Federal Court Cour fédérale

**Date: 20241230**

**Docket: T-1978-24**

**Citation: 2024 FC 2099**

**Ottawa, Ontario, December 30, 2024**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**SABITA SHRESTHA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant Sabita Shrestha seeks judicial review of the second review by the Canada Revenue Agency [CRA] finding that she was ineligible for the Canada Emergency Response Benefit [CERB] during the Covid-19 pandemic because she earned more than $1,000 of income during the applicable periods and because she did not stop working or have reduced hours for pandemic-related reasons.

[2] Ms. Shrestha argues that she met the CERB eligibility requirements. According to Ms. Shrestha, the second reviewer erred by not deducting from gross income expenses for which she was not reimbursed by her employer, and by not accepting that the reduction in her hours was as a result of the pandemic. She also believes that the second review decision was unjust and biased.

[3] The Respondent disagrees, arguing that Ms. Shrestha has not met the high threshold for establishing bias, and that the second review decision is reasonable.

[4] I find that Ms. Shrestha has not established that the second reviewer was biased or that the decision was unreasonable. For the more detailed reasons below, this judicial review application will be dismissed.

[5] I deal first with the preliminary issues of the style of cause, admissibility of some of Ms. Shrestha's evidence, as well as the redaction of certain confidential information contained in her record. I then address the issues of bias and reasonableness of the decision in turn.

## II. Preliminary issues

### A. *Style of Cause*

[6] I agree with the Respondent that the style of cause should be amended.

[7] In written submissions, the Respondent raised the issue of the proper Respondent, noting the Applicant has named the Canada Revenue Agency as such in her judicial review application. Counsel submitted that the Respondent should be the Attorney General of Canada. I agree.

[8] Paragraph 303(1)(a) and subrule 303(2) of the *Federal Courts Rules*, SOR/98-106, when read together, indicate that the tribunal in respect of which a judicial review application is brought should not be named as a respondent but rather the Attorney General of Canada must be named instead. See Annex "A" below for relevant provisions. Accordingly, the style of cause here is amended immediately to replace "Canada Revenue Agency" with "Attorney General of Canada" as the Respondent.

B. *Admissibility of the Applicant's additional evidence*

[9] For at least two reasons, I also agree with the Respondent that Ms. Shrestha's new evidence, namely, Exhibit B to her supporting affidavit comprising her T2200 Declaration of Conditions of Employment, is inadmissible.

[10] First, the document was not before the second reviewer. Second, Ms. Shrestha has not shown that the document falls within any of the three exceptions to this general rule, as described in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20. These exceptions include (i) general background that does not involve evidence relevant to the merits of the matter decided by the administrative decision-maker, (ii) procedural defects that cannot be found in the record

of the administrative decision-maker, and (iii) an absence of evidence before the administrative decision-maker when they made a related finding.

[11] Further, the T2200 form is dated after the date of the second review and Ms. Shrestha has not provided any satisfactory reason why the information could not have been provided to the CRA earlier. As this Court has noted previously, the third *Access Copyright* exception does not apply to situations where an applicant could have, but did not, submit evidence before the administrative decision-maker that the applicant later seeks to have admitted before the Court: *Gregory v Canada (Attorney General)*, 2024 FC 157 at para 18, citing *Ramos v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 667 at para 20.

[12] At the hearing, Ms. Shrestha argued that she did not respond to calls from the CRA reviewers who were seeking additional information from her (such as the information in the T2200 form) because they could be scams; hence, she responds only to correspondence from the CRA. The Court cannot consider this argument, however, because it was not raised in either Ms. Shrestha's supporting affidavit or her written submissions, and she did not provide any reason why the argument was not made sooner. This last-minute submission does not aid the work of the Court, and it would be prejudicial to the Respondent if the Court were to accept it.

C. *Redaction of the Applicant's record*

[13] At the outset of the hearing, I noted the redaction of Ms. Shrestha's social insurance number from various documents in the Respondent's record. When asked if the Respondent

would assist in redacting this information from the Applicant's record, counsel did not hesitate to accept doing so. The Court thanks the Respondent for the assistance in this regard.

## III. The Applicant has not established bias

[14] I find that Ms. Shrestha's submissions about bias on the part of the CRA reviewers are speculative and unsupported by the evidence.

[15] The test for bias or, more specifically, "a reasonable apprehension of bias" is captured in two questions. First, what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude? Second, would the informed person think it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? Further, there is a rebuttable presumption that the administrative decision-maker will act fairly and impartially. See *Sandhu v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 889 at para 61.

[16] In other words, a party asserting bias faces a high threshold to prove it. Based on Ms. Shrestha's evidence and arguments, I cannot conclude that she has met the onus on her. Disagreement with the second reviewer's assessment is insufficient, in itself, to ground an allegation of bias.

## IV. The second review decision is not unreasonable

[17] I find that Ms. Shrestha has not met her onus of demonstrating that the second review decision is unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100.

[18] Consistent with her position on the first and second reviews, Ms. Shrestha argues that expenses related to her employment not reimbursed by her employer should be deducted from her income before assessing her eligibility for CERB. She says that her letter setting out these employment expenses was not considered by the CRA.

[19] I disagree. This assertion is not borne out in the case notes that underlie the second review and form part of the reasons for the decision. The notes acknowledge the letter and outline an action plan that includes explaining to Ms. Shrestha that, for employed individuals, work expenses cannot be deducted.

[20] In my view, the second review case notes explain coherently, logically and intelligibly the reviewer's rationale for finding Ms. Shrestha ineligible for CERB for four 4-week periods falling within the timeframe April 12, 2020 to August 1, 2020. The notes outline unanswered gaps in the evidence, such as missing documentation regarding commissions, paystubs, bank statements from the beginning and end of the applicable timeframe, and information about whether she ever was laid off from her job.

[21] The case notes show that the second reviewer called Ms. Shrestha and left a voice message about the reason for the call and indicated a 2-week deadline by which she needed to call back; otherwise, the review determination would be made based on what the CRA had on file. Ms. Shrestha failed to return the second reviewer's call by the stipulated deadline.

[22] It was open to the second reviewer to determine Ms. Shrestha's eligibility for CERB was inconclusive based on the incomplete financial information before the reviewer at the time of the decision. That it may have been possible for the reviewer to make other inferences or draw other conclusions from the evidence does not mean that the reviewer's rationale was arbitrary, capricious or unreasonable or that the reviewer's findings cannot be supported by the evidence: *National Bank of Canada v Lavoie*, 2013 FC 642 at para 30, rev'd on other grounds 2014 FCA 268.

[23] I provide an example. Paragraph 6(1)(a) of the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 [*CERB Act*], mandates that a worker who is employed or self-employed is eligible for income support if they ceased working for reasons related to Covid-19 for at least 14 consecutive days within the 4-week period for which they applied for support.

[24] Ms. Shrestha asserts that her hours were reduced because of Covid-19. Although that may be the case, it was not unreasonable in my view for the second reviewer to determine, absent evidence to demonstrate that she ceased working for 14 consecutive days in each of the relevant periods, that her eligibility was inconclusive. I note that the eligibility requirements

under the *CERB Act* are cumulative. In other words, failing to meet this requirement alone is sufficient to find a CERB applicant ineligible for income support.

[25] I add that there is no evidence Ms. Shrestha took any steps to allay concerns she had about the nature of the reviewers' calls (both the first and second reviewers), such as by calling the contact number provided on official correspondence from the CRA. She simply ignored the calls.

[26] Further, Ms. Shrestha's oral submissions about her commission income at the judicial review hearing were in the nature of testimony, were unsupported by affidavit evidence, and were not mentioned in her written submissions. For the same reasons as I found the T2200 form inadmissible, I have not considered these submissions.

[27] Regardless, bearing in mind that the onus was on Ms. Shrestha to put her best foot forward during the administrative decision-making process by providing the CRA with all necessary documentation and information, I cannot conclude that the second review decision was unreasonable. Her arguments on this judicial review are essentially a request for the Court not only to reweigh the evidence that was before the second reviewer, but also to assess the new evidence improperly before the Court. This is not the role of the Court on judicial review, however: *Vavilov*, above at para 125.

[28] It was for the second reviewer to assess the sufficiency of Ms. Shrestha's evidence, as part of their "fact finding mission;" absent a fundamental misapprehension of the evidence,

which has not been shown here, a reviewing court should not intervene*: Rehman v Canada (Attorney General)*, 2023 FC 1534 at para 42, citing *Sjogren v Canada (Attorney General)*, 2023 FC 24 at para 43.

## V. Conclusion

[29] For the above reasons, the judicial review application is dismissed.

[30] During the hearing, the Respondent withdrew his request for costs. In the circumstances, no costs are awarded.

**JUDGMENT in T-1978-24**

**THIS COURT'S JUDGMENT is that**:

1. The style of cause is amended, with immediate effect, to identify the Respondent as the Attorney General of Canada.

2. The Applicant's judicial review application is dismissed.

3. There are no costs.

"Janet M. Fuhrer"

Judge

**Annex "A": Relevant Provisions**

***Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8.**
***Loi sur la prestation canadienne d'urgence*, LC 2020, ch 5, art 8.**

| | |
|---|---|
| **Eligibility** | **Admissibilité** |
| **6 (1)** A worker is eligible for an income support payment if | **6 (1)** Est admissible à l'allocation de soutien du revenu le travailleur qui remplit les conditions suivantes : |
| **(a)** the worker, whether employed or self-employed, ceases working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in respect of which they apply for the payment; and | **a)** il cesse d'exercer son emploi — ou d'exécuter un travail pour son compte — pour des raisons liées à la COVID-19 pendant au moins quatorze jours consécutifs compris dans la période de quatre semaines pour laquelle il demande l'allocation; |
| […] | […] |

***Federal Courts Rules*, SOR/98-106.**
***Règles des Cours fédérales*, DORS/98-106.**

| | |
|---|---|
| **Respondents** | **Défendeurs** |
| **303 (1)** Subject to subsection (2), an applicant shall name as a respondent every person | **303 (1)** Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur : |
| **(a)** directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or | **a)** toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande; |
| […] | […] |
| **Application for judicial review** | **Défendeurs — demande de contrôle judiciaire** |
| **(2)** Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent. | (2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1978-24 |
| **STYLE OF CAUSE:** | SABITA SHRESTHA v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 17, 2024 |
| **JUDGMENT AND REASONS:** | FUHRER J. |
| **DATED:** | DECEMBER 30, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Sabita Shrestha | FOR THE APPLICANT (ON THEIR OWN BEHALF) |
| Devin Lundy | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |