Federal Court Cour fédérale

Date: 20141219

Docket: T-260-14

Citation: 2014 FC 1230

Ottawa, Ontario, December 19, 2014

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

KELLY PLATO

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicant was an unsuccessful candidate in a job selection process for a position as a tax auditor at the Canada Revenue Agency [the CRA]. After the Applicant successfully challenged that process through an independent third party review, the CRA issued corrective measures which, in part, were found to be unreasonable by this Court in *Plato v Canada (Revenue Agency)*, 2013 FC 348 at paras 20-23 [*Plato 1*].

[2] Following the decision in *Plato 1*, the CRA issued new corrective measures which are now the subject matter of this application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant asks this Court to set aside the decision of the CRA purporting to correct the errors in the selection process and have the matter remitted back to the CRA to rectify such errors in accordance with the independent third party review. The Applicant also requests his costs, fixed in the amount of $2,500.00.

[3] My colleague, Madam Justice Mary Gleason, has set out much of the relevant background to this matter in *Plato 1* at paras 3-13. In summary, the CRA ran a job competition in 2007 and 2008 for an AU-02 tax auditor position. The Applicant qualified for such a position but was not chosen at the placement stage of the selection process. An independent third party review of the selection process was requested by the Applicant and the reviewer found, in her decision dated September 23, 2011, that the process had arbitrarily used a locally developed assessment tool when a standardized assessment tool was available and, also, that some aspects of the process lacked transparency. The reviewer ordered the CRA to correct these errors in the selection process and the CRA attempted to do so by way of a letter to the Applicant dated October 25, 2011.

[4] The Applicant was not satisfied with the CRA's corrective measures and sought judicial review in this Court. In *Plato 1*, Madam Justice Gleason found that, although the CRA had reasonably dealt with the errors relating to transparency, it had failed to correct the use of the locally developed assessment tool. This failure was unreasonable and Justice Gleason sent the matter back to the CRA with the following guidance (*Plato 1* at para 23):

> This ruling does not necessarily mean that CRA is required to rerun the competition or excise consideration of abilities in respect of legislation from the selection process. Indeed, as was conceded by counsel for the applicant during oral argument, it may well be open to CRA to retrospectively authorize the use of the local selection tool for evaluation of the legislation policies and procedures competency in this case. However, it is not for me to comment on what remedy must be selected, as this a matter of discretion for the manager making this decision, who is required only to ensure that his or her remedy is logically tied to the third party reviewer's decision and in some way addresses the breach that the third party reviewer found to have occurred.

II. Decision under Review

[5] By a memorandum dated December 17, 2013, the CRA revised and re-issued its corrective measures. The CRA manager stated that retroactive authorization for use of the locally developed assessment tool had been requested and the Standardized Assessment Section of CRA's Human Resources Branch had confirmed that, had the selection board requested an exception not to use the standardized assessment tool at the time of the selection process, such a request would have been granted.

III. Motion to File a New Affidavit

[6] The Applicant commenced this application for judicial review on January 16, 2014. After the deadline for serving the Respondent's affidavits had passed, counsel for the CRA was advised of some new facts concerning this matter and, pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106, the Respondent moved for an order allowing an additional affidavit from Lin Li dated May 29, 2014, to be filed. The Applicant opposed that motion and filed evidence to support his arguments. In reply to such evidence, the Respondent requested that an

affidavit from its former counsel be submitted. On July 29, 2014, Madam Prothonotary Mireille Tabib allowed the affidavit from the Respondent's former counsel to form part of the record for the motion and directed that the motion to allow the additional affidavit from Lin Li be heard at the same time as this application for judicial review.

[7] At the hearing of this matter, it was determined that counsel for the parties would first address the Respondent's motion concerning the additional affidavit of Lin Li, and afterwards the Court would hear the parties' submissions on the issues of whether this application had been rendered moot and whether the CRA's decision under review was reasonable.

[8] The Respondent argues that the additional evidence should be admitted under Rule 312 so long as it: (1) serves the interests of justice; (2) assists the Court; (3) does not cause serious prejudice to the other party; (4) could not have been made available earlier; and (5) does not unduly delay the proceedings (*LaPointe Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at paras 8-9, 299 NR 244; *Allergan Inc v Canada (Health)*, 2013 FC 1165 at paras 14-15, 116 CPR (4th) 467).

[9] The Respondent submits that this evidence meets all five criteria for the following reasons: (1) it will serve the interests of justice by showing that the Applicant has received a better job than the one for which he was competing in the selection process under review; (2) it will assist the Court in resolving the mootness issue; (3) the Applicant will not be prejudiced since he can respond at the hearing or by filing a supplementary record; (4) the Respondent's

deadline for filing affidavits was March 27, 2014, and the Applicant only accepted the new position after that; and (5) it will not cause any delay.

[10] The Applicant agrees with the Respondent as to the test to permit additional evidence, but he emphasizes that the Court's discretion to admit the additional evidence "should be exercised with great circumspection" (*Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5, 292 NR 187 [*Mazhero*]).

[11] In the Applicant's view, the motion should be denied for three reasons. First, the Respondent knew about the promotion before the filing deadline of March 27, 2014, as the Applicant had actually accepted the new position on March 17, 2014. If still more time was required, then the deadline could have been extended by consent to April 11, 2014. Second, the affidavit is irrelevant since the Applicant concedes that he would not have been the successful candidate with respect to the selection process under review. Third, the Respondent had assured the Applicant that it would not be advancing a mootness argument and only changed its mind after the Applicant had submitted his record.

[12] The affidavit of Lin Li states in part as follows:

> On May 23, 2014, I was informed of Mr. Plato's permanent appointment to an AU-03 Investigator position. The AU-03 appointment is one level above the position of AU-02…for which Mr. Plato applied in the selection process and for which the pool expired on February 26, 2010.

[13] I agree with both parties on the test for such a motion. In *Mazhero* at para 5, Mr Justice John Evans endorsed the following passage from *Deigan v Canada (AG)*, 168 FTR 277 at para 3, which sets out both the test and its rationale:

> The new *Federal Court Rules* allow the filing of a supplementary affidavit and of a supplementary record, however such should only be allowed in limited instances and special circumstances, for to do otherwise would not be in the spirit of judicial review proceedings, which are designed to obtain quick relief through a summary procedure. While the general test for such supplementary material is whether the additional material will serve the interests of justice, will assist the Court and will not seriously prejudice the other side, it is also important that any supplementary affidavit and supplementary record neither deal with material which could have been made available at an earlier date, nor unduly delay the proceedings.

The foregoing passage was endorsed by a full panel of the Federal Court of Appeal in *Gwasslaam v Canada (Fisheries and Oceans)*, 2009 FCA 25 at para 4, 387 NR 179.

[14] In this case, the additional affidavit of Lin Li should be admitted as evidence. Not only does the admission of this evidence serve the interests of justice, because it shows that the Applicant now occupies a position higher than that for which he applied for in 2007, but it will also assist the Court in addressing below the question of mootness which has been raised by the Respondent. In addition, the Applicant will not be seriously prejudiced by the admission of the affidavit; indeed, counsel for the Applicant stated at the hearing of this matter that he did not intend to cross-examine Ms. Li if the evidence was admitted. Although the Applicant suggests that the information in Ms. Li's affidavit was known to the Respondent before the filing deadlines, the fact of the matter is that the Respondent's former counsel only learned about the Applicant's new position on or about May 6, 2014, and the motion for leave to file the affidavit was made soon thereafter. Lastly, the admission of this affidavit will not and has not delayed this

judicial review application, as the motion for leave to allow the additional affidavit from Lin Li was heard at the same time as this application for judicial review.

IV. Is the application for judicial review moot?

[15] In *Borowski v Canada (AG)*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231 [*Borowski*], the Supreme Court of Canada stated that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case". This involves a two-step analysis: "First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case" (*Borowski* at 353).

[16] In my view, this second application for judicial review by the Applicant is moot. The issues raised by this application have become academic and will have no practical effect on the rights of the parties.

[17] Although the parties may disagree as to the reasonableness of the decision under review, after nearly seven years since the competition for the AU-02 tax auditor position commenced, this matter should now come to an end.

[18] The Applicant has conceded in his motion materials "that he would not be a successful candidate with respect to the selection process under review, irrespective of the outcome of this

judicial review application”. This is because the Applicant was not among the top ten candidates for the AU-02 position, and so he would never have been selected regardless of the error identified by the independent reviewer with respect to use of the locally developed assessment tool.

[19] Moreover, the Applicant was recently promoted to an AU-03 position through a different selection process. The Applicant does not have a full stake in the outcome of this application (see: *Canada (AG) v Grundison*, 2009 FC 212 at paras 1, 7, 9-10 (available on CanLII)).

[20] Furthermore, there is no reason for this Court to exercise its discretion and determine the judicial review application on its merits. The problem was that the CRA used a locally developed and unapproved assessment tool in lieu of a standardized assessment tool in the contested selection process. That standardized tool is no longer in place and, as Madam Justice Gleason noted in *Plato 1* (at para 5), “it was not in use when the [first] corrective measures were issued in this file”. Not only that, but the position has long since been filled and the pool of applicants created by the AU-02 competition expired in February, 2010. There is therefore no longer a live controversy or concrete dispute and nothing that the resolution of this case could affect.

[21] Since this application is moot, it is not necessary to determine the reasonableness of the corrective measures taken by the CRA subsequent to *Plato 1*.

[22] In the result, therefore, the Applicant’s application for judicial review is dismissed, and there shall be no award as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, and that there is no award of costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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