3. REMIT the matters for redetermination of the CERB and CRB applications by an Officer of the Canadian Revenue Agency not previously involved in these matters; and

4. ORDER costs in the amount of $500 in favor of the Applicant.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2044-22
STYLE OF CAUSE:	ABDELRAHMAN MAHMOUD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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