Federal Court Cour fédérale

Date: 20240719

Docket: T-857-23

Citation: 2024 FC 1131

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 19, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

CONSTRUCTION GAUTHIER ENTREPRENEUR GÉNÉRAL INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] Construction Gauthier Entrepreneur Général Inc. [applicant] is seeking judicial review of a decision dated March 24, 2023, in which the Canada Revenue Agency [CRA] confirmed the denial of a request for an extension of time for late-filed applications for the Canada Emergency Wage Subsidy [decision]. The applicant alleges that the decision breached procedural fairness and is unreasonable.

[2] For the following reasons, I will allow the application for judicial review. I find that there was a breach of procedural fairness, as the second-review officer did not have a complete file before her. The decision is also unreasonable since it does not meet the requirements of justification, transparency and intelligibility.

II. Facts

[3] The Canada Emergency Wage Subsidy [CEWS] is provided for in section 125.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], and is administered by the CRA.

[4] The CEWS is part of a package of measures introduced by the Government of Canada in response to the COVID-19 pandemic. This subsidy was designed to provide financial support to eligible employers directly affected by the pandemic. Eligible employers who were entitled to the CEWS could file applications as of April 27, 2020. For the periods that are relevant to this matter, applications had to be filed no later than February 1, 2021.

[5] The following facts are not disputed by the parties.

[6] Since July 1, 2018, the applicant's president, Pier-Alexandre Gauthier [Mr. Gauthier], and the applicant's secretary and treasurer, Maxime Tremblay [Mr. Tremblay], have been listed as directors in the *Registraire des entreprises du Québec* [REQ].

[7] Between May 2020 and January 2021, Mr. Gauthier made at least three attempts to fill out CEWS applications on the CRA's website. He received an error message on each attempt and was unable to contact the CRA by telephone to complete the applications.

[8] On January 29, 2021, Mr. Gauthier asked Mr. Tremblay to try to access the CRA site. On January 31, 2021, Mr. Tremblay managed to connect to the CRA site and requested a web access code.

[9] Mr. Tremblay received this code in the mail on February 10, 2021. On February 11, 2021, Mr. Tremblay tried to complete the CEWS applications for the relevant periods. He received an error message stating that he was not the owner of the company and that he had to call the CRA to make changes, which he did that same day. However, the CRA website did not allow Mr. Tremblay to complete the applications because he had missed the deadline.

[10] On February 26, 2021, Mr. Gauthier requested an extension of time from the CRA to have the CEWS applications for the relevant periods analyzed. He referred in particular to subsection 220(3) of the ITA, which he believed would allow the CRA to extend the time for making a return under the ITA. Mr. Gauthier also stated that since the CRA website did not allow him to complete the prescribed forms on February 11, 2021, subsection 220(2.1) of the ITA would allow the CRA to waive the requirement to use the prescribed forms for the CEWS applications. Mr. Gauthier attached to that request for an extension the information required by the CRA to analyze the CEWS applications, including screenshots showing the error code on the

CRA website, the browsing history on the CRA site and a Bell Canada report showing the calls made to Service Canada using his mobile device.

[11] On June 29, 2021, the office of the applicant's member of Parliament sent an email to the CRA to follow up on the applicant's request for an extension of time. Attached to that email was Mr. Gauthier and Mr. Tremblay's version of events, in addition to the screenshots sent with the request for an extension.

[12] On November 5, 2021, a CRA officer called Mr. Gauthier. During that conversation, the officer informed Mr. Gauthier that he was not listed in the CRA's records as a director of the company. The officer stated that it was the employer's responsibility to ensure that the information in its company's record was up to date. She also informed Mr. Gauthier that it was not the CRA's fault if access prior to the deadline was problematic. Lastly, the officer mentioned that there was a process for requesting a second review if he could provide evidence of the attempts made before the deadline.

[13] On November 9, 2021, the CRA officer verbally notified Mr. Gauthier of the first-review decision not to grant an extension of time to file his CEWS applications. That decision was based on the fact that the applicant was not a "qualifying entity" under subsection 125.7(1) of the ITA, since the application was not filed by an individual with primary responsibility for the financial activities of the business.

[14] On November 30, 2021, Mr. Gauthier filed a request with the CRA for a second review. He indicated in that request that he and Mr. Tremblay have been the company's president and secretary-treasurer, respectively, since July 1, 2018. He also stated, among other things, that Mr. Gauthier was listed on the T2 form when income tax returns were filed for the fiscal years ending on December 31, 2018, 2019 and 2020. He further submitted that, in his view, there is no obligation in the ITA to disclose a change of director. He cited *Gagné (Estate) v The Queen*, 2020 TCC 111 to argue that the information in the REQ is proof of its content and is binding on third parties in good faith. Mr. Gauthier stated that these arguments were not mentioned in his initial request for an extension dated February 26, 2021, because he believed that the applicant was a qualifying entity. Lastly, he reiterated that in his view, subsection 220(3) of the ITA allows the CRA to extend the time for filing a return under the ITA, and that subsection 220(2.1) of the ITA allows the CRA to waive the requirement to use the prescribed forms.

[15] On March 14, 2023, a second-level officer was assigned to the applicant's file. She contacted Mr. Gauthier as part of her analysis and made notes in the CRA system describing the interview with Mr. Gauthier during the call. According to those notes, Mr. Gauthier stated among other things that he and Mr. Tremblay had been the owners since 2018 and that they always signed their financial statements as owners. He identified error code "ERR.018" and stressed that they had both tried unsuccessfully to access the online account and to contact the CRA several times between October 19, 2020, and January 29, 2021. Mr. Gauthier also explained that after submitting the request for an access code on February 11, 2021, they were again blocked because they had not been registered in the CRA's system as the owners. Also

according to the notes, Mr. Gauthier stated that when they were finally able to access the online record, the periods for CEWS applications had closed.

[16] On March 23, 2023, the officer completed her second-review report and recommended denying the request, since [TRANSLATION] "the employer is responsible for keeping its records up to date whenever there is a change of owner/director." She further noted that [TRANSLATION] "when determining whether to exercise discretion under subsection 125.7(16) of the ITA, the Minister may take into account the [Frequently Asked Questions] as well as the Taxpayer relief provisions, administrative law and any relevant considerations, on a case-by-case basis." The officer referred specifically to question 26-02 of the CEWS Frequently Asked Questions [FAQs], which describes the circumstances under which the CRA will accept a late-filed original application for the wage subsidy. The officer copied question 26-02 of the FAQs into her second-review report.

[17] On March 24, 2023, the applicant received the decision in a letter, which read:

> [TRANSLATION]
>
> After conducting a second-level review of the late-filed original application for the wage subsidy, the decision to deny the wage subsidy applications was confirmed, given that the Agency did not receive additional information that would allow it to change its decision.

[18] On April 21, 2023, the applicant filed its application for judicial review. In support of its application, the applicant attached the affidavits from Mr. Gauthier and Mr. Tremblay. They were not cross-examined.

[19] The respondent filed the affidavit from the second-review officer. On September 12, 2023, the second-review officer was cross-examined. During this cross-examination, the officer confirmed that she did not review the following documents because she did not have them at the time her decision was made:

(a) The written request for an extension of time dated February 26, 2021;

(b) The applicant's income tax returns for the fiscal years ending on December 31, 2018, 2019 and 2020, where Mr. Gauthier's name is listed on the T2 form as the applicant's president; and

(c) The written request for a second review dated November 30, 2021.

[20] During her cross-examination, the officer also confirmed that, as part of her analysis, she consulted the REQ and noted that Mr. Gauthier and Mr. Tremblay were listed as directors. She further confirmed that she had access to the applicant's tax returns, but did not analyze them.

III. Issues and standards of review

[21] In this case, the first- and second-review officers looked at the requests to extend the time to file CEWS applications and not the applicant's eligibility for the CEWS. The decision that I must consider is therefore the decision dated March 24, 2023, denying the request for an extension.

[22] With this in mind, the issues are as follows:

1. What is the applicable standard of review?
2. Does the decision observe the principles of procedural fairness?
3. Is the decision reasonable?
4. If applicable, what is the appropriate remedy?

[23] An allegation dealing with procedural fairness involves a standard similar to that of correctness. The question is whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56).

[24] The Court is concerned with the process that the decision-maker followed to reach her conclusion. Procedural fairness includes the (1) right to be heard, and (2) the opportunity to respond to the case to be met (*Therrien (Re)*, 2001 SCC 35 at para 82). It is well established that the requirements of the duty of procedural fairness are "eminently variable", inherently flexible and context-specific (*Baron v Attorney General of Canada*, 2023 FC 1177 at paras 19, 24).

[25] The parties agree that if there is not an issue of procedural fairness, the standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653, at paras 10, 25 [*Vavilov*]). I agree that reasonableness is the applicable standard of review for the reasons for the decision.

[26] On judicial review, the Court must determine whether a decision bears the hallmarks of reasonableness—namely justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision in a given situation will always depend on the relevant factual and legal constraints that bear on the decision under review (*Vavilov* at para 90). A decision may be described as unreasonable if the administrative decision-maker misinterpreted the evidence on the record (*Vavilov* at paras 125, 126). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *There was a breach of procedural fairness*

[27] The applicant alleges four breaches of procedural fairness: (a) the CRA failed to inform it of its requirements for applying for the CEWS; (b) the CRA processed the request with undue delay; (c) the CRA did not consider its written explanations; and (d) a superior did not analyze the first-level request.

[28] From the outset, since the focus of this judicial review is the request for an extension of time to file the CEWS applications and not the CEWS applications themselves, the first alleged breach will not be considered. The fourth alleged breach will also not be considered because it pertains to the first-level decision, which is not before me.

[29] The third breach is determinative. It concerns the fact that the written requests in which the applicant detailed its factual and legal arguments were not considered at all in making the decision, since they were not in the possession of the second-review officer. The applicant added that no rationale was given by the CRA to justify the fact that these written requests were not available to this officer. At the hearing, the applicant raised the principle of "*audi alteram partem*" and argued that it was not properly heard.

[30] The respondent essentially argues that the applicant had a full and fair opportunity to be heard. The respondent stresses that the CRA officers contacted Mr. Gauthier twice before the decisions were made: on November 5, 2021, for the first review, and on March 14, 2023, for the second review. During these calls, the officers informed Mr. Gauthier of the main issue with his

application, which was that he was not listed as a director for the applicant in the CRA's records. Both of them stated that it was the employer's responsibility to ensure that the information in their company's record is up to date. According to the respondent, therefore, the applicant was aware of the problem with its application and had an opportunity to provide factual and legal justifications to defend its position. The respondent argues that this was therefore not a breach of procedural fairness.

[31] The respondent maintains that although the officer stated that she did not have the applicant's letters when she conducted her analysis, her analysis report shows that she read the contents of the letter of request for the second review dated November 30, 2021, and there is nothing to indicate that she was unaware of or questioned the applicant's claims. According to the respondent, the arguments in that letter were included on the record one way or the other, and it cannot be said that the officer failed to consider the applicant's arguments when making the decision. The respondent appears to argue that the officer implicitly considered the letter in her decision.

[32] With respect, I cannot accept this type of justification. Rather, I accept the applicant's submissions that the CRA did not consider its written explanations and that this was a breach of its right to be heard. That is a significant shortcoming when a decision-maker does not have relevant documents and those documents refer to facts of which she had no personal knowledge when making her decision.

[33] In *Kotowiecki v Canada (Attorney General)*, 2022 FC 1314 [*Kotowiecki*], which was similar to this case, Justice Fuhrer noted that a document containing the applicant's arguments was in fact submitted to the CRA, but was not provided to the decision-maker. Referring to *Togtokh v Canada (Immigration and Citizenship)*, 2018 FC 581 at para 16 and *Rasasoori v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207 [*Rasasoori*] at para 13, Justice Fuhrer reformulates a scenario regarding a deficient certified tribunal record [CTR] that would constitute a breach of procedural fairness. This is a scenario where "[a] document is known to have been properly submitted by an applicant but is not in the CTR, and it is clear that the document, for reasons beyond an applicant's control, was not before the decision-maker" (*Kotowiecki* at para 27).

[34] Justice Fuhrer then notes that procedural fairness includes the right to be heard, and the officer's failure to consider the applicant's letter was procedurally unfair (*Kotowiecki* at para 29, citing *Akram v Canada (Citizenship and Immigration)*, 2018 FC 1105 at para 22 [*Akram*]). Specifically, when a decision has been made on the erroneous belief that an application was complete or when the decision-maker was not endowed with all the relevant documentation to make a decision, the right to be heard has been compromised (*Akram* at paras 22, 23).

[35] I am of the view that the same analysis applies in this case. Although no CTR was produced, there is no dispute that the applicant did indeed send two letters in support of its request for an extension of time, and attached documents and rather detailed written submissions describing its factual and legal arguments. We know that these documents were properly submitted by the applicant. It is clear, however, that these documents, for reasons beyond the

applicant's control, were not before the decision-maker. I conclude that this was a breach of procedural fairness that justifies setting aside the decision.

[36] Despite my finding that there was a breach of procedural fairness that I consider determinative, I will nevertheless examine the issue involving the reasons for the decision.

B. *The decision is unreasonable*

[37] In addition to the preceding, several deficiencies lead me to conclude that the decision is unreasonable, which justifies setting it aside.

[38] The applicant alleges that the decision is unreasonable because (a) the reasons for the decision fail to provide a transparent and intelligible justification; (b) the decision unduly limits the discretionary power to accept a late-filed application; and (c) the applicant complied with the internal rules for its late-filed application to be accepted. The applicant states that the only written reasons for the decision that it was aware of before filing the application for judicial review were to the effect that [TRANSLATION] "… the Agency did not receive additional information that would allow it to change its decision." The applicant alleges that these reasons do not in any way justify the decision that was made, as they do not explain why the late-filed application was not accepted (*Vavilov* at para 136). It adds that additional information was indeed provided to the CRA to justify the late filing, but for some unexplained reason, the second-review officer was not aware of it.

[39] Meanwhile, the respondent argues that the case law has recognized that, when an officer conducts a review, drafts a report and makes a recommendation to the decision-maker, and the decision-maker then adopts this recommendation, providing no reasons or only brief reasons of his or her own, the reasons of the officer are considered to be the reasons (*Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119 at para 23, citing *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37, 38). The respondent submits that the report prepared by the second-level officer, including the review of her summary of the relevant facts and the section entitled [TRANSLATION] "Research by the officer responsible for the second-level review and/or additional information obtained," suggests that she accepted the submissions of the applicant and its representative. It adds that the officer's analysis of the file leads to the conclusion that the circumstances in this case do not reveal an error by the CRA but rather a failure on the part of the directors to perform the activities for which they are responsible. According to the respondent, this conclusion is intelligible and consistent with the facts presented to the officer.

[40] I disagree with the respondent's position. Although it is true that an officer's reasons in a report provided to the decision-maker may be considered to be the reasons for the decision, they must still be consistent with the reasons that were actually provided to the applicant. Otherwise, the decision would not be based on reasoning that is both rational and logical (*Vavilov* at para 102). Likewise, any flaws or shortcomings must be sufficiently central or significant to render the impugned decision unreasonable (*Vavilov* at para 100).

[41] In this case, I would point out that the second-level officer's report does not reflect the reason given to the applicant, which is that the CRA [TRANSLATION] "did not receive additional

information.” This reason completely ignores the letter dated November 30, 2021, in which the applicant did in fact provide additional information. Furthermore, the mere presence of the November 30, 2021, letter in the file contradicts the reasons provided in the decision.

[42] As such, it is clear that the applicant sent additional information with factual and legal arguments, but the officer did not have them. The respondent does not dispute that these documents were sent to the CRA. They were therefore part of (or should have been part of) the file that the second-level officer had to assess as a whole.

[43] I am therefore of the opinion that there is a lack of consistency between the reasons set out in the second-review officer’s report and the reasons provided in the decision. Consequently, the decision cannot be justified in relation to the factual constraints that were relevant to the officer’s analysis (*Vavilov* at paras 105, 126; see also *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 61).

[44] The applicant also argues that the CRA erred by limiting the discretionary power conferred under subsections 220(2.1) and 220(3) of the ITA in improperly imposing limits on the factors it would consider as potentially justifying a waiver of the filing requirement. The applicant argues that the CRA’s internal criteria unreasonably limit the Minister’s discretionary power. The applicant further alleges that the circumstances existed under which, according to question 26-02 of the FAQs, the CRA would accept its late-filed original application for the CEWS:

> It is evident that [it] attempted to file [its] application before the applicable deadline, but [the] specific account was temporarily

> suspended or there was some other account limitation that prevented the filing of the application prior to the applicable deadline.

[45] The applicant adds that it is of the view that a limitation caused by wrong information in the CRA's records as to the identity of its directors and officers prevented it from filing the application before the deadline. It states that the up-to-date information regarding its directors and officers can be found in two places, namely the REQ, which is binding on third parties—including the CRA—in good faith, and at the CRA as a result of income tax returns from several years that were signed by Mr. Gauthier as president. The applicant therefore argues that although the second-review officer had access to all the information, she did not see fit to consult it.

[46] The respondent, meanwhile, maintains that the second-review officer's report demonstrates that in making her recommendation, she considered the FAQs, which constitute a policy statement to guide reviewing officers in applying the Minister's discretion to requests for extensions of time. The respondent indicates that the case law recognizes that not only is it permitted, but it is also helpful for a Minister's delegate to make use of an administrative policy when exercising discretionary power, as it encourages the application of consistent principle in decisions (*Ford v Canada (Attorney General)*, 2015 FC 1057 at para 51, citing *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 59).

[47] The respondent adds that in her report, the officer was careful to situate the Minister's discretionary power under subsection 125.7(16) of the ITA among the taxpayer relief provisions set out in the ITA, and to stress that these relief provisions are tax fairness measures that also apply under exceptional situations. The respondent therefore argues that the officer's

recommendation duly considered the legal constraints that apply to her and that she did not improperly fetter the Minister's discretion by using the policy statement in the FAQs as part of her analysis. It stresses that, in her reasons, when the officer stated that the facts [TRANSLATION] "reveal an error by the employer and not the CRA," she clearly indicated that she was seeking to understand the reason for the delay in filing the CEWS application and whether it could be attributable to the CRA. According to the respondent, this shows that the second-review officer's analysis looked at reasons other than "exceptional circumstances."

[48] At the hearing, the respondent pointed out that it is clear that the FAQs would not allow an exception in the applicant's case due to the lack of diligence on the part of its directors, which could be inferred from their affidavit. In its view, between May 2020 and January 2021, no concrete action was taken to complete the applications on time. It also pointed out that the Canadian tax system is based on self-reporting, which means that it is the employer's duty to update the company's data in the CRA system.

[49] From the outset, I do not accept the respondent's observation as to the applicant's lack of diligence. Although the respondent tries to blame the delay on the applicant's failure to take concrete action, Mr. Gauthier stated that he made at least three attempts between May 2020 and January 2021. Mr. Gauthier also showed the error code that he received and his unsuccessful attempts to contact the CRA by telephone. Meanwhile, Mr. Tremblay stated that he tried to complete the applications as soon as Mr. Gauthier asked him to do so. They were not cross-examined and I therefore cannot infer facts as the respondent proposes.

[50] In addition, although the respondent argues that the officer considered reasons other than "exceptional circumstances," I do not see any analysis of the applicant's circumstances related to the scenario set out in the FAQs under question 26-02. The evidence on record confirms rather that the applicant tried to file the application before the applicable deadline and that there was a limitation that prevented it from filing the application before the deadline in the guidelines. The officer copied the text under question 26-02 from the FAQs in its entirety, but there is no explanation as to why the specific scenario in the FAQs would not apply to the applicant.

[51] In any case, given the conclusions above regarding the fact that the officer did not have either of the applicant's letters when she conducted her analysis, I cannot agree that the officer was reasonably able to consider reasons other than the exceptional circumstances mentioned in question 26-02 of the FAQs.

[52] Therefore, the decision cannot be reasonable, since it is not justified in relation to the factual constraints relevant to the officer's analysis (*Vavilov* at para 105).

C. *The appropriate relief*

[53] At the hearing, the parties agreed that the matter should be remitted to the decision-maker for redetermination if I found the decision to be unreasonable. However, the applicant argued that if I found that there was a breach of procedural fairness, I should allow its request for an extension of time. The respondent disagrees, arguing that even if there is a finding of breach of procedural fairness, I should return the file for reconsideration.

[54] Considering the analyses in *Kotowiecki*, *Rasasoori* and *Akram*, I am of the view that the appropriate relief would be to set aside the decision and return the matter for redetermination by a different officer. As Justice Fuhrer pointed out in *Kotowiecki*, it is not for the Court to speculate how the applicant's submissions could have affected the officer's decision (*Kotowiecki* at para 28, citing *Rasasoori* at paras 15, 16).

[55] I also concur with the remarks of Justice Roy that the court on judicial review can only control the legality of a decision, not substitute its view of the matter (*Akram* at para 21).

[56] Lastly, I agree with the respondent that this is not a case where there is only one possible outcome (*Vavilov* at para 142).

[57] To comply with the right to be heard, it behooves a decision-maker to make a decision based on the full breadth of information submitted by the applicant (*Akram* at para 23). The letter requesting an extension of time dated February 26, 2021, and the letter requesting a second review dated November 30, 2021, will therefore be deemed to be part of the record that will be considered for redetermination (*Akram* at para 24).

V. Conclusion

[58] I must point out that I am not criticizing the second-review officer for not having all the relevant documents before her when she began her analysis of the file. These were circumstances beyond her control. In my view, without the documents submitted by the applicant, the officer's analysis was bound to fail. This is nevertheless a breach of procedural fairness, since she did not

have a complete file. The applicant also demonstrated that the decision did not meet the requirements of justification, intelligibility and transparency (*Vavilov* at para 100).

[59] Consequently, the application for judicial review is allowed. This matter shall be returned to the CRA for redetermination of the applicant's request for an extension of time in accordance with the reasons for this judgment.

VI. Costs

[60] At the hearing, the parties confirmed that they had agreed to costs in the amount of $2,581.07 to be paid in favour of the successful party. In light of the circumstances of this case, that amount is reasonable.

[61] I award costs of $2,581.07 in favour of the applicant.

JUDGMENT in T-857-23

THIS COURT ORDERS that:

1. The application for judicial review is allowed.

2. Costs in the amount of $2,581.07 are awarded to the applicant.

"Phuong T.V. Ngo"
Judge

Certified true translation
Norah Mulvihill

FEDERAL COURT

SOLICITORS OF RECORD

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