Federal Court  Cour fédérale

**Date: 20161213**

**Docket: T-1185-15**

**Citation: 2016 FC 1368**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, December 13, 2016**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**CHARLOTTE RHÉAUME**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review by the applicant, Charlotte Rhéaume, of a decision dated May 29, 2015, rendered at the final level of the grievance process by Diane Lorenzato, the assistant commissioner of the Human Resources Branch at the Canada Revenue Agency [CRA]. In that decision, the assistant commissioner denied Ms. Rhéaume's two grievances, contesting the removal of her name from two inventories on grounds of unsatisfactory performance.

[2] The application for judicial review is dismissed for the following reasons.

## I. Background

[3] Ms. Rhéaume has been employed by the CRA since 1987. In December 2011, following a notice of interest issued within the CRA, Ms. Rhéaume, who held a position at the SP-05 level at the time, agreed to a lateral transfer to an interim SP-06 position as an access to information and privacy [ATIP] advisor for the period from October 17, 2011, to March 29, 2013.

[4] In the course of her employment as an acting SP-06, Ms. Rhéaume applied for a permanent SP-06 advisor position in selection process 2012-0636-QUE-1714-0636, which was posted on January 27, 2012. On April 5, 2012, she was told that she had achieved a passing score for each of the qualifications assessed. Her name was then retained in the inventory for a permanent SP-06 position.

[5] In October 2012, Ms. Rhéaume applied for an interim senior ATIP advisor position at the SP-07 level. She qualified and was ranked fourth with another candidate. Her name was added to the inventory for a position at the SP-07 level. On November 16, 2012, Ms. Rhéaume was informed of her score via e-mail. She was ranked seventh in the process at that time.

[6] On November 19, 2012, the Director of the ATIP Directorate, Marie-Claude Juneau, told Ms. Rhéaume via two letters that her name would be removed from the SP-06 and SP-07 inventories for performance reasons. Deficiencies in Ms. Rhéaume's work had been noted by the assistant director at an initial meeting on June 29, 2012, and at a second meeting on

November 13, 2012. At the second meeting, she was told that she was not meeting the expectations of the position and that her acting appointment in the SP-06 position was terminated. Ms. Rhéaume returned to her position at the SP-05 level.

[7] In those same letters dated November 19, 2012, Ms. Juneau also told Ms. Rhéaume that there was a possibility that her name would be placed back in the inventories after receipt of confirmation by her immediate supervisor that her performance had improved and that she was meeting expectations in her current position. It was also indicated that it was her responsibility to provide that confirmation to the resourcing advisor, and that her name could not be placed back in the inventory if the inventory had expired. Lastly, Ms. Juneau informed Ms. Rhéaume that the action of verifying performance was not subject to recourse in that selection process and that if she had concerns about her performance, she should approach her immediate supervisor about it.

[8] In November and December 2012, Ms. Rhéaume filed five grievances:

A. Grievance 12-1208-70099811, contesting the CRA's decision to prematurely end her appointment as an advisor at the SP-06 level;

B. Grievance 12-1208-70100478, contesting the CRA's decision to remove her name from the SP-07 inventory;

C. Grievance 12-1208-70100479, contesting the CRA's decision to remove her name from the SP-06 inventory;

D. Grievance 12-1208-70100480, criticizing the assistant director of being threatening and demeaning to her at the meeting on November 13, 2012; and

E. Grievance 12-1208-70100481, contesting the evaluation of her performance for the period from September 1, 2011, to August 31, 2012, that was given to her on November 13, 2012.

[9] On December 5, 2013, while the decision at the second grievance level was still pending, Ms. Rhéaume's union representative informed Ms. Juneau that Ms. Rhéaume's new evaluation for the period from September 1, 2012, to August 31, 2013, demonstrated that she was meeting the expectations of her position and that she wanted to be placed back in the SP-06 and SP-07 inventories. In a response dated December 12, 2013, Ms. Juneau indicated that according to the guidelines on performance verification in a selection process, it was up to Ms. Rhéaume to make a reinstatement request to the resourcing advisor. Her union representative then sent the request to human resources.

[10] On September 16, 2014, Ms. Rhéaume made a request to be placed back in the inventories.

[11] Because the five grievances were denied at the first, second and third levels of the grievance process, they were referred to the assistant commissioner of the CRA, Ms. Lorenzato, for the fourth and final level of the grievance process. The CRA's Senior Labour Relations Advisor, Stephen Black, reviewed the five grievances and heard the requests, comments and observations of Ms. Rhéaume's union representative at a hearing on May 7, 2015. Following that meeting, Mr. Black prepared a final level grievance summary for the assistant commissioner.

[12] In a letter dated May 29, 2015, Ms. Lorenzato denied Ms. Rhéaume's grievances contesting the removal of her name from the SP-06 and SP-07 inventories. She noted the corrective action sought by Ms. Rhéaume and stated that she had considered the entire file as well as the presentation made by Ms. Rhéaume's union representative. She stated that the guidelines on performance verification in a selection process stipulate that if a qualified candidate in an inventory subsequently receives [TRANSLATION] "expectations are not being met" on a performance evaluation in his or her current position, he or she will be removed from the inventory. The results of Ms. Rhéaume's performance evaluation indicate that she was not meeting the expectations and therefore her name was removed from the inventories. Lastly, Ms. Lorenzato stated that she was satisfied that the action taken by management was appropriate. She therefore denied the two grievances and refused to allow the corrective action sought.

## II. Issues

[13] The applicant raises a number of issues that, in my opinion, can be summarized as follows:

A. Does the assistant commissioner's decision dated May 29, 2015, violate the applicable guarantees of procedural fairness?

B. In the event that the decision respects the applicable guarantees of procedural fairness, is the decision reasonable?

[14] At the hearing of the application, the Court invoked of its own motion the preliminary issue of the mootness of the application for judicial review and invited the parties to make additional written submissions on this issue. The two parties availed themselves of the opportunity. I will therefore examine this issue first.

## III. Analysis

### A. *Is the application for judicial review moot?*

[15] The legal principles governing the application of the doctrine of mootness were stated by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. A court may decline to decide a case which raises merely a hypothetical or abstract question, or 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. This essential ingredient must be present not only when the proceeding is commenced before the Court, but also at the time when the court is called upon to reach a decision (*Borowski* at p 353).

[16] The approach to follow involves a two-step analysis. The Court must first determine whether there remains a live controversy or "whether the required tangible and concrete dispute has disappeared". If the response to the second question is affirmative, the Court will decide if it should exercise its discretion and hear the case (*Borowski* at pp 353-354). In this regard, the Court will consider the existence of an adversarial context, the conservation of judicial resources and its proper law-making function (*Borowski* at pp 359-363).

[17] In this case, Ms. Rhéaume filed five grievances. Only two were addressed in the decision dated May 29, 2015, which is the subject of this application for judicial review, that is, those bearing reference numbers 12-1208-70100478 and 12-1208-70100479. This Court has not been called upon to rule on Ms. Rhéaume's three other grievances, including the grievance contesting the performance evaluation that caused her name to be removed from the two inventories in

question and the grievance contesting the decision to prematurely end her lateral transfer to the acting SP-06 position. While Mr. Black's final level grievance summary recommends that the five grievances be denied, the decisions on the other grievances were not filed in the Court record and are not the subject of an application for judicial review.

[18] Ms. Rhéaume clearly stated in the statement for the two grievances that are subject of the application for judicial review that she contests the decisions of the ATIP director to remove her name from the SP-06 and SP-07 inventories and that she is asking, as corrective action, that the decisions be set aside and that her name remain in the inventories for notice of interest SP-07 and selection process 2012-0636-QUE-1714-0636 for the SP-06 advisor position.

[19] While the parties do not agree on the exact expiry date of the two inventories, they agree that the SP-06 and SP-07 inventories are now expired.

[20] Even if this Court set aside the decision and returned Ms. Rhéaume's file to the assistant commissioner, Ms. Rhéaume could no longer potentially be given a placement through those inventories because they no longer exist. Therefore, the decision of this Court would have practically no meaningful effect on Ms. Rhéaume's rights concerning those two expired inventories.

[21] I thus find that this application for judicial review is moot because the two inventories in question have expired (*Plato v Canada (National Revenue)*, 2014 FC 1230 at para 20, aff'd 2015 FCA 217; *Elkayam v Canada (Attorney General*), 2004 FC 908 at paras 10 and 15, aff'd 2005

FCA 102; *Weerasooriya-Epps v Canada (Attorney General)*, 2004 FC 688 at para 16; *Cahill v Canada (Attorney General)*, 2002 FCT 773 at p 5).

B. *Should the Court exercise its discretion to decide the matter?*

[22] Applying the criteria developed by the Supreme Court of Canada in *Borowski* to the facts in this case, I am of the opinion, for the following reasons, that there is no need for me to exercise my discretion to address the issues raised by Ms. Rhéaume.

[23] Ms. Rhéaume submits that she has a direct interest in the outcome of the dispute and that the Court's decision will directly affect her rights. She states that the dispute will impact her current permanent position, her salary and the calculation of her pay for her upcoming retirement and her current career. She argues that the fact that the pools expired does not mean that her rights were not impacted.

[24] She claims that the positions still exist and that all of the qualified candidates in the inventories received offers of employment, either permanent or temporary. She adds that the employer even posted at least one new notice of interest for an SP-06 position in June 2014. She is of the opinion that she would have undoubtedly been offered such position had her name not been removed from the inventory. Ms. Rhéaume also presumes that she would have been appointed to an acting SP-07 position because there were only two candidates left to be appointed from the SP-07 inventory.

[25] I cannot agree with Ms. Rhéaume's arguments. The record before this Court does not show any evidence establishing that Ms. Rhéaume would have been given a placement because she qualified for the two inventories in question. Like the CRA explained in its written submissions, an inventory is created to constitute a pool of qualified candidates for possible placement. It does not guarantee a placement for qualified candidates.

[26] Ms. Rhéaume stated in her additional written submissions that her notice of application for judicial review seeks not only an order from this Court that she be reinstated in the SP-06 and SP-07 inventories, but also orders (1) that she be retroactively appointed to a permanent position at the SP-06 group and level or an equivalent; (2) that she be paid the difference in salary between the SP-05 group and level and the SP-06 and SP-07 groups and levels with interest, retroactive to the filing of the grievances; and (3) that the Court render any other remedies that it deems just.

[27] In her oral submissions, Ms. Rhéaume recognized that while the assistant commissioner committed a reviewable error with respect to the two grievances that are the subject of the application for judicial review, it would not be appropriate to remove someone else from the position to give her a permanent position at the SP-06 group and level. She also recognized that if a new notice of interest was posted for the creation of a new inventory, her current performance evaluations would have to be examined.

[28] Also, this Court has no jurisdiction in an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, to order compensation for the salary

difference sought and alleged by Ms. Rhéaume. A simple request that the Court render any other remedies that it deems just does not allow this Court to control the legality of decisions rendered with respect to other grievances that were not the subject of an application for judicial review.

[29] Regarding the factor of conserving judicial resources, Ms. Rhéaume first states that the application for judicial review was heard and thus the concern for economy is no longer present. However, the Supreme Court of Canada stated in *Borowski* that it is not because the Court heard the merits of a case that it must necessarily use its discretion to rule on the issues raised (*Borowski* at pp 363-364).

[30] Ms. Rhéaume also claims that the CRA cannot benefit from its own wrongdoing. Specifically, she advances that the CRA breached its obligations under the collective agreement by failing to respect the grievance procedure deadlines. She stated that the CRA took almost two and a half years for the three levels of response to the grievances.

[31] In this regard, without ruling on the justification for the delays in processing the grievances, I agree with the CRA's argument that Ms. Rhéaume could have availed herself of clause 18.13 of her collective agreement, which states that where the employer has not conveyed a decision within 15 days from the date that a grievance is presented at any level, except the final level, the employee may, within the next ten days, submit the grievance at the next higher level of the grievance procedure. The Court also notes that clause 18.08 of that same agreement states that whenever there are four levels in the grievance procedure, the grievor may elect to waive either level two or three.

[32] Ms. Rhéaume also alleges that the CRA did not raise the mootness of the case and that the responses to grievances did not mention expired inventories.

[33] However, it has been clearly established that the Court can raise the issue of mootness (*Canada (National Revenue) v Mcnally*, 2015 FCA 195 at para 10; *Solis Perez v Canada (Citizenship and Immigration)*, 2008 FC 663 at para 18, aff'd 2009 FCA 171).

[34] Regarding her argument that the CRA did not mention that the grievances had expired in its responses to her grievances, the Court notes that it is explicitly mentioned in the letters dated November 19, 2012, that Ms. Rhéaume's name could not be placed back in the inventories if those inventories had expired. The response at the second level of the grievance process also stated that reinstatement was possible if the inventory was still valid.

[35] Lastly, regarding the third factor stated in *Borowski*, I am of the view that this case raises no important matter of public interest justifying this Court's exercise of its discretion and determination of the issues raised by Ms. Rhéaume in her application for judicial review.

[36] In light of the foregoing, the application for judicial review is dismissed for mootness.

[37] Regarding costs, considering the circumstances of the case and the outcome of the application, I am of the opinion, in the exercise of my discretion, that it should be ordered that each party bear its own costs.

[38] In conclusion, I note that the respondent in this case is the federal board, commission or other tribunal directly affected by the order sought, that is, the CRA. I confirm the validity of the style of cause.

## JUDGMENT

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

1. The application for judicial review is dismissed;

2. Each party will bear its own costs.

"Sylvie E. Roussel"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1185-15 |
| **STYLE OF CAUSE:** | CHARLOTTE RHÉAUME v CANADA REVENUE AGENCY |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | MAY 17, 2016 |
| **JUDGMENT AND REASONS:** | ROUSSEL J. |
| **DATED:** | DECEMBER 13, 2016 |

**APPEARANCES:**

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|---|---|
| Charlotte Rhéaume | FOR THE APPLICANT (SELF-REPRESENTED) |
| Nadia Hudon | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENT |