

Federal Court



Cour fédérale

Date: 20240424

Docket: T-1475-23

Citation: 2024 FC 616

Ottawa, Ontario, April 24, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

TRACY SANDERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Between March 15 and September 26, 2020, Ms. Tracy Sanders, the Applicant, received monthly payments in the amount of \$2,000 for a total of seven periods (periods 1 to 7) under the *Canada Emergency Response Benefit Act*, SC 2020, c 5 s 8 [CERB Act].

[2] On March 21, 2023, the Canada Revenue Agency [Agency] selected Ms. Sanders for an eligibility review; Ms. Sanders submitted her T4E and T4A for the taxation year 2019 as part of this first review. On March 30, 2023, following an initial eligibility review, the Agency informed Ms. Sanders that she was ineligible for the Canadian Emergency Response Benefits [CERB]. In particular, the Agency concluded that Ms. Sanders did not earn at least \$5,000 of employment or self-employment income in 2019 or in the 12 months before the date of her first application.

[3] By way of a letter dated April 11, 2023, Ms. Sanders requested a second review of her eligibility. With the letter she sent to the Agency, Ms. Sanders attached her 2019 T4E and T4A slips to demonstrate that she had earned \$5,000 of employment or self-employment income in 2019 or in the 12 months before the date of her first application.

[4] In her letter, and relevant to this application, Ms. Sanders stated she followed a full-time French course from September 2018 to July 2019, and that when she finished her course in July 2019, she decided to start her own incorporated company in Quebec. She added that soon after starting her company the pandemic hit, her business was operating at a loss and she could not find any work because of the health measures closures. She stated that no one was hiring and as a result, she was left with no income. Ms. Sanders stressed that when the CERB became available, the rules surrounding eligibility were not clear, and that she believed she would be approved for the CERB because of her financial situation.

[5] The officer in charge of the second review [the Officer] communicated with Ms. Sanders on May 8, May 30, June 2, and June 14, 2023, to discuss the file with her.

[6] In his notes relating to the May 8, 2023 call, the Officer outlined that Ms. Sanders indicated that she had started her own self-employment business after July 2019, which was an online retail store. The Officer also noted that Ms. Sanders told him she did this work from July 2019 to March 2020, until the pandemic started and all the lockdown restrictions came in place, and that she had begun collecting the CERB as she had lost her job due to COVID-19.

[7] In the notes relating to the May 30, 2023 call, the Officer outlined that Ms. Sanders mentioned she did self-employed social media work for the TTS Ink company from October to December 2019, that she had her own online shop for everything to do with cats and that she did this work from November 2019 to June 2020. The Officer noted that he requested she send a cancelled cheque for the social media work, a letter from the company stating what type of work she had done and when it was provided, and a bank statement for these earnings. The Officer also noted that he asked for her 2019 personal bank statements along with any invoices or receipts to correlate her online shop income. According to the notes, Ms. Sanders responded that she should be able to collect these documents.

[8] On June 12, 2023, Ms. Sanders provided the following additional documents to the Agency: (1) an invoice to Miccor dated November 13, 2019, for social media marketing services for an amount of \$3,336.16; (2) a bank statement for the period of April 24 to May 23, 2023; (3) a bank statement created on June 7, 2023, showing the deposit of an amount of \$3,336.16 on June 6, 2023; (4) a letter from Miccor stating Ms. Sanders did social media postings and profile work for Miccor from September to November 2019; (5) an invoice to the 9407-7559 Québec Inc. company for website management, inventory procurement, accounting and other related

administration tasks for the period covering November 9 to December 31, 2019, for an amount of \$2,100; and (6) a bank statement for the period of January 24 to February 22, 2020, showing the deposit of an amount of \$2,100.00 on February 18, 2020.

[9] In the notes relating to the June 14, 2023 call, the Officer outlined having indicated to Ms. Sanders that the documentation she provided showed her working until December 31, 2019. The Officer noted that he asked Ms. Sanders again about her work and that she responded that she did not work from January to March 2020 as she was a full-time student going to school to learn French. According to the notes, the Officer then went over the eligibility criteria relating to the loss of work due to COVID-19 and he explained to Ms. Sanders that if she wasn't working for the three months leading up to the pandemic, then she would not have lost her work due to COVID-19. The notes state Ms. Sanders confirmed again that she was not working, and based on this criterion, the Officer indicated to her that she did not qualify for the CERB.

