Federal Court  Cour fédérale

Date: 20191231

Docket: T-1795-18

Citation: 2019 FC 1661

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 31, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

ANDRÉE GAGNON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Andrée Gagnon, participated in a staffing process conducted by her employer, the Canada Revenue Agency [CRA], for the position of technical advisor. She was not the candidate selected for placement. Ms. Gagnon then asked to review the results and content of the assessments of the successful candidate; the CRA denied her request. She then sought

recourse under the *Procedures for recourse on staffing (Staffing Program)* implemented by the CRA [Procedures], in order to obtain access to this information. In a decision dated June 1, 2018, an independent reviewer, Jean Alain Corbeil [Reviewer], determined that the CRA's refusal to disclose the information requested by Ms. Gagnon violated the principles of procedural fairness and natural justice, and recommended that the error be corrected.

[2] Further to the Reviewer's decision, the CRA appointed a new manager, Danielle Parent [Manager], to re-examine Ms. Gagnon's request for disclosure. After conducting her analysis, the Manager agreed to disclose the results and the content of the successful candidate's written exams to Ms. Gagnon's union representative, but she only gave the results to Ms. Gagnon. The Manager informed Ms. Gagnon of her decision orally, on June 18, 2018, and then in writing, on August 6, 2018.

[3] Dissatisfied with the disclosure of just the results and deeming this outcome to be inconsistent with the Reviewer's decision, Ms. Gagnon filed this application for judicial review with the Court. She contends that the content of the successful candidate's assessments is relevant and should be disclosed to her in order to address her concerns and allow her to determine whether, as she suspects, she was treated arbitrarily during the staffing process. Ms. Gagnon is of the view that the CRA did not correct its error as ordered by the Reviewer. She is asking the Court to issue a writ of *mandamus* compelling the CRA to disclose the content of the successful candidate's assessments to her.

[4] The Attorney General of Canada [AGC], in its capacity as the respondent, objects to Ms. Gagnon's application. First of all, it notes that the recourse filed by Ms. Gagnon confuses the Reviewer's decision of January 2018 with the Manager's subsequent decision following up on it. The AGC submits that Ms. Gagnon's application for judicial review was filed out of time, since it was only filed on October 10, 2018, much later than the 30-day period prescribed by section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act], for filing such an application. The AGC further submits that, given the steps taken by the Manager, the CRA had already complied with the requirements of the Reviewer's decision and that the conditions for issuing a writ of *mandamus* were not satisfied. The AGC adds that the remedy sought by Ms. Gagnon is not covered in the order issued by the Reviewer and would exceed the Reviewer's powers.

[5] Ms. Gagnon's recourse raises two questions. First, was Ms. Gagnon's application for judicial review filed out of time and, if so, should the Court extend the time to file her application? Second, does the recourse sought by Ms. Gagnon satisfy the applicable criteria for issuing a writ of *mandamus*?

[6] For the following reasons, Ms. Gagnon's application for judicial review must be dismissed. After reviewing the evidence presented by Ms. Gagnon and the decisions rendered by the Reviewer and the Manager, I am unable to conclude that Ms. Gagnon satisfied the requirements for obtaining an extension of time, or that, under the circumstances of this case, it would be in the interests of justice to exercise my discretion and grant her such an extension. Moreover, even if we assume that Ms. Gagnon's application was not filed out of time, she failed to satisfy the well-established jurisprudential criteria for issuing a writ of *mandamus*. The order

that Ms. Gagnon is seeking from the Court is not necessary, as the CRA has already complied with the decision and followed up on the Reviewer's findings.

II. Background

A. *Facts*

[7] This application was filed in the context of a staffing process at the CRA. Under subsection 54(1) of the *Canada Revenue Agency Act*, SC 1999, c 17, the CRA has the authority to develop its own staffing program and establish its internal policies and procedures to govern it. The CRA therefore developed a staffing program with four separate stages: planning, screening for prerequisites, assessment and appointment. The Procedures adopted by the CRA most notably offer employees of the CRA three types of possible recourse against decisions made in a staffing process, namely individual feedback [IF], decision review [DR] and independent third party review [ITPR] (Section 5.2 of the Procedures).

[8] These types of recourse allow candidates who are dissatisfied with the staffing process to contest it at certain stages if they feel they were treated arbitrarily, and to request disclosure of information that led to the decision affecting them (subsections 5.5 and 5.6 of the Procedures). At the DR stage, employees may obtain information about themselves or about other candidates involved, on condition that the CRA used this information to make a staffing decision. In the context of an ITPR, an independent reviewer may draw an adverse inference against the CRA and recommend correction of the error made if that reviewer finds that there was arbitrary

treatment. That said, there are limits to the power of an independent reviewer, who cannot order the production of documents or determine precisely how the error is to be corrected.

[9] In a staffing process in March 2017, Ms. Gagnon applied for the position of Technical Advisor, Trust Accounts Examination/Trust Accounts Compliance, at the CRA. Ms. Gagnon successfully advanced through the screening for prerequisites stage as well as the assessment stage. After the assessment stage, only Ms. Gagnon and the candidate eventually selected for placement, Annie McLean, remained on the list and were placed in the pool for the position in question. They were therefore the only two candidates who could be considered at the final appointment stage. On May 4, 2017, Ms. Gagnon was informed of the fact that she was one of the selected candidates and of the recourse available to her at that stage of the staffing process. However, Ms. Gagnon did not make any request for recourse at the assessment stage and did not ask to consult her own assessments.

[10] On October 3, 2017, after the appointment stage, Ms. Gagnon received a recourse notification from the CRA, which most notably mentioned the average she had obtained further to the assessments, 77.4 percent. The recourse notification also noted that selection was based on the best average and that, for this reason, Ms. Gagnon had not been selected for the position. The CRA appointed Ms. McLean, the candidate who had obtained the best average for scores awarded in the assessment of the four relevant competencies for the position. Following receipt of this notification, Ms. Gagnon first participated in IF with the hiring manager responsible for the staffing process, who explained to her at the time that the staffing requirement at the appointment stage is the average of each candidate’s assessments. Unhappy with the results of

this individual feedback, Ms. Gagnon subsequently requested an ITPR in accordance with the Procedures. However, Ms. Gagnon did not request a DR.

[11] In support of her request for an ITPR, Ms. Gagnon stated that she wanted to consult the results and the content of the exams of the successful candidate, Ms. McLean, to determine whether she had in fact been subjected to arbitrary treatment during the appointment process. According to Ms. Gagnon, consultation of this information was essential to verifying whether Ms. McLean had actually obtained the highest average, further to a non-arbitrary correction of the assessments by the CRA, as the CRA claims.

[12] Further to her request for an ITPR, Ms. Gagnon sent the CRA a list of information that she wanted to obtain in order to determine whether there had been arbitrary treatment in the appointment of the successful candidate. On December 22, 2017, since she had still not received the requested information, Ms. Gagnon sent her allegations to the CRA. In response, the CRA forwarded part of the information requested by Ms. Gagnon, but without disclosing the successful candidate's results for the four assessments that had served as the basis for the CRA's decision at the appointment stage. The CRA also forwarded a copy of the assessments so that Ms. Gagnon could confirm that the results had been properly accounted for.

[13] After making several attempts to obtain all the information requested, Ms. Gagnon received an email from the CRA, dated January 8, 2018, in which the Agency justified its refusal to provide the additional information requested on the ground that the pool contained only two eligible candidates at the final stage. Consequently, claimed the CRA, it would be impossible for

the Agency to provide the information requested without violating obligations set out in the Privacy Act, RSC 1985, c P-21.

[14] In her request for an ITPR, Ms. Gagnon made the following final allegations to the Reviewer:

> [TRANSLATION]
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> 1. We are alleging that the average score obtained by the applicant in the assessments used at the appointment stage was higher than the score obtained by the candidate selected by the CRA, thereby demonstrating arbitrary treatment of the applicant by the CRA. We are asking the reviewer for a decision in our favour based on the principle of an adverse inference mentioned in paragraph 5.6.11 of the Procedures.
>
> 2. We are alleging that the answers to the questions included in the assessments used at the appointment stage were assessed and/or accounted for in an arbitrary manner by the CRA. We are asking the reviewer for a decision in our favour based on the principle of an adverse inference referred to in paragraph 5.6.11 of the Procedures.

[15] In February 2018, Mr. Corbeil was assigned to serve as Reviewer for Ms. Gagnon's file. On June 1, 2018, the Reviewer rendered a decision of adverse inference against the CRA under paragraph 5.6.11 of the Procedures, declaring that Ms. Gagnon had been treated arbitrarily. He most notably mentioned that, in his opinion, the CRA's refusal to disclose the requested information violated the principles of procedural fairness and natural justice. The Reviewer therefore ordered the CRA to correct the error as soon as possible, that is, Ms. Gagnon's arbitrary treatment resulting from the refusal to disclose all the requested information to her. The Reviewer also recommended that a new manager be assigned to implement this corrective measure, and that the appointment of the successful candidate be revoked in the event that the

average of her results was lower than that obtained by Ms. Gagnon. However, in the decision, the Reviewer acknowledged that he did not have the power to order the disclosure of the information sought by Ms. Gagnon.

B. *Impugned decision*

[16] Further to the Reviewer's decision, the CRA appointed a new manager, Ms. Hébert, to implement corrective measures. I note that Ms. Gagnon is not contesting the Reviewer's decision as such, but is rather of the view that the implementation of corrective measures by the CRA failed to comply with the Reviewer's order. In other words, she is challenging the decision rendered by the Manager, which was supposed to follow up on that order.

[17] Upon completing her analysis, the Manager agreed to transfer all the information requested by Ms. Gagnon to Mathieu Juneau, Ms. Gagnon's union representative, together with a confidentiality statement preventing Mr. Juneau from sharing the information with Ms. Gagnon. This information included both the results and the content of the assessments of the successful candidate. During a subsequent meeting between the Manager and Ms. Gagnon, held on June 18, 2018, only the results of the successful candidate's assessments were shared with Ms. Gagnon, not the full content of the assessments.

[18] On August 6, 2018, the Manager explained to Ms. Gagnon, in writing, that the disclosure of the results confirmed that the successful candidate had in fact obtained a better average than that obtained by Ms. Gagnon and had therefore obtained the best results at the assessment stage. The Manager also indicated that disclosure of the content of the successful candidate's

assessments was not necessary, since the disclosure of the results was enough to demonstrate the fairness of the appointment and staffing process. In an email dated August 6, the Manager most notably provided the following explanations in support of her decision to only disclose the successful candidate's results to Ms. Gagnon: 1) only the results of the assessments were relevant and had in fact been used at the appointment stage, rather than the content of these assessments; 2) Ms. Gagnon's allegations did not contain any evidence that would lead to a finding of arbitrary treatment; and 3) Ms. Gagnon could have, and should have, sought recourse at the assessment stage (rather than at the appointment stage) if she wanted to obtain the content of the assessments, because she should have known that the scores obtained at the assessment stage could be determinative at the appointment stage.

[19] In support of her decision not to disclose the content of the assessments and to provide only the results, the Manager cited the position of Justice Kane in *Qui v Canada (Revenue Agency)*, 2018 FC 392 [Qui]. In that decision, the applicant contested a reviewer's finding that she did not have jurisdiction to order the disclosure of information at the appointment stage. The reviewer reached this conclusion on the basis that 1) the applicant had relevant recourse that she should have pursued before initiating the ITPR; and 2) the applicant had decided not to pursue recourse to the fullest extent possible at the assessment stage. Justice Kane determined that the reviewer's decision to decline competence was reasonable and sufficiently intelligible. More specifically, Justice Kane indicated that she agreed with the reviewer, in that recourse under the Procedures must be sought at the appropriate time (Qui at para 87).

[20] Relying on Qui, the Manager was therefore of the opinion that Ms. Gagnon did not take advantage of all the recourse available to her after the assessment stage. She also added that Ms. Gagnon should have known, after reading the job posting, that the scores obtained after the assessments could be determinative at the appointment stage. Lastly, since the Reviewer did not order the production of the content of the assessments, it was now incumbent on her, as the Manager mandated to determine the information what could be disclosed, to decide what should be disclosed.

III. Analysis

A. *Extension of time*

[21] The AGC submits that Ms. Gagnon filed her application out of time and that the period of 30 days provided in the Act for filing an application for judicial review should not be extended.

[22] In this case, Ms. Gagnon filed her application for judicial review on October 10, 2018, 114 days after she verbally received the successful candidate's exam results on June 18, 2018, and 65 days after receiving the Manager's written reasons on August 6, 2018, which justified the non-disclosure of the content of Ms. McLean's assessments. Subsection 18.1(2) of the Act provides that the 30-day period for filing an application for judicial review starts from the date on which an applicant became aware of the decision giving rise to the application. There is therefore no doubt that Ms. Gagnon failed to comply with the 30-day time limitation for filing an application prescribed in subsection 18.1(2) of the Act. What remains to be determined is whether it is appropriate to grant an extension of time.

[23] In order to successfully obtain an extension of time, Ms. Gagnon must satisfy four well-established criteria identified by the Federal Court of Appeal [FCA] for granting an extension of time (*Thompson v Canada (Attorney General)*, 2018 FCA 212 [Thompson] at para 5; *Chan v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 130 at para 4; *Canada (Attorney General) v Larkman*, 2012 FCA 204 [Larkman] at para 61; *Canada (Attorney General) v Hennelly*, 244 NR 399, 1999 CanLII 8190 (FCA) at para 3). These four factors are the following: (i) did Ms. Gagnon have a continuing intention to pursue her application for judicial review; (ii) is there some potential merit to the application; (iii) would the AGC or CRA suffer prejudice as a result of the delay; and (iv) is there a reasonable explanation to justify the delay? It is Ms. Gagnon who bears the burden of proving these elements (*Virdi v Canada (Minister of National Revenue)*, 2006 FCA 38 [Virdi] at para 2).

[24] That said, the power to grant an extension of time remains discretionary, and although the four criteria established by the case law provide a framework for the exercise, they are not intended to limit this discretion. In fact, it is not necessary for all these four criteria which govern the discretionary exercise to be decided in Ms. Gagnon's favour. At the end of the day, the overriding consideration in the exercise of the Court's discretion is "the interests of justice" (*Larkman* at paras 62, 85). In *Larkman*, the FCA therefore clarified that over and above the criteria developed by the case law, the overriding consideration is "whether the granting of an extension of time is in the interests of justice" (*Larkman* at para 62). The Court must therefore be flexible in examining each of the criteria in order to ensure that justice is served and to decide whether it would be in the interests of justice to grant an extension of time (*Thompson* at para 6; *Larkman* at para 62; *MacDonald v Canada (Attorney General)*, 2017 FC 2 at para 11).

[25] The AGC concedes that the delay did not cause CRA to suffer any prejudice. However, the AGC maintains that Ms. Gagnon did not discharge her burden of presenting evidence to support the three other factors set out in the case law, namely, that she had a continuing intention to contest the Manager's decision, that a judicial review of this decision had a reasonable chance of success, and that she had reasonable explanations to justify the amount of time that elapsed between the Manager's decision and her notice of application.

[26] I agree with the AGC. In this case, I am not persuaded that this is a situation where I should exercise my discretion in favour of Ms. Gagnon and where it is in the interests of justice to grant an extension of time, because the evidence is completely insufficient to satisfy at least two of the factors which govern the exercise of my discretion. More specifically, in her notice of application, Ms. Gagnon remains completely silent about her intention to contest the Manager's decision, and she does not provide any explanation for the belated filing of her application. In fact, nowhere in her written submissions does Ms. Gagnon account for the delay in filing her application or request an extension of time from the Court. Moreover, as I will discuss later in the second part of the analysis, Ms. Gagnon did not present any compelling reasons or arguments to demonstrate the chances of success of her application for judicial review.

[27] I note that Ms. Gagnon did not submit her own affidavit in support of her application for judicial review, but only provided one sworn by Mr. Juneau, her union representative. During the hearing before this Court, counsel for Ms. Gagnon suggested that Ms. Gagnon's intention can be inferred from paragraphs 20 to 24 of Mr. Juneau's affidavit. These paragraphs concern exchanges with the CRA between June 29, 2018, and August 6, 2018. I will come back to this

point. However, no affidavit was sworn by Ms. Gagnon, the applicant. Yet the FCA has clearly stated that when an moving party requests an extension of time, this should be done by way of his or her own affidavit evidence (*Virdi* at paras 2–3):

> As the moving party, the appellant bore the burden of establishing the elements necessary for an extension of time. Generally speaking, this must be done by affidavit evidence sworn by the moving party himself that can be subject to cross-examination.
>
> In the case at bar, the appellant did not see fit to swear his own affidavit. Instead, he asks the Court to find that he had a reasonable explanation for his delay, a continuing intention to seek judicial review and an arguable case solely on the basis of an affidavit sworn by his lawyer's secretary. This failure to provide his own evidence to the Court was, in this case, fatal to his motion.
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> [Emphasis added.]

[28] An extension of time required Ms. Gagnon to demonstrate a continuing intention to pursue her application for judicial review throughout the period since the Manager's decision, before and after the prescribed 30-day time limitation. It is Ms. Gagnon who should have this intention to file an application for judicial review, and it is her responsibility to prove this intention by swearing her own affidavit, which would allow the Court to gauge the existence and the continuity of this intention. She did not do so. Moreover, I note that when an applicant fails to request an extension of time to file an application for judicial review, as in the case at bar, it is not inconsistent with the interests of justice to hold this party responsible for that choice, regardless of the merits of the case (*Thunderchild First Nation v Weekusk*, 2015 FCA 284 at paras 29–30).

[29] In this case, Ms. Gagnon did not present any arguments or evidence concerning her intention to contest the Manager's decision, either before or after the prescribed time limitation.

The only indirect mention of this element comes from comments by her union representative. However, even accepting that this affidavit sworn by the union representative could communicate Ms. Gagnon's intention, I note that Mr. Juneau's affidavit does not contain any evidence about a continuing intention to file an application for judicial review after August 2018. In other words, even if I gave Ms. Gagnon's arguments and the evidence submitted a generous interpretation, I cannot find any sufficient indication that she had the requisite continuing intention to contest the Manager's decision.

[30] In his affidavit, Mr. Juneau, the union representative, mentions that on June 29, 2018, the union representing Ms. Gagnon intended to file an application for *mandamus* with the Court to compel the CRA to implement the Reviewer's order. Ms. Gagnon was informed accordingly that same day. Mr. Juneau's affidavit also states that on July 5, 2018, the union's legal counsel confirmed to a representative of the CRA that the union would consider all available legal options, including an application for *mandamus*. Having read these paragraphs, I note that the possibility of pursuing *mandamus* as a remedy before the Court was mentioned for the first time on June 29, 2018 and repeated in early July. However, these confirmations of intention predated the Manager's written decision, eventually rendered on August 6, 2018, which offered a detailed explanation of the reasons behind the refusal to provide the content of the successful candidate's assessments. Mr. Juneau's affidavit does not contain any information about Ms. Gagnon's intention or the union's intention to pursue an application for judicial review following receipt of the Manager's written decision on August 6, 2018. Yet, it is this written decision which triggered the 30-day time limitation prescribed in the Act.

[31] I must also point out that there is no evidence that Ms. Gagnon demonstrated her intention to pursue her application for judicial review within 30 days of receiving the Manager's written reasons, or the evidence only demonstrates her continuing intention up to the actual filing date of her application. Since Ms. Gagnon had already expressed dissatisfaction about not being able to access the content of the assessments during her meeting with the Manager in mid-June 2018, and since this same decision by the CRA was subsequently confirmed, in writing, by the Manager in early August 2018, with supporting reasons, it was her responsibility to file her application for judicial review within the prescribed time, or to explain why she could not do so.

[32] I will now move on to the last criterion established by the case law, namely, a reasonable explanation for the delay. Again, on this question, I can only note Ms. Gagnon's absolute silence: there is no reasonable explanation for Ms. Gagnon's delay in filing her application for judicial review, either in her submissions or by way of Mr. Juneau's affidavit. In fact, Ms. Gagnon did not provide any explanations whatsoever and completely ignored the issue. At no point does Ms. Gagnon explain why she waited until October 10 to file her application for judicial review.

