Federal Court Cour fédérale

Date: 20241204

Docket: T-29-24

Citation: 2024 FC 1953

Toronto, Ontario, December 4, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

DARRELL LUTZKO

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Darrell Lutzko [Applicant], brings this application for judicial review of decisions in which officers of the Canada Revenue Agency [CRA], acting on the delegated authority of the Minister of National Revenue [Minister], declined to exercise their discretion to cancel tax imposed upon the Applicant related to excess contributions to his Tax-Free Savings Account [TFSA]. The Applicant is seeking judicial review of the second level review decision

for his 2019 taxation year dated August 20, 2021 [Second Decision] and the first level review decision for his 2020 taxation year dated July 26, 2021 [First Decision].

[2] While I cannot help but acknowledge the extraordinary hardship that the Applicant suffered during the times at issue on this judicial review, for the reasons that follow, the Court's review shall be limited to the Second Decision, which I find the Applicant has not shown to be unreasonable. I also find that the Applicant was not denied procedural fairness. Accordingly, this application is dismissed.

II. Statutory Framework and CRA Guidelines

[3] An individual who over-contributes to their TFSA is required to pay a tax on the excess amount pursuant to section 207.02 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp). However, subsection 207.06(1) of the *Income Tax Act* gives the Minister the discretion to waive or cancel tax payable on any excess TFSA amount where the taxpayer establishes that: (i) the tax liability arose as a consequence of a reasonable error; and (ii) the excess TFSA funds were removed from the TFSA without delay.

[4] The CRA's Manual re Tax-Free savings Account Program-TOM 9000-Relief Procedures [CRA *Guidelines*] provides guidance to the CRA in exercising its discretion under subsection 207.06(1) of the *Income Tax Act*. In terms of "key factors" to consider in granting relief, the CRA *Guidelines* provide that "[r]easonable error does not, in and of itself, include getting poor advice from the financial institution or misreading notices [of] the Canada Revenue Agency (CRA) or continuing to make excess contributions after CRA contact." The CRA *Guidelines*

include a section for "Relief Criteria for first time over-contributors" which states that reasonable error may include, *inter alia*, an unintentional error or series of actions for a first time over-contributor.

III. Facts

A. *The Applicant's Over-Contribution*

[5] The Applicant contributed $6,000 to his TFSA account on January 1, 2019. On that date, the Applicant's TFSA contribution room limit was $6,000. When the Applicant's mother died on June 7, 2019, he became the designated beneficiary of her TFSA. The Applicant received her TFSA proceeds in the amount of $59,779.24 and opted to transfer the amount to his TFSA account on June 18, 2019 [the Over-Contribution].

[6] The Applicant was assessed by the CRA on July 14, 2020, in respect of the Over-Contribution in connection with the 2019 taxation year. The Applicant received a Notice of Assessment which stated that he had over-contributed to a TFSA resulting in tax being assessed; the Applicant was advised to withdraw the amount immediately.

[7] On July 23, 2020, the Applicant made an exemption request, requesting that the Minister designate the TFSA proceeds as an exempt contribution on the basis that he was a survivor of his mother. In the meantime, the Applicant removed the Over-Contribution from his TFSA account on September 23, 2020.

[8] On October 5, 2020, the Applicant requested that the Minister cancel the tax assessed on the Over-Contribution for the 2019 taxation year. The Applicant based his request on three factors: (i) he was suffering from mental distress; (ii) he relied on incorrect information from his insurer; and (iii) he had removed the Over-Contribution without delay.

[9] By letter dated November 20, 2020, the CRA notified the Applicant that the exemption request could not be processed because the Applicant was not the spouse or common-law partner of the deceased and therefore was not a "survivor." The CRA advised that beneficiaries can contribute any of the amounts received to their own TFSA so long as they have contribution room available.

B. *The First Level Review for the Applicant's 2019 Taxation Year*

[10] The CRA issued a first level review decision for the 2019 taxation year by letter dated February 22, 2021. The CRA summarized the Applicant's arguments in favour of an exemption, but rejected the Applicant's request on the basis that: (i) the CRA considers an error made by the Applicant's financial institution to be a matter between him and the institution; and (ii) CRA records show that excess contributions were made to his TFSA after the CRA had issued him a 2015 education letter on May 27, 2016, regarding previous excess contributions.

[11] On March 23, 2021, the Applicant made a request of the CRA for reconsideration of the first level decision on the basis of his earlier reasons and an additional submission that the CRA delayed in advising him of the Over-Contribution.

[12] The CRA responded to the Applicant by letter dated June 11, 2021 [CRA Request]. The CRA requested that the Applicant provide additional information in respect of his statement that he had been suffering from mental distress by providing: a medical certificate or letter signed by the Applicant's doctor confirming his medical conditions; the duration of the illness; dates of any treatments or hospitalization; and an explanation of how the Applicant's medical condition put his TFSA into an excess position.

[13] In response to the CRA Request, the Applicant forwarded additional submissions and expanded the relief he requested to include the taxation years 2020 and 2021. He did not include any medical information. In his supporting affidavit filed on this application [Affidavit] and in his oral submissions at the hearing, the Applicant stated that it was impossible to get doctor's appointments during the COVID-19 pandemic and, in any event, he was too overwhelmed to deal with the CRA Request at the time.

C. *The Second Decision*

[14] A separate CRA official, not involved with the first level review, considered the Applicant's request and submissions and confirmed that the Applicant's circumstances did not support cancellation of the tax on the Applicant's Over-Contribution. The Second Decision states in part:

> You also explained that you had no intent to purposely over contribute to your TFSA and indicate that there is a lack of transparency on the CRA's part to put the onus on the taxpayer to fully understand the procedures of a TFSA considering the emotional and distressing situations in this extraordinary circumstance.

> As per our previous letter dated June 11, 2021, we need more information to review your request. Since we did not receive all the information we asked you for, we cannot process your request to cancel the tax. We cannot take your claim of mental distress into consideration in our review as you did not provide the requested documents.
>
> Once you have been notified regarding contributions, it is your responsibility to ensure that their contributions are kept within limits.
>
> After a thorough review of the information submitted in the facts of your case, we have determined that you continued to make excess contributions to your TFSA in 2019 and 2020, after you were notified by the Canada Revenue Agency on the implications of excess contributions. The CRA sent you an Education Letter dated May 27, 2016, regarding excess contributions made in your account in 2015.
>
> Even though your TFSA excess contributions were unintentional, we do not consider misinterpreting your TFSA contribution limit to be a reasonable error. Under Canada's self-assessment taxation system, individuals are responsible for understanding their TFSA accounts and their limits, to review their notice of assessment or reassessment to verify the information, and to ask for information from us when needed.
>
> You are responsible for making sure that you make all contributions within the guidelines set out in the legislation for TFSA contributions.

IV. Preliminary Issues

[15] The Minister has raised two preliminary issues.

A. *Exception to Rule 302 of the Federal Courts Rules*

[16] The Applicant has put in issue the reasonableness of both the Second Decision and the first level decision of the CRA in connection with his 2020 tax year. The Minister proposes that

pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], an exception be made to allow both decisions to be judicially reviewed since they are closely related and arise from the same set of facts and legislative provision.

[17] Even with the Respondent's agreement, I decline to exercise my discretion under Rule 302 and my review will be of the Second Decision only. Rule 302 of the *Rules* limits judicial review to a single order subject to limited exceptions (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173). Rule 302 presupposes that both decisions are capable of being judicially reviewed. That is not the case here. The first level decision is not a final decision; it is subject to a second independent review and it is only this latter decision that will eventually constitute a final decision entitled to judicial review.

B. *Objection to the Applicant's Supporting Affidavit*

[18] The Respondent objects to the Applicant's Affidavit because of irregularities in the commissioning of the Affidavit and the exhibits which were not commissioned by the same person. The Respondent alternatively submits that if the Court is inclined to look past these irregularities, it objects to the inclusion of documents in the Application Record that were not before the CRA when it rendered the Second Decision or do not fall under any of the exceptions to the rule recognized in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 19-20 [*Access Copyright*].

[19] The Respondent has raised a valid issue in connection with the commissioning of the Affidavit. Rule 80(3) of the *Rules* requires that where an affidavit refers to an exhibit, the exhibit shall be signed by the person before whom the affidavit is sworn.

[20] As the Applicant is a self-represented litigant, I have taken into account the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* (2006). According to these principles, it is within the discretion of this Court to grant latitude to a self-represented litigant on procedural issues (*Thatcher-Craig v Clearview (Township)*, 2023 ONCA 96 at para 51), and in this case, I am prepared to do so.

[21] However, even accepting the Applicant's failure to comply with Rule 80 of the *Rules*, the content of the Affidavit (with one exception) cannot be allowed since it contains argument as well as new information that was not before the CRA when it made the Second Decision and goes beyond mere background information (*Bernard v Canada (Revenue Agency*), 2015 FCA 263 at paras 23, 31). The exception relates to the following statements at paragraph 13 of the Affidavit: "[t]hroughout the covid pandemic, especially in 2020, medical attention was very limited since priorities were mostly concentrated for covid patients"; and "[m]edical treatment and consultations were difficult to obtain with the medical community concentrating on covid pandemic issues." These statements go to the procedural fairness issue raised by the Applicant which is not otherwise apparent on the record (*Access Copyright* at paras 19-20), and therefore shall be allowed.

[22] Turning to the exhibits, applying *Access Copyright* and based on concessions made by the Respondent at the oral hearing, the following exhibits shall be included in the Application Record: (i) the Statement of Death of Mary Lutzko included as part of Exhibit B (as it falls under the exception of general background information); (ii) the letter from Dr. Classen dated December 22, 2021, included in Exhibit I (as the Respondent has conceded that it should be allowed as it relates to the Applicant's procedural fairness argument); (iii) documents that already appear in the Certified Tribunal Record which include the documents attached to Exhibits C and E (with the exception of the Applicant's letter dated July 23, 2020, which was not before the CRA when it made the Second Decision), Exhibit G, the copy of the CRA Request included in Exhibit I, Exhibits J and K (with the exception of the Applicant's letter to the TFSA Processing Unit dated July 29, 2021, which was not before the CRA when it made the Second Decision) and Exhibits L and N; (iv) court documents attached as Exhibit M; and (v) Exhibit O, which is an internal CRA document (without the Respondent having conceded its relevancy).

[23] The Federal Court decisions attached as part of Exhibits A and D and the *Income Tax Act* excerpts included as Exhibit H shall be treated as part of the Applicant's authorities and not as evidence.

[24] Finally, the Respondent does not object to the inclusion of the document containing answers on written cross-examination, which was attached to a letter from the Applicant to the Chief Justice dated October 7, 2024.

V. Issues and Standard of Review

[25] The Applicant has raised the following issues:

A. Is the Second Decision reasonable?

B. Was the Applicant denied procedural fairness?

[26] The role of a court performing judicial review of the merits of a decision was explained by the Supreme Court of Canada in its decision in *Canada* (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under *Vavilov*, the Applicant bears the burden of showing that the decision under review was unreasonable in that there is some fundamental flaw in its rationale or outcome, or that it lacks the hallmarks of justification, intelligibility and transparency to those who are subject to it (*Vavilov* at paras 95, 99-100). In conducting this analysis, the Court is not entitled to either reweigh or reassess the evidence (*Vavilov* at para 125).

[27] Issues of procedural fairness on the other hand are reviewed on a standard akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35, 54-55 [*Canadian Pacific*], citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court looks to ensure that administrative decisions are made using a fair, open and appropriate procedure that provides an opportunity for those affected by the decision to understand the case they have to meet and put forward their views and evidence fully for consideration by an impartial decision maker (*Canadian Pacific* at para 41).

VI. Analysis

A. *Was the Second Decision Reasonable?*

[28] The Applicant submits that he established multiple bases for an exception under subsection 207.06(1) of the *Income Tax Act* and that the CRA's refusal to exercise its discretion to waive or cancel his tax liability was unreasonable. Essentially, these bases are: his Over-Contribution was made in extraordinary circumstances beyond his control; and his actions were the result of the enormous mental distress he was under.

(1) *Was the CRA's Finding on "Reasonable Error" Unreasonable?*

[29] First, the Applicant says it was unreasonable for the CRA not to find that his Over-Contribution was a reasonable error made under extraordinary circumstances beyond his control which led to a decline in his mental health. Those circumstances included a series of deaths in his family and the COVID-19 pandemic. He notes that while the CRA did not address the second element of the test, he removed all excess over-contribution amounts from his TFSA "without delay" considering "complications resulting from the death of significant other elderly parents, natural disasters and delays caused by covid, throughout this ordeal."

[30] The Applicant cites two Federal Court cases which he says support his position. The Applicant submits that *Gekas v Canada (Attorney General),* 2019 FC 1031 [*Gekas*] involved a taxpayer who made an honest mistake like him and who also was not a first time over-contributor but whose assessment was conducted using a "robotic approach" that failed to

consider any mitigating circumstances. He also cites *Howard v Canada (Attorney General)*, 2022 FC 1673 [*Howard*], where the taxpayer cited extraordinary circumstances beyond her control, which included: (i) an error on the part of her financial institution in calculating her contribution room; (ii) the taxpayer relying on her friend to take pictures of her mail while she was outside of the country during the COVID-19 pandemic; and (iii) the taxpayer's friend missing a key letter from the CRA. The Applicant believes that these cases support a finding that his similar situation amounts to circumstances beyond his control.

[31] The Court's task, however, is not to decide whether the Applicant's circumstances constitute a "reasonable error," but only to determine whether the Second Decision is reasonable in its assessment of "reasonable error." I find that it is.

[32] I agree with the Respondent that the CRA considered the Applicant's circumstances and the Second Decision provides responsive reasons on the first element of the test under subsection 207.06(1) of the *Income Tax Act*. While the circumstances under which the Applicant made the Over-Contribution were unquestionably stressful, I am unable to find that the Second Decision was unreasonable without reweighing and reassessing the evidence, which this Court is not entitled to do (*Vavliov* at para 125). The CRA explained why the Applicant's position did not constitute grounds for "reasonable error" given the Applicant's responsibility in a self-assessing taxation system and the fact that the CRA does not consider misinterpreting the TFSA contribution limits to be a reasonable error. This rationale has been upheld in jurisprudence of this Court (*Yew v Canada (Revenue Agency)*, 2022 FC 904 at paras 53-54). The Second

Decision acknowledges that the Applicant's Over-Contribution was unintentional; however, the CRA fairly emphasizes that the Applicant was not a first time over-contributor.

[33] I also agree with the Respondent that the cases of *Gekas* and *Howard* are distinguishable. Neither case should be read as an endorsement of what constitutes a "reasonable error"; rather, in both cases, the Court found fault in the decision maker's analysis. In *Gekas*, the Court considered that it was unreasonable for the CRA to focus on the fact that the taxpayer was a repeat over-contributor in circumstances where the financial institution was completely at fault such that the over-contributions were outside of the taxpayer's control (*Gekas* at paras 30-31). In this case, the Applicant conceded at the oral hearing that the advice of his insurer did not play a role in his over-contribution and he just was incapable of processing their advice at the time.

[34] I also find that *Howard* is distinguishable. The Court did not find that the taxpayer's circumstances were sufficient to find a "reasonable error." Rather, it found that there simply was no line of analysis within the given reasons that could reasonably lead from the evidence to the decision maker's final determination as required by *Vavilov* (*Howard* at paras 31-32). That is not the case here, where the Second Decision is both justified and responsive to the Applicant's submissions.

(2) *Was the CRA's Failure to Consider the Applicant's Mental Stress Unreasonable?*

[35] The CRA stated in the Second Decision that it could not take the Applicant's claim of mental distress into consideration in its review, as the Applicant did not provide the supporting medical documentation it had requested in the CRA Request.

[36] At the oral hearing, the Applicant said that he was unable to process this request given his mental state at the time and it would have been impossible for him to get a doctor's appointment during the COVID-19 pandemic. This evidence was not before the CRA when it made the Second Decision. The Applicant now has a letter from his family doctor that he offers to support his claim. This letter has been accepted in support of the Applicant's procedural fairness arguments; it cannot be considered by this Court in considering the reasonableness of the Second Decision.

[37] I therefore find that the Applicant has not shown the Second Decision to be unreasonable.

B. *Was the Applicant Denied Procedural Fairness?*

[38] The Applicant has raised two procedural fairness issues.

(1) *The Applicant's Delay in Obtaining a Letter from his Doctor*

[39] The CRA provided an opportunity for the Applicant to support his position that his Over-Contribution resulted from his state of mental distress. The Applicant did not respond to the CRA Request and did not provide any medical documentation until this judicial review application. The letter from the Applicant's doctor reads in part:

> To whom it may concern,
>
> I have met with Darrell today and he explained to me the circumstances that he was going through in his life in 2019. It does sound as if he was under quite a considerable amount of psychological stress and strain and it is reasonable to believe that it likely contributed to some mistakes in his bookkeeping in regards to his parents estate. I have been Darrell's physician for several years and our interactions in the last three years have primarily

> been to discuss musculoskeletal problems and we had not been discussing his mental or psychological well being over the years in question. However, he has described to me vividly his state of being during those years and it does sound likely to me that there could have been some impairment in his executive functioning that might have contributed to simple mistakes that were made.

[40] This letter speaks to the issue of the impact of the Applicant's mental distress on the Applicant's Over-Contribution, however, it does not address the Applicant's delay in obtaining this letter in time for consideration by the CRA on the second level review. Nor can an explanation for the Applicant's delay be found in the statements in the Applicant's Affidavit which are general statements and do not address the Applicant's personal inability to obtain a doctor's appointment in order to address the CRA Request in time.

[41] I am unable in these circumstances to find that the Applicant was denied procedural fairness.

(2) *The CRA Failed to Send Education Letters*

[42] Second, the Applicant states that the CRA never sent the Applicant any education letters for the presumed TFSA over-contributions for 2019 and 2020 tax years. Instead, he alleges that the "CRA sent demanding and continuous harassing notices of assessment." He notes that the taxpayer in *Howard* received multiple education letters.

[43] I do not find that the failure on the part of the CRA to send the Applicant an educational letter amounts to a breach of procedural farness. The CRA *Guidelines* indicate that the CRA may send these letters, but it is not required to do so and it may instead send notices of

assessment, which it did. Education letters are one of a number of methods by which the CRA notifies a taxpayer that they have over-contributed to their TFSA and are required to withdraw the excess contribution immediately in order to avoid related tax liabilities. The Applicant received such notice whether or not it was in the form of an education letter.

[44] I find that the Applicant understood the case he had to meet and was given opportunities to provide both his position and evidence to support it for consideration by the CRA, but failed to do so (*Canadian Pacific* at para 41).

VII. Conclusion

[45] As I find that the Second Decision bears the hallmarks of a reasonable judgment and the Applicant was not denied procedural fairness, this application is dismissed.

JUDGMENT in T-29-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-29-24
STYLE OF CAUSE:	DARRELL LUTZKO v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF ZOOM VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 27, 2024
JUDGMENT AND REASONS:	WHYTE NOWAK J.
DATED:	DECEMBER 4, 2024

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