

Federal Court



Cour fédérale

Date: 20230912

Docket: T-2368-22

Citation: 2023 FC 1225

Ottawa, Ontario, September 12, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

AIJUN SUN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a second review decision made by a benefits validation agent [Agent] of the Canada Revenue Agency [CRA] dated October 12, 2022. The Agent determined that the Applicant was not eligible for the Canada Recovery Benefit [CRB] payments she received pursuant to section 3 of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [Act] and required her to repay the amounts received.

[2] The Applicant argues that the decision is unreasonable as she meets the eligibility criteria for the CRB and that the CRA breached its duty of procedural fairness.

[3] For the reasons that follow, I find that the Applicant has not demonstrated that the decision is unreasonable or that she was denied procedural fairness. Accordingly, the application for judicial review shall be dismissed.

I. Background

A. The CRB Regime

[4] The CRA is the federal agency responsible for administering the CRB. The CRB was available for any two-week period beginning on September 27, 2020, and ending on October 23, 2021, to eligible employed and self-employed individuals who were directly affected by the COVID-19 pandemic.

[5] The eligibility criteria for the CRB are set out in subsection 3(1) of the *Act*, which provides, in part, as follows:

3 (1) A person is eligible for a Canada recovery benefit for any two-week period falling within the period beginning on September 27, 2020 and ending on October 23, 2021 if

...

3 (1) Est admissible à la prestation canadienne de relance économique, à l'égard de toute période de deux semaines comprise dans la période commençant le 27 septembre 2020 et se terminant le 23

(d) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, they had, for 2019 or in the 12-month period preceding the day on which they make the application, a total income of at least \$5,000 from the following sources:

- (i) employment,
- (ii) self-employment,
- (iii) benefits paid to the person under any of subsections 22(1), 23(1), 152.04(1) and 152.05(1) of the *Employment Insurance Act*,
- (iv) allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
- (v) any other source of income that is prescribed by regulation;

...

(f) during the two-week period, for reasons related to COVID-19, other than for reasons referred to in subparagraph 17(1)(f)(i) and (ii), they were not employed or self-employed or they had a reduction of at least 50% or, if a lower percentage is fixed by regulation, that percentage, in their average weekly employment income or self-employment income for the two-week period relative to

octobre 2021, la personne qui remplit les conditions suivantes :

...

d) dans le cas d'une demande présentée en vertu de l'article 4 à l'égard d'une période de deux semaines qui débute en 2020, ses revenus provenant des sources ci-après, pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente sa demande, s'élevaient à au moins cinq mille dollars :

- (i) un emploi,
- (ii) un travail qu'elle exécute pour son compte,
- (iii) des prestations qui lui sont payées au titre de l'un des paragraphes 22(1), 23(1), 152.04(1) et 152.05(1) de la *Loi sur l'assurance-emploi*,
- (iv) des allocations, prestations ou autres sommes qui lui sont payées, en vertu d'un régime provincial, en cas de grossesse ou de soins à donner par elle à son ou ses nouveau-nés ou à un ou plusieurs enfants placés chez elle en vue de leur adoption,
- (v) une autre source de revenu prévue par règlement;

...

f) au cours de la période de deux semaines et pour des raisons liées à la COVID-19, à l'exclusion des raisons prévues aux sous-alinéas 17(1)f(i) et (ii), soit elle n'a pas exercé d'emploi — ou exécuté un travail pour son compte —, soit

(i) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, their total average weekly employment income and self-employment income for 2019 or in the 12-month period preceding the day on which they make the application, and

(ii) in the case of an application made under section 4 in respect of a two-week period beginning in 2021, their total average weekly employment income and self-employment income for 2019 or for 2020 or in the 12-month period preceding the day on which they make the application;

elle a subi une réduction d'au moins cinquante pour cent — ou, si un pourcentage moins élevé est fixé par règlement, ce pourcentage — de tous ses revenus hebdomadaires moyens d'emploi ou de travail à son compte pour la période de deux semaines par rapport à :

(i) tous ses revenus hebdomadaires moyens d'emploi ou de travail à son compte pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente une demande, dans le cas où la demande présentée en vertu de l'article 4 vise une période de deux semaines qui débute en 2020,

(ii) tous ses revenus hebdomadaires moyens d'emploi ou de travail à son compte pour l'année 2019 ou 2020 ou au cours des douze mois précédant la date à laquelle elle présente une demande, dans le cas où la demande présentée en vertu de l'article 4 vise une période de deux semaines qui débute en 2021;

[6] For the purpose of this application, there are two key eligibility requirements – (i) an applicant must have earned at least \$5,000 of employment income or net self-employment income for 2019, for 2020 or in the 12 months prior to the date on which they make their application; and (ii) an applicant must have experienced a 50% reduction in their average weekly income relative to the previous year for reasons related to COVID-19.

[7] Pursuant to section 6 of the *Act*, an applicant is required to provide the Minister with “any information that the Minister may require in respect of the application”.

[8] In the course of administering the CRB program, the CRA selects some applications for review. Where an application is selected for review, the applicant is contacted by the CRA and the agent goes over the CRB eligibility requirements with the applicant. As part of that discussion, the agent may request additional documents and information from an applicant.

[9] The CRA’s “Confirming CERB, CRB, CRSB, and CWLB Eligibility” policy sets out what documents applicants should provide to prove they meet the minimum income threshold when they are selected for review. The policy expressly notes that “pension income, rental income, Social Assistance, do not count as ‘employment’ or ‘self-employment’ income [sic]”. For self-employment income, the policy provides the following guidance:

Things to consider for small business owners:

- Do they have business cards to promote their business?
- Do they advertised? [*sic*] E.g. Kijiji, Marketplace, Craigslist, their own website?
- Do they actively seek employment opportunities?
- Do they have a registered BN?
- Do they perform regular work and provide to non-related persons?
- If they are always paid in cash, do they have proof they keep track of hours and payments?

Family Members:

If the applicant states they are working for a family member and the family member pays them for their service, consider:

- Would an arms length individual accept the same conditions of employment?
- Did the family member have another individual working for them and then hired the applicant?
- Has the applicant worked for the family member for a number of years and reports the income?
- Is there a contract for services performed? If no contract, the income from a family member may be considered a “gift”. There must be an agreement to pay, written at the time the service began.
- Does the applicant provide the same service to other clients who are not related?

[...]

Acceptable proof:

- Invoice for services rendered, for self employed individuals or sub contractors. For example an invoice for painting a house or a cleaning service etc. Must include the date of the service, who the service was for, and the applicant’s or company’s name.
- Documentation for receipt of payment for the service provided, e.g. statement of account, or bill of sale showing a payment and the remaining balance owed
- Documentation showing income is earned from carrying on a “trade or business” as a sole proprietor, an independent contractor, or some form of partnership
- Contracts
- A list of expenses to support the net result of earnings
- Any other documentation that will substantiate \$5,000.00 in self employment income

[...]

Proof of 50% reduction:

[...]

If you are or were self-employed

- Invoice for services rendered that includes:
 - the service date
 - who the service was for
 - the name of the individual or company
- Receipt of payment for the service or services provided (a statement of account or bill of sale showing a payment and the remaining balance owed)

[10] Following this eligibility review, the agent will advise an applicant, by letter, if they are eligible for CRB. Where the agent determines that an applicant is not eligible, the applicant is advised of the possibility of a second review of their eligibility.

[11] Where a second review is requested, a different agent undertakes an independent review based on the original documentation and information provided by an applicant and any additional documentation and information provided following the first review (including documentation and information that may be expressly requested by the agent during the second review).

B. The Applicant's CRB Application

[12] The Applicant describes herself as a “professional landlord.” During the relevant period, she worked with her daughter and her husband to buy, rent, and manage several properties in Canada, China and the United States.

[13] The Applicant applied for the CRB for 28 two-week periods between September 27, 2020 and October 23, 2021. All of these payments were issued without review.

C. CRA's Review of the Applicant's CRB Eligibility

[14] On or about March 2, 2022, the CRA selected the Applicant's CRB application for an eligibility review. The CRA agent conducting the first review asked the Applicant to submit documentation in support of her application.

[15] On or about March 28, 2022, the CRA received documents from the Applicant, including bank statements from Bank of America with no identification, or debts/credits description from December 2020; January–April and October–December 2021; and January 2022.

[16] By letter dated July 5, 2022, the agent conducting the first review advised the Applicant that she was not eligible for CRB because she did not earn at least \$5,000 in employment income or net self-employment income for 2019, 2020 or in the 12 months prior to the date of her first application.

[17] Following receipt of the first review decision, in July of 2022, the Applicant amended her 2019, 2020 and 2021 income tax returns to report \$5,100 in business income in 2019, \$5,120 in business income in 2020 and \$5,500 in business income in 2021. These business income amounts were originally reported as rental income by the Applicant.

[18] By letter dated August 1, 2022, the Applicant requested a second review of her eligibility for CRB. In support of the second review, the Applicant provided the Applicant's 2019, 2020 and 2021 amended tax returns and the associated Notices of Re-assessment.

[19] On September 27, 2022, the agent conducting the second review [Agent] spoke with the Applicant by telephone for 45 minutes. During that call, the Agent requested that the Applicant submit additional documents – namely, bank statements (January 2020 to July 2020) with the Applicant's name, address and account number.

[20] By letter dated September 27, 2022, the Applicant followed up with the CRA to state that she had submitted bank statements requested by the Agent. In her letter, the Applicant explained that the bank statements show there were gaps in rent deposits, which she claims were due to COVID-19:

From the Bank of Montreal bank statement, you will find \$1075 January rent for the property at Calgary was deposited to my BMO bank account on Jan. 27, 2022. However, you can find that there were not any rent deposits from Feb. 2020 to July 2020. I lost six months of income from the property in Calgary because of Covid-19. The tenant damaged the house and left the house in Feb. 2020 and I could not find a new tenant because of covid-19 immediately. It took me seven months to find the new tenant [...].

From the Bank of America statements, you will find that in year 2020 for the property at 1330 E Santa Fiore Street, I lost a tenant in Feb. 2020 and I also lost the tenant in December 2020 at an eviction cost around USD\$1000 because of Covid-19. You can find that no rent around \$1,380 was deposited for December 2020 and around USD\$1,000 was paid for the eviction in the bank of America statements. The tenant lost jobs and could not pay the rent because of Covid-19.

[21] In her letter, the Applicant also emphasized the time and resources she invests into managing the rental properties, stating that she “worked as a full time manager”.

[22] By letter dated October 12, 2022, the Agent provided their second review decision to the Applicant. The Agent determined that the Applicant was not eligible for CRB as: (i) the Applicant did not earn at least \$5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months prior to the date of her first application; and (ii) the Applicant did not have a 50% reduction in her average weekly income compared to the previous year due to COVID-19.

[23] The Agent recorded the basis for their findings in a second review report, which forms part of the reasons for decision [see *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 22]. The second review report provides:

...information on file and documentation sent by [Applicant] shows that she 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 your first application. [Applicant] attested that she buys and rent properties for her family only. [Applicant] said she manages the property however; [Applicant] dose [sic] not get paid for services as [Applicant] is business partner with her daughter and they exchange money all the time is US and CAD currency. [Applicant] dose [sic] not invoice her daughter for her services and or have a set amount she gets paid. The docs sent by [Applicant] shows the rent deposits on monthly basis

She did not have a 50% reduction in your average weekly income compared to the previous year due to COVID-19

[Applicant] also attested that she applied for the emergency benefits as her tenant [sic] left her apartment and she could not find new tenants and she needed the money as she lost her rental income. For CWLB [Applicant] said she applied as she had to

evacuated [sic] the tenants and lost income this reason [sic] is considered to be unreasonable or unrelated to a Covid-19 lockdown.

II. Preliminary Issues

A. Style of Cause

[24] In their memorandum of fact and law, the Respondent requests an order amending the style of cause to name the Attorney General of Canada (rather than the CRA) as the respondent. Pursuant to Rule 303 of the *Federal Courts Rules*, SOR/98-106, the appropriate respondent in this application is the Attorney General of Canada and not the CRA. The style of cause shall be amended accordingly.

B. Admissibility of Evidence Filed by the Applicant

[25] The Respondent asserts that portions of the Applicant's affidavit and documents appended to her affidavit and her written representations are inadmissible, as the information and documentation was not before the Agent when they rendered their decision.

[26] The documents at issue are as follows: (a) copies of the Applicant's 2019, 2020 and 2021 amended income tax returns that were amended and submitted after the second review decision; (b) a Notice of Reassessment for the taxation year 2019 issued after the second review decision related to amendments made after the second review decision; (c) various receipts and invoices,

Visa card statements and pages showing the transaction history of a chequing account; (d) a page entitled “Current expenses or capital expenses” from the Government of Canada’s website; (e) a page entitled “Claiming expenses on Rental Properties” from Turbo Tax Canada’s website; (f) a request for material in the possession of the Respondent dated December 8, 2022 and the Respondent’s response thereto; (g) copies of the Applicant’s seven leases; and (h) copies of the Applicant’s 2016, 2017 and 2018 income tax returns. There is no dispute that these documents were not before the Agent when they rendered their second review decision.

[27] The Respondent also objects to portions of the Applicant’s affidavit that provide information that did not form part of the record when the Agent rendered the second review decision, including statements that: (a) the Applicant amended her 2019 and 2020 income tax returns in July of 2022 in order to have at least \$5,000 of net self-employment income to satisfy the CRB eligibility requirement; (b) she further amended her 2019 and 2020 income tax returns in November of 2022 after the second review decision to show that she had a 50% reduction in income; and (c) various other pieces of information as set out in paragraphs 6, 7, 11, 13, 14, 15, 16, 17, 18, 19, 22, 23 and 24 of the Applicant’s affidavit.

[28] The Applicant asserts that all of the contested documentation and information should be before the Court, as the second review decision was based on incomplete information and this new documentation or information demonstrates that she is eligible for the CRB.

[29] As a general rule, materials that were not before the decision-maker are not admissible on judicial review [see *Association of Universities and Colleges of Canada v Canadian Copyright*

Licensing Agency (Access Copyright), 2012 FCA 22 at para 19]. The Federal Court of Appeal has recognized certain exceptions to this general rule, such as where the new evidence: (i) provides general background that might assist the Court in understanding the issues relevant to the judicial review; (ii) is necessary to bring procedural defects to the Court's attention; or (iii) highlights the complete absence of evidence before the administrative decision-maker [see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97–98; *Maltais v Canada (Attorney General)*, 2022 FC 817 at para 21].

[30] I find that none of these exceptions apply to the disputed documents and information. To the contrary, they constitute an impermissible attempt by the Applicant to supplement the evidence that was before the Agent. Accordingly, the disputed evidence is inadmissible and will not be considered.

III. Issues for Determination

[31] The remaining issues for determination are as follows:

- A. Was the Agent's second review decision unreasonable?
- B. Was the Applicant denied procedural fairness?

IV. Standard of Review

[32] With respect to the first issue, when a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[33] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

[31] A reasonable decision is “one that is 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” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “...what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision 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 para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (Vavilov, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (Vavilov, at para. 100).

[34] With respect to the second issue, the standard of review for issues relating to procedural fairness is best reflected by the correctness standard, even though, strictly speaking, no standard of review is being applied [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34–35, 54–55]. The Court must ask whether the procedure was fair having regard to all the circumstances, and the ultimate question is “whether the applicant knew the case to meet and had a full and fair chance to respond” [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at paras 54, 56; *Maltais v Canada (Attorney General)*, *supra* at para 19].

V. Analysis

A. **The Decision was reasonable**

[35] The Applicant asserts that the decision was unreasonable because she satisfied the \$5,000 minimum income threshold and the Agent failed to explain how they determined that she did not meet the threshold.

[36] I reject this assertion. The onus was on the Applicant to establish that she met the eligibility requirements set out in both paragraph 3(1)(d) and (f) of the *Act* [see *Walker v Canada (Attorney General)*, 2022 FC 381 at para 55]. The evidence that the Applicant placed before the Agent was

that she originally characterized the income that she now asserts was business income as rental income. However, rental income is not eligible income for the purposes of establishing eligibility for the CRB, since it is income derived from property and not business [see *Smeele v Canada (Attorney General)*, 2023 FC 21 at paras 13, 18]. Following the first review decision, the Applicant amended her tax return to shift that income from rental income to business income.

[37] The Applicant's income did not become eligible self-employment income simply because she amended her tax returns to change the type of income reported from rental to business income. In that regard, tax assessments are one document that can provide income information to the CRA with respect to CRB eligibility, but they do not "prove" the Applicant actually earned the type of income she reported, or that the income itself is from an eligible source [see *Aryan v Canada (Attorney General)*, *supra* at para 35]. Given the shifting characterization of her income, the absence of any service agreement, the absence of any invoices for the Applicant's services and the only evidence of payment to the Applicant being for rental income, I find that it was reasonably open to the Agent to determine that the \$5,100, \$5,120 and \$5,500 claimed by the Applicant as business income in 2019, 2020 and 2021 did not constitute self-employment income. Moreover, I find that the basis for this determination was sufficiently detailed in the Agent's second review report.

[38] Furthermore, even if the Agent's determination that the Applicant's income was not self-employment income could be characterized as unreasonable, the evidence before the Agent was that the Applicant did not have a 50% reduction in her average weekly income relative to the previous year. In her submissions made in support of the second review, the Applicant claimed

she had \$5,100 (2019), \$5,120 (2020) and \$5,500 (2021) in self-employment income, which clearly shows an increase (rather than a decrease) in her self-employment income.

[39] The Applicant asserts that the 50% reduction criterion applies to her global income and thus when her significant rental income losses are considered, she met the reduction criterion. However, contrary to the Applicant's assertion, section 3(1)(f) of the *Act* clearly provides that in considering whether there has been a 50% reduction in her average weekly income, the only relevant income that can be considered is her employment or self-employment income. Any reduction to her rental income is irrelevant.

[40] Accordingly, I find that the Agent's determinations that the Applicant did not earn at least \$5,000 in employment income or net self-employment income in 2019, 2020 or the 12 months prior to the date of her most recent application, and that she did not experience a 50% reduction in her average weekly income relative to the previous year were reasonable. On either of those bases, the Applicant, based on the evidence before the Agent, was ineligible for the CRB. There was also the further issue of whether any reduction in the Applicant's self-employment income was related to COVID-19, but having found the Agent's determination that there was no qualifying 50% reduction, I need not consider the reasonableness of the Agent's further finding that any reduction was not for reasons related to COVID-19.

B. *The Applicant was not denied procedural fairness*

[41] The Applicant asserts that she was denied procedural fairness as there was a lack of communication with the Agent and that, as a result, she was left without clear guidance on what she needed to do to prove eligibility. She asserts that:

The applicant called CRA several times, but nobody gave the applicant the right answers how to revise the applicants tax returns. For example, should the applicant withdraw maximum business income as the self-employed income and choose not to capitalize the repair and maintenance in order to reduce the net income or just expense more repairs to make sure the average weekly income has more than 50% reduction.

[42] Procedural fairness requires the CRA to ensure that the Applicant knows the case to meet and has the opportunity to respond. The duty of procedural fairness does not require the CRA to provide legal or tax advice to taxpayers. The Applicant spoke with the Agent, at length, prior to the second review decision and was given an opportunity to submit additional information and documents. In such circumstances, I am satisfied that the Applicant knew the case to meet and had a full and fair chance to respond thereto.

[43] The Applicant further asserts that the first review decision failed to inform her that she also did not satisfy the 50% reduction criterion and that this omission was unfair and “made it impossible to succeed”. There is no merit to this argument. The fact that the Agent identified additional grounds for denying the Applicant’s CRB eligibility does not constitute a breach of the principles of natural justice or procedural fairness, as all of the eligibility criteria in subsection 3(1) of the *Act* must be met and the Agent was responsible for considering all of them, even if the initial

refusal was based only on the minimum income threshold [see *Lussier v Canada (Attorney General)*, 2022 FC 935 at para 24]. In any event, the Applicant's failure to meet the minimum income threshold was sufficient to render her ineligible for the CRB even without any consideration of whether she also failed to meet the 50% reduction criterion.

[44] Accordingly, I am not satisfied that the Applicant has demonstrated any denial of procedural fairness.

VI. Conclusion

[45] Having found that the Applicant has failed to demonstrate that the Agent's decision was unreasonable or that she was denied procedural fairness, the application for judicial review shall be dismissed.

VII. Costs

[46] I see no reason to depart from the general principle that the successful party should be entitled to their costs. The Respondent seeks costs in the amount of \$500.00, which I find is entirely reasonable.

JUDGMENT in T-2368-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name the Attorney General of Canada as respondent.
2. The application for judicial review is dismissed.
3. The Applicant shall pay to the Respondent costs of the application in the amount of \$500.00.

"Mandy Ayles"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2368-22

STYLE OF CAUSE: AIJUN SUN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: AUGUST 31, 2023

**REASONS FOR JUDGMENT
AND JUDGMENT:** AYLEN J.

DATED: SEPTEMBER 12, 2023

APPEARANCES:

Aijun Sun FOR THE APPLICANT
(SELF-REPRESENTED)

Christophe Tassé-Breault FOR THE RESPONDENT

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