[10] The same day, Ms. Sanders contacted the Officer to discuss the matter further. According to the Officer's notes, Ms. Sanders confirmed again she had not worked at all from January to March 2020 and that she was going to school full time.

[11] On June 15, 2023, the Officer wrote his second review report. The Officer noted that the documents Ms. Sanders had provided showed her working only until December 31, 2019, and that Ms. Sanders had confirmed both that she had not worked from January 2020 to March 2020 and that she had not lost work for reasons directly related to COVID-19.

[12] By way of letter dated June 19, 2023, the Agency informed Ms. Sanders she was not eligible for the CERB as she did not stop working or have her hours reduced for reasons related to COVID-19. The letter stated that Ms. Sanders would be required to repay the payments received for which she was not eligible. It also stated that Ms. Sanders could apply to the Federal Court for a judicial review within 30 days of the letter.

[13] On July 17, 2023, Ms. Sanders filed her Notice of Application, challenging the June 19, 2023, Agency's second review decision that found her ineligible for the CERB [the Decision].

[14] In her Memorandum of Facts and Law, Ms. Sanders raises only one argument against the Decision and asserts that she met all of the eligibility requirements to receive the CERB. She notes inaccuracies, or discrepancies, with the case notes of the Officer between what she explained to him about the period she was in school and her employment situation when she applied for the CERB versus his understanding of their conversations as recorded in the case notes. These inaccuracies, she asserts, have led to negatively impact the outcome of her case.

[15] In the affidavit she signed on August 3, 2023, in support of her application, Ms. Sanders affirms, *inter alia*, that (1) she is being discriminated against because her situation is unique; (2) she lost her job with Miccor, the company she was working for from September to November 2019, because her job was dependent on the Italian economy and Italy suffered the effects of COVID-19 sooner than Canada; (3) in November 2019, she started her own online e-commerce company but she was unable to work due to COVID-19 because her suppliers in China had

stopped production in January 2020; and (4) she tried to find alternate employment but it was extremely difficult to find work.

[16] The Attorney General of Canada [AGC] responds, in essence, that the Decision is reasonable.

[17] About two weeks before the hearing of this application, Ms. Sanders moved for leave to file four additional documents, pursuant to Rules 312(c) and 359 of the *Federal Courts Rules*, SOR/98-106 [Motion]. The AGC opposes Ms. Sanders' Motion.

[18] I must thus first decide on the Motion and determine whether Ms. Sanders can file her additional affidavit and exhibits. Then, I must decide if Ms. Sanders has demonstrated the Decision to be unreasonable given the evidence in the record and the applicable law.

[19] First, I will dismiss Ms. Sanders's Motion and will not grant her leave to file the four additional exhibits. Second, and despite the sympathy I feel for her situation, I will also dismiss her application for judicial review. After reviewing the reasons for the Decision, the evidence that was before the Officer, and the applicable law, I see no reason to overturn the Decision. Ms. Sanders has not discharged her burden to demonstrate that the Decision is unreasonable.

II. Motion for Leave to File New Evidence

[20] Ms. Sanders submits the exhibits she proposes to add to her record are necessary to substantiate the accuracy of two pieces of information utilized by the Agency in the assessment

of her eligibility to the CERB. She further submits that the evidence she is proposing to add is not new, but is supplementary information to back up facts and statements she has already shared with the Agency regarding the timeframe of her French language training and her online incorporation operations.

[21] Ms. Sanders argues that the Motion meets the criteria for submitting new information as: (1) the evidence to be adduced will serve the interests of justice; (2) the evidence will assist the Court; (3) the evidence will not cause substantial or serious prejudice to the other side; and (4) the evidence was not available at an earlier date (*Pfizer Canada Inc v Canada (Minister of Health)*, 2006 FC 984 at para 22).

[22] The AGC opposes the Motion and responds that Ms. Sanders has failed to establish that she meets the criteria under Rule 312 of the *Federal Courts Rules* as set out in *Oceanex Inc v Canada (Transport)*, 2017 FC 496 at paragraph 21. The AGC argues that: (1) the additional affidavit and exhibits were all available when Ms. Sanders filed her first affidavit on August 7, 2023; (2) the additional exhibits were not part of the documentation available to the second-level review agent; and (3) the filing of additional material at this stage would cause prejudice to the AGC (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4 [*Forest Ethics*]).

[23] As the Federal Court of Appeal stated in *Forest Ethics*, in order to obtain an order under Rule 312, the applicants must satisfy two preliminary requirements: (1) the evidence must be admissible on the application for judicial review, meaning that, as it is well known, normally the

record before the reviewing court consists of the material that was before the decision maker (*Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 at 144-145 (CA); *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*]); and (2) the evidence must be relevant to an issue that is properly before the reviewing court.

[24] In regards to the first requirement, contrary to what Ms. Sanders submits in her written representations in support of her Motion, I am satisfied the four exhibits Ms. Sanders is seeking to add to her case are indeed new. In fact, Ms. Sanders acknowledged, at the hearing, that these documents were not amongst the documents considered by the Officer in the assessment of her eligibility to the CERB.

[25] As a general rule, documents and information that were not available to the decision maker are inadmissible on judicial review before the Court. As pointed out by Mr. Justice Denis Gascon in *Lavigne v Canada (Attorney General)*, 2023 FC 1182 [*Lavigne*], it is well established that, in a judicial review, the general rule is that a reviewing court can only consider documents that were before the administrative decision maker, with a few exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Access Copyright* at paras 19–20; *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 42 [*Aryan*]; *Kleiman v Canada (Attorney General)*, 2022 FC 762 at paras 25–26; *Ntuer v Canada (Attorney General)*, 2022 FC 1596 at para 12; *Lalonde v Canada (Revenue Agency)*, 2023 FC 41 at para 23). Accordingly, these exceptions apply to documents that (1) provide general background that might assist the reviewing court in understanding the issues; (2) bring attention to procedural defects or breaches

of procedural fairness in the administrative proceeding; or (3) highlight the complete absence of evidence before the decision maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23–25; *Access Copyright* at paras 19–20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18).

[26] I have found no exceptions to the general rule of limiting the Court to the evidentiary record that was before the decision maker that may be applicable to those documents and I must thus conclude that this new evidence is therefore inadmissible. Ms. Sanders has not met the first of the two applicable requirements under Rule 312.

[27] In addition, I am satisfied that the new exhibits will not affect the result. The documents do not demonstrate that Ms. Sanders was working, whether as an employee or as being self-employed, after December 2019, even assuming without deciding that Ms. Sanders was not studying in early 2020. As such, Ms. Sanders does not meet the second of the two applicable requirements. I will dismiss Ms. Sanders' Motion.

III. The Merits of the Application for Judicial Review

A. *Preliminary matter: arguments that were not before the Officer*

[28] Before the Court, Ms. Sanders raises arguments relating to the Chinese and Italian economy that were not raised before the Officer. Ms. Sanders presents these arguments to support her claim that she did lose work because of COVID-19. During the hearing, Ms. Sanders

also stated that it is common knowledge that China and Italy were heavily affected by COVID-19 before Canada.

[29] The AGC submits the Court should not consider the Chinese and Italian economy arguments as they were not provided to the Officer and were not considered during the second review. The AGC adds that, in any event, the Chinese and Italian economic arguments are irrelevant as they are not supported by evidence.

[30] I agree with the AGC. As I previously mentioned, documents and information that were not before the decision maker are generally not admissible in an application for judicial review, and no exemption applies here. Likewise, arguments that were not put to the decision maker cannot, generally, be examined by the reviewing court on judicial review (*Access Copyright* at para 15 citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 19, 23-28).

B. *Standard of review*

[31] The applicable standard of review is reasonableness (*Aryan* at para 16; *He v Canada (Attorney General)*, 2022 FC 1503 at para 20 [*He*]; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at para 12).

[32] The Supreme Court of Canada has confirmed that the reasonableness standard applies to judicial review of an administrative decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). None of the situations that justify rebutting this

presumption arise in this judicial review (*Vavilov* at paras 25, 33, 53; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27).

[33] Where the applicable standard of review is reasonableness, the role of a reviewing court is to review the reasons given by the administrative decision maker and 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 consider “the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at para 15). The decision must possess the required attributes of transparency, justification, and intelligibility. Lastly, the party challenging the decision has the burden to show that it is unreasonable and must convince the Court “that there are sufficiently serious short comings in the decision such that it cannot be said to exhibit the requisite degree of justification, transparency and intelligibility” (*Vavilov* at para 100; *Aryan* at para 45; *Lavigne* at para 17).

C. *Legal framework*

[34] The CERB was available between March 15, 2020 and September 26, 2020, for eligible employees and self-employed workers who had suffered a loss of income due to the COVID-19 pandemic. The eligibility criteria for the CERB are set out in the CERB Act. Namely, section 6 of the CERB Act requires that the worker ceased working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in respect of which the worker had applied for the CERB.

[35] The Agency's second review report is part of the reasons of the Decision (*Aryan* at para 22; *Larocque v Canada (Attorney General)*, 2022 FC 613 at para 17; *Mathelier-Jeanty v Canada (Attorney General)*, 2022 FC 1188 at para 20).

D. *The Decision has not been shown to be unreasonable*

[36] In order to be eligible to the CERB, Ms. Sanders had the burden to demonstrate that during each of the CERB periods for which she had applied, she was not working for reasons related to COVID-19.

[37] However, in this case Ms. Sanders did not provide any evidence that she was working after December 2019, despite having been informed by the Officer that this was an issue. The link between her unemployment in March 2020 and COVID-19 was simply unsubstantiated as the documentation provided to the Agency by Ms. Sanders did not establish she had lost work or had her work hours reduced for reasons related to COVID-19 in the relevant period.

[38] The April 11, 2023 letter Ms. Sanders sent to the Agency does not state otherwise. Rather, in this letter, Ms. Sanders outlines she decided to start her own incorporated company in Quebec in July 2019 after she finished her French course. In her letter, Ms. Sanders adds that soon after starting her company, the pandemic hit and her business was operating at lost.

[39] Also in her letter, Ms. Sanders outlines that, *currently*, i.e., in 2023, she was still building her business, that it has progressed slower than anticipated because of the pandemic, and that she has encountered supplier shortages and a reduction in sales because the public did not have the disposable income it once had during pre-pandemic times. She adds that it is starting to improve

very slowly, but is still operating at a loss. However, this does not relate to her employment situation back in March 2020.

[40] Further, Ms. Sanders provided no evidence to the Officer to support the state of her company's operations from July 2019 onward, to support her claim that her business was operating at lost after the pandemic hit, or that it was, in fact, operating in March 2020. Likewise, Ms. Sanders provided no evidence of any efforts to find employment, which could have justified a link between her unemployment and COVID-19 (*Walker v Canada (Attorney General)*, 2022 FC 381 at paras 46-48).

[41] At the hearing, Ms. Sanders mentioned the Officer did not ask for additional documents to support her claim that she was indeed working for her company between January and March 2020 and that she did not go to school during that period. However, according to the call notes, the Officer did ask for documents and particularly raised concerns in regards to her employment in the January to March 2020 period; the burden was on Ms. Sanders to demonstrate her eligibility and provide sufficient evidence.

[42] Even if I were to assume that the Officer erred in concluding that Ms. Sanders was going to school between January and March 2020, the record still has no evidence that Ms. Sanders was working during that period and/or that she lost her job or had her hours reduced for reasons related to COVID-19. The evidence demonstrates she worked until December 2019.

[43] Lastly, Ms. Sanders affirmed, in her affidavit, that she was a victim of discrimination.

However, I note that she did not pursue this argument in her memorandum and did not raise it at the hearing. Likewise, Ms. Sanders raised no issue relating to procedural fairness.

[44] I am satisfied the Officer's Decision and reasons are transparent, intelligible and justified. As such, the Decision is reasonable and falls within the range of acceptable outcomes in light of the evidence and the applicable law.

IV. Conclusion

[45] I find that Ms. Sanders has not met the two applicable requirements to file new evidence under Rule 312 of the *Federal Courts Rules*. As such, Ms. Sanders' motion for leave is dismissed.

[46] Ms. Sanders has not demonstrated that the Officer's Decision does not possess the required attributes of transparency, justification, and intelligibility, and I have not been convinced it is tainted by a reviewable error. Nothing justifies this Court's intervention, and the application for judicial review will therefore be dismissed.

[47] Per the parties' agreement, costs of \$400.00 are awarded, in favour of the AGC.

JUDGMENT in T-1474-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's Motion under Rule 312 is dismissed.
2. The Application for judicial review is dismissed.
3. Costs are awarded in favour of the Respondent, for an amount of \$400.00.

"Martine St-Louis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1475-23
STYLE OF CAUSE: TRACY SANDERS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING: MONTRÉAL, QUEBEC
DATE OF HEARING: APRIL 16, 2024
JUDGMENT AND REASONS: ST-LOUIS J.
DATED: APRIL 24, 2024

APPEARANCES:

Tracy Sanders

FOR THE APPLICANT
ON HER OWN BEHALF

Me Arianne Gauthier

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT