

Federal Court



Cour fédérale

Date: 20231214

Docket: T-2592-22

Citation: 2023 FC 1689

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 14, 2023

PRESENT: Madam Justice Walker

BETWEEN:

MOHSINE EL HARIM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. El Harim, the applicant, holds a bachelor's degree in architecture. He worked as an architect as an employee until 2017, when he became self-employed. In 2019, Mr. El Harim provided architectural services for which he initially reported gross self-employed income of \$4,850 (net self-employed income: \$4,242). On January 6, 2021, Mr. El Harim filed an amended income tax return for 2019 (the 2019 T1 return) in which he reported that he had earned gross self-employed income of \$6,350 (net self-employed income: \$5,590). Mr. El Harim also reported

an amount of \$150 in gross self-employed income on his 2020 income tax return. He explained that the sum of \$6,500 (\$6,350 + \$150) related to three projects for which he had provided architectural services in 2019 and early 2020. However, after the emergence of the COVID-19 pandemic, Mr. El Harim was no longer able to solicit business from clients or apply for new professional mandates.

[2] Mr. El Harim then claimed the following benefits:

- the Canada Emergency Response Benefit (CERB) for 7 four-week periods (March 15, 2020, to September 26, 2020);
- the Canada Recovery Benefit (CRB) for 27 two-week periods (September 27, 2020, to October 9, 2021); and
- the Canada Worker Lockdown Benefit (CWLB) for periods 1, 9–13 and 15, for a total of 7 periods (between October 24, 2021, and February 5, 2022).

[3] The CERB, CRB, and CWLB are part of the range of measures introduced by the federal government starting in 2020 to address the economic impacts caused by the COVID-19 pandemic. These were targeted monetary payments aimed at providing financial support to workers who had suffered a loss of income as a result of the pandemic and could not benefit from the protection afforded by the regular EI system. The Canada Revenue Agency (CRA) is the federal agency responsible for administering the CERB, CRB, and CWLB.

[4] As is the case for most COVID-19 benefits, the CRA paid Mr. El Harim benefits on the basis of his claims, with the exception of periods 13 and 15 of the CWLB. However, on August 24, 2022, the CRA undertook a first audit of Mr. El Harim's eligibility for these benefits. On September 8, 2022, the CRA made three first review decisions finding that Mr. El Harim was

ineligible for the CERB, CRB and CWLB because he did not meet the eligibility requirements of having earned at least \$5,000 (before taxes) in employment or self-employment income during the relevant periods.

[5] On October 4, 2022, Mr. El Harim requested a second review of his files. He provided the CRA with the following documents:

- (a) a copy of his architecture degree;
- (b) the plans and drawings describing his three architecture projects in 2019/early 2020;
- (c) two receipts signed by Mr. El Harim, in which he certifies that he received the sums of \$1,750 (on November 7, 2019) and \$1,750 (on December 13, 2019) for architectural design services provided for one of his projects;
- (d) extracts from his Outlook mailbox describing conversations between Mr. El Harim and a client and the client's payment of \$150 in February 2020;
- (e) a letter signed by another client to confirm the payment to Mr. El Harim of \$1,500 in fees for his architectural services; and
- (f) a copy of his bank statements showing a \$1,750 Interac e-transfer received on December 13, 2019, and a \$150 Interac e-transfer received on February 10, 2020.

[6] The second review of Mr. El Harim's claims for benefits was conducted by a second CRA validation officer (the Officer). As part of his review, the Officer recorded his notes in the CRA's systems and prepared a second review report for the three benefits claimed.

[7] On November 10, 2022, the CRA denied Mr. El Harim's benefit claims (the Decisions) on the ground that he had not earned at least \$5,000 (before taxes) in employment income or net self-employment income in 2019, 2020, 2021 or in the 12 months prior to the date of his first claim, and on the following grounds:

- A. In the case of the CERB, he had not stopped working or his hours of work had not been reduced because of COVID-19.
- B. In the case of the CRB, (1) he did not work for reasons other than COVID-19, and (2) there had not been a 50% reduction in his average weekly income compared to the previous year due to COVID-19.
- C. In the case of the CWLB, (1) he was not working for reasons that were not considered reasonable or related to a COVID-19 lockdown; (2) the area in which he lived, worked or provided a service was not designated as a COVID-19 lockdown region; and (3) there had not been a 50% reduction in his average weekly income compared to the previous year due to COVID-19.

[8] Mr. El Harim is now seeking judicial review of the Decisions. He claims that the Officer did not comply with his procedural fairness obligations in denying his benefit claims on grounds not previously mentioned to him. Mr. El Harim also challenges the reasonableness of the Decisions. He claims that the Officer (1) deviated from the CRA's guidelines that list acceptable documents for demonstrating self-employment income and (2) misinterpreted the evidence and some of the eligibility requirements for benefits. In Mr. El Harim's opinion, the Decisions do not explain why the evidence filed in support of his second review request is insufficient.

[9] For the reasons that follow, Mr. El Harim's application for judicial review will be allowed. Having reviewed the evidence on the record, the applicable law and the Officer's reasons, I am of the view that the Decisions are unreasonable. However, Mr. El Harim has not satisfied me that the Officer acted unfairly in the circumstances of this case or that he did not comply with the rules of procedural fairness.

I. Breach of procedural fairness

[10] Mr. El Harim submits that the Officer did not comply with the principles of procedural fairness by denying his claims for benefits on grounds that were not included in the September 8, 2022, decisions at the first level of the CRA review process. He claims that in his first request for review, the CRA determined that he did not meet the first eligibility requirement for the three benefits because he did not earn at least \$5,000 (before taxes) in employment income or net self-employment income during the relevant periods. However, the Officer added additional grounds for denial in the disputed Decisions: he had not worked for reasons other than COVID-19, and there had not been a 50% reduction in his average weekly income compared to the previous year due to COVID-19.

[11] Procedural fairness issues do not require applying the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–56 (*CPR*)). Rather, it is up to the reviewing court to consider, “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (*CPR* at para 54). The procedural fairness issue in the case at hand is whether, in itself, adding additional grounds for denial makes the Officer’s process unfair or inequitable.

[12] A taxpayer must meet all the eligibility requirements for the CERB, CRB and CWLB, and the Officer was responsible for considering all these requirements (*Lussier v Canada (Attorney General)*, 2022 FC 935 at para 24). Mr. El Harim does not dispute this fact.

Furthermore, he acknowledges that the Officer accepts in the Decisions the initial ground for ineligibility, namely, that he did not meet the minimum income requirement of \$5,000 from employment or self-employment. However, Mr. El Harim contends that by adding grounds in support of his negative Decisions, the Officer breached the rules of procedural fairness and prevented him from having a full and fair chance to respond. (*CPR* at para 56; *Fortier v Canada (Attorney General)*, 2022 FC 374 at paras 14–16 (*Fortier*)).

[13] I do not agree with Mr. El Harim’s argument in the particular circumstances of this case. The Officer’s addition of grounds for denial does not necessarily make the process unfair.

[14] In *Fortier*, the CRA concluded that the applicant was ineligible for the CERB because he had not stopped working, or his hours had not been reduced, due to COVID-19. In reviewing the documents submitted by the applicant during the second review, the CRA officer found that the applicant’s employer had entered the code “AOO” in his record of employment in the box entitled “Reason for issuing this ROE”. The Officer then contacted the former employer, who stated that the applicant’s employment had ended because his contract had ended. However, while the officer concluded that the applicant had not stopped working on a ground related to COVID-19, the Officer did not give the applicant the opportunity to provide submissions as to why his employment had ended. The applicant sought judicial review of the CRA’s decision, and the Attorney General agreed that the CRA had breached the applicant’s right to be heard and to have an opportunity to know the case to meet. The Court agreed with the parties’ position.

[15] However, Mr. El Harim does not raise any such issues. The facts and issues underlying his application for judicial review are different from those in *Fortier*; the recent decision in *Baron v Canada (Attorney General)*, 2023 FC 1177 (*Baron*) is more relevant. In the particular circumstances of that case, Justice Gascon concluded that there was a breach of procedural fairness because the CRA had denied the claimant's claim for benefits at the second level for an entirely different reason. In other words, the CRA had set aside the eligibility requirement it had relied on at the time of its first decisions, namely, the minimum income requirement of \$5,000, and had relied on other grounds in the disputed decisions, namely that he had not stopped working for a reason related to COVID-19 and had not experienced a reduction of at least 50% in his average weekly income relative to the previous year (*Baron* at para 3).

[16] I note that in Mr. El Harim's case, this is not a situation in which the CRA's first decisions were based on only one requirement while the Decisions are based on one or more entirely different requirements. The Officer accepted the initial reason given to Mr. El Harim for denying his claims for benefits and added other reasons to justify this denial.

[17] I am not satisfied by Mr. El Harim's argument that the addition of grounds by the Officer without prior notice is in itself a breach of his right to be heard that must result in allowing his application for judicial review. In this application, the issues of procedural fairness and reasonableness of the Decisions are intertwined. Whether the Officer should have informed Mr. El Harim that he would consider other requirements beyond that of requiring a minimum income depends on the reasonableness of the Officer's conclusion with respect to this requirement. If the Officer concluded transparently and justifiably that Mr. El Harim had not

earned at least \$5,000 (before taxes) in net self-employment income in the relevant periods, this application for judicial review will inevitably be dismissed. As I note above, the eligibility requirements for the CERB, CRB and CWLB are cumulative. If the Officer's conclusions on minimum income are reasonable, any failure by the Officer to give Mr. El Harim an opportunity to present his position on the additional grounds would not change the ultimate outcome of this application.

II. Reasonableness of the Decisions

[18] The determinative issue in the case at hand is whether the Officer's conclusion that Mr. El Harim is ineligible for the benefits claimed because he does not meet the requirement of having earned at least \$5,000 in net self-employment income is reasonable. This conclusion is clearly the Officer's key conclusion, and the parties' arguments about the reasonableness of the Decisions focus on the sufficiency of Mr. El Harim's evidence in support of his self-employment income for 2019.

[19] As argued by the parties, reasonableness is the standard of review applicable to the merits of the Officer's Decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23–25 (*Vavilov*); *Sid Seghir v Canada (Attorney General)*, 2022 FC 466 at para 6; *Aryan v Canada (Attorney General)*, 2022 FC 139 at paras 15–16 (*Aryan*)). Where the applicable standard of review is reasonableness, the role of a reviewing court is to consider the administrative decision maker's reasons and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The

reviewing Court must therefore ask whether “the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility” (*Vavilov* at para 99).

[20] Mr. El Harim submits that the Decisions are unreasonable because the Officer concluded that the evidence in the file was insufficient to establish the actual amount of his income but did not explain why this evidence was insufficient. In his view, the Officer erred in basing his analysis on the weakness of the evidence regarding the deposit of fees in cash in his bank account. In addition, Mr. El Harim claims that neither the amendment of his 2019 T1 return nor the absence of a history as a self-employed worker undermines his credibility or his eligibility for the benefits claimed.

[21] In response, the respondent submits that the Officer’s conclusions are based on a consistent and rational analysis based on the evidence on record and that the Officer assessed all the evidence. In the respondent’s opinion, the inability to conduct an independent audit of all amounts paid to Mr. El Harim for his architectural services, the amendment of his 2019 T1 return and the lack of a self-employment history undermine his credibility. Therefore, the Officer’s request for additional evidence and his conclusion that Mr. El Harim was ineligible for the CERB, CRB, and CWLB are fully justified.

[22] In his second review report, which forms part of the reasons for the Decisions (*Aryan* at para 22), the Officer notes the evidence submitted by Mr. El Harim: a document summarizing the three 2019 contracts (total fees: \$6,500), plans and drawings; receipts for payments received in 2019 totalling \$3,500; a receipt for a payment received in 2022 for \$11,500; two bank

statements showing receipt of a first transfer on December 13, 2019, for \$1,750 and a second transfer on February 10, 2020, for \$150; and a screenshot of a conversation between Mr. El Harim and a client.

[23] The Officer notes that Mr. El Harim barely keeps any evidence of his income and that his first income tax return as a self-employed worker was in 2019. The Officer concludes that the documents sent by Mr. El Harim were insufficient to prove his 2019 income and goes on to state the following:

[TRANSLATION]

The taxpayer also made a T1 amendment in January 2021 to add “forgotten” income (SCI: \$4,850 gross for \$4,242 net /PNCI: \$6,350 gross for \$5,590 net). The lack of documentation and the fact that the taxpayer has no prior history means that the reported income is not accepted, as there is insufficient evidence to confirm that the income was in fact earned.

[24] The Decisions contain only a statement that Mr. El Harim did not earn at least \$5,000 (before taxes) in employment or self-employment income during the relevant periods.

[25] Having read the entire report and the Decisions, I conclude that the Officer’s reasoning and conclusions do not meet the requirements of justification and transparency set out in *Vavilov*. The Officer does not explain why he ignored the plans and drawings of Mr. El Harim’s architectural projects corroborating the other evidence mentioned, including a client’s letter confirming the work undertaken by Mr. El Harim, receipts containing his clients’ telephone numbers and a description of the services rendered, conversations between Mr. El Harim and a second client confirming the completion of the work and the final deposit in Mr. El Harim’s bank account, and extracts from bank statements. Clearly, Mr. El Harim did not file evidence of

receipt of the funds signed by his clients, and his bank extracts are incomplete. However, the Officer does not address the relationship between the various pieces of evidence in the file.

[26] The respondent submits that the Officer rejected the receipts provided by Mr. El Harim because they were signed by Mr. El Harim, not by his clients. The respondent points out that this is why the Officer accepted only the evidence of the \$1,750 transfer. However, this is the respondent's explanation. The Officer does not explain why he considers the receipts insufficient. In his report, he notes only that there is [TRANSLATION] "no deposit" for each receipt.

[27] The respondent also contends that the lack of complete evidence and a self-employment history and the amendment to the 2019 T1 return raise credibility issues, meaning that the Officer acted reasonably in requesting additional evidence. The respondent states that it is reasonable to conclude that Mr. El Harim created [TRANSLATION] "additional fictional business income in order to meet" the eligibility requirements for benefits, but such a conclusion is not in any way reflected in the Decisions. Although the Officer refers to the points identified by the respondent, he does not express any concerns about Mr. El Harim's credibility (*Crook v Canada (Attorney General)*, 2022 FC 1670 at para 27 (*Crook*)). I agree with Mr. El Harim's argument that the respondent is attempting to undertake a detailed analysis of the exhibits provided by Mr. El Harim, although this analysis does not appear in either the Decisions or the Officer's affidavit filed by the respondent.

[28] In some circumstances, the CRA's refusal to accept evidence of income without proof of payment or a self-employment income history is justified and reasonable (*Hayat v Canada (Attorney General)*, 2022 FC 131 at para 22). The problem here is that the Officer does not justify his decision to reject the evidence provided by Mr. El Harim, nor does he explain his conclusion on the lack of self-employment history (*Crook* at paras 22–26). The Officer mentions only one doubt about the receipts provided by Mr. El Harim when he notes on the receipts list that there was [TRANSLATION] “no deposit”.

[29] Mr. El Harim submits that he was entitled to amend his 2019 T1 return (*Lavigne v Canada (Attorney General)*, 2023 FC 1182 at para 36). The respondent does not dispute this point but notes that if taxpayers are entitled to change the income they have reported, it is because of tax considerations unrelated to the benefits (*Lavigne* at para 37). I agree with the respondent, but at the risk of repeating myself, the Officer does not mention that distinction.

[30] I acknowledge that an administrative decision must not be assessed against a standard of perfection (*Vavilov* at para 91). However, “[w]here a decision maker’s rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility” (*Vavilov* at para 98). This is the case here, and I find that the Decisions do not bear the hallmarks of reasonableness. I base this conclusion primarily on the absence of an explanation from the Officer as to why all the evidence provided by Mr. El Harim was insufficient in the context to prove that he had earned at least \$5,000 in self-employment income during the relevant periods. While the Officer noted that Mr. El Harim did not deposit certain

amounts in his bank account, that he has no self-employment history, and that he amended his 2019 T1 return, the Officer does not make any unfavourable findings regarding Mr. El Harim's credibility. Furthermore, he does not explain his conclusion that the evidence is [TRANSLATION] "insufficient." This significant shortcoming considerably undermines the rationale for the Decisions and makes them unreasonable.

[31] It is possible that after completing a third review, the CRA will still conclude that Mr. El Harim does not meet the eligibility requirements for benefits under the CERB, CRB and CWLB. However, the Decisions under review do not provide Mr. El Harim with a transparent and coherent explanation for the rejection of his claims for benefits. He is therefore entitled to a reconsideration of his case by an independent officer and, subsequently, to justified and reasonable decisions.

[32] In the record filed in support of his application for judicial review, Mr. El Harim tries to submit to the Court some new documents related to his strategies for developing his activities as a self-employed architect. In view of my finding that the Decisions are not reasonable and that Mr. El Harim's case must be returned to the CRA for reconsideration, I will not consider the admissibility of this new evidence. Mr. El Harim will have the opportunity to file his additional evidence addressing all the eligibility requirements for the benefits at issue during the reconsideration process.

III. Conclusion

[33] For all these reasons, Mr. El Harim's application for judicial review is allowed.

[34] Given all the circumstances, Mr. El Harim is entitled to receive costs as a winning party, and the sum of \$500 is reasonable and justified.

JUDGMENT in T-2592-22

THIS COURT ORDERS as follows:

1. The application for judicial review filed by the applicant, Mr. El Harim, is allowed.
2. Mr. El Harim's file with respect to his CERB, CRB, and CWLB claims is returned to the CRA for reconsideration by a new officer.
3. Costs totalling \$500 are awarded to Mr. El Harim.

"Elizabeth Walker"

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2592-22

STYLE OF CAUSE: MOHSINE EL HARIM v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: MONTRÉAL, QUEBEC

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