[33] In the absence of a reasonable explanation for the procedural delay, a delay representing more than double the 30 days provided in the Act, and in the absence of any evidence of Ms. Gagnon's continuing intention to file her application, I cannot identify any reason that could allow me to extend the time for filing her application.

[34] It has been repeatedly recognized that undertaking a judicial review of decisions rendered by administrative tribunals within the relatively short time limits prescribed by the Act reflects the public interest in the finality of administrative decisions (*Canada v Berhad*, 2005 FCA 267 [*Berhad*] at para 60, leave to appeal to SCC refused, 31166 (May 25, 2006); *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 24). The time limit is not "whimsical" and "exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay" (*Berhad* at para 60).

[35] I recognize that the interests of justice remain the overriding consideration in granting an extension of the time limit. However, the interests of justice do not exist in a vacuum and do not absolve an applicant from the duty to satisfy the burden of proof that rests on his or her shoulders. In this case, exercising my discretion in favour of Ms. Gagnon would not only require me to ignore the criteria established by the FCA for extending a time limit, but would also require me to turn a blind eye to the complete lack of evidence supporting the factors set out in the case law and consider granting such an extension. I cannot do that. The rule of law is based on the fundamental principles of certainty and predictability. The exercise of discretion must find its origins in the law. The exercise of such power would not be appropriate or wise, and in the interests of justice, if it condoned conduct which disregards the minimum requirements of the applicable law.

[36] This is enough to deny Ms. Gagnon's application. In any event, since the substantive arguments made by Ms. Gagnon are also unfounded, her application would have been denied anyway, even if it had been filed within the 30-day time limit.

B. *Application for mandamus*

[37] Ms. Gagnon submits that her application meets the criteria for obtaining a writ of *mandamus*, as set out in the decision rendered in *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742 [*Apotex*], aff'd [1994] 3 SCR 110. It is well established that these conditions are cumulative and must all be strictly met in order for the Court to be able to consider issuing a writ of *mandamus* (*Rocky Mountain Ecosystem Coalition v Canada (National Energy Board)* (1999), 174 FTR 17 at para 30 (FC)). These conditions are described as follows in *Apotex*, at pages 766 to 769:

> 1. There must be a public legal duty to act.
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> 2. The duty must be owed to the applicant.
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> 3. There is a clear right to performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty
> >
> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.
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> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> > (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
> >
> > (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way;
>
> (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
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> 5. No other adequate remedy is available to the applicant.
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> 6. The order sought will be of some practical value or effect.
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought:
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> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.
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> [Citations omitted.]
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> (See also Canada (Health) v The Winning Combination Inc., 2017 FCA 101 at para 60; Lukács v Canada (Transportation Agency), 2016 FCA 202 at para 29; Complexe Enviro Progressive Ltée v Canada (Transport), 2018 FC 1299 at paras 68–70).

[38] Ms. Gagnon submits that there is a public legal duty towards her since the CRA is a body corporate with a duty to develop a staffing program to govern appointments, including recourse offered to employees. She claims that since the CRA's staffing program was enacted pursuant to legislation and the decisions made in the context of a staffing process have a "judicial" character, it gives rise to a public legal duty *(Burstyn v Canada (Canada Revenue Agency)*, 2007 FC 822 at paras 26–29).

[39] Ms. Gagnon also alleges that she has a right to performance of that duty. She contends that the Reviewer's decision was an enforceable decision and that the CRA's failure to implement the decision was tantamount to a refusal to act, since the content of the successful candidate's assessments was not disclosed. Ms. Gagnon maintains that the Reviewer rejected the CRA's reasoning that the content of the assessments was not relevant to her recourse. Ms. Gagnon asserts that the Reviewer found that the principles of procedural fairness and natural justice apply to the CRA and that an employee must be able to obtain information that would allow him or her to demonstrate arbitrary treatment.

[40] Ms. Gagnon maintains that the content of the assessments is necessary to determine whether the assessment standards were applied fairly by the CRA. In support of her argument, Ms. Gagnon cites *Sargeant v Canada (Attorney General)*, 2002 FCT 1043 [*Sargeant*], in which the Court determined that it was unreasonable for an independent reviewer to find that he lacked jurisdiction to draw an adverse inference against the employer, because of an institutional barrier preventing the employee from obtaining relevant information. Ms. Gagnon added that unlike the situation in Qui, she did not have any reason to act prior to the appointment stage and that the AGC's reasoning would require all candidates placed in a pool of qualified candidates to pursue recourse at the assessment stage, without having any knowledge of whether or how the assessments will be used at the appointment stage.

[41] Lastly, Ms. Gagnon claims that all other criteria for the issuance of a writ of *mandamus* have been satisfied: 1) no other remedy is available to her; 2) the order will have a practical effect; 3) there is no equitable bar to the Court ordering the relief sought because she came

before the Court with [TRANSLATION] “clean hands”; 4) the balance of convenience weighs in favour of issuing an order in the nature of *mandamus* because the CRA has an obligation to disclose under the Procedures; and 5) since the disclosure of the information is compatible with the purposes for which this information was obtained, the CRA would not violate the *Privacy Act*.

[42] I disagree with Ms. Gagnon’s opinion and analysis. Not only were the *mandamus* criteria not satisfied, but the CRA had already complied with the Reviewer’ decision.

[43] Mandamus is an extraordinary remedy which comes with its own set of conditions. The primary fundamental conditions that would justify the issuance of a writ of *mandamus* are well established and have been set out by the FCA in *Apotex*. These conditions are cumulative, and all must be satisfied before the Court can contemplate issuing a writ of *mandamus*. They include the following: 1) there must be a public legal duty to act; 2) the duty must be owed to the applicant; and 3) there is a clear right to performance of that duty, in particular: a) the applicant has satisfied all conditions precedent giving rise to the duty and b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal, which can be either expressed or implied.

[44] Given the cumulative nature of these conditions, it is enough, to dispose of the *mandamus* conclusions in Ms. Gagnon’s application for judicial review, to address the existence of [TRANSLATION] “a clear right to performance of a duty”. In this case, there is no doubt that there

was no legal duty for the CRA to disclose the specific information requested by Ms. Gagnon, namely, the content of Ms. McLean's assessments.

[45] By disclosing the results used by the hiring manager and providing her reasons for the refusal to disclose the content of the assessments, the Manager corrected the arbitrary treatment identified by the Reviewer and suffered by Ms. Gagnon at the appointment stage of the staffing process. Ms. Gagnon would have liked this correction to have led to the disclosure of the content of the assessments. However, a writ of *mandamus* cannot serve to force a decision-maker to act in a certain way. In fact, it is well established that an order of *mandamus* cannot compel a public authority to exercise discretion in a particular way and cannot dictate the specific result to be achieved (*Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74 at para 126; *Albatal v Canada (Royal Mounted Police)*, 2016 FC 371 at para 15). The CRA's underlying power to decide to implement the decision is discretionary under the law, and the Court itself cannot impose the result of the CRA's exercise of discretion. Ms. Gagnon does not have vested rights in the performance of the specific positive duty that she is seeking to impose on the CRA, namely, the duty to disclose the content of the assessments that she wants to obtain.

[46] The interpretation of the procedures by the reviewers and by the Court in *Sargeant* and *Qui* suggest that an independent reviewer does not have the power to order how the disclosure should be carried out in the context of recourse exercised by an employee after the appointment stage. Instead, it is the CRA which holds this discretionary power and which may determine how the disclosure is to be carried out. Moreover, in his decision, the Reviewer specifically acknowledged that he did not have the power to directly order that the requested information be

provided to Ms. Gagnon, despite his finding that Ms. Gagnon had the right to obtain both the results of the successful candidate's assessments and the content of these assessments.

[47] Moreover, the AGC rightly points out that the CRA had already provided Ms. Gagnon with the successful candidate's results. As noted by the AGC during submissions before the Court, refusing to provide access to the content of the assessment is not tantamount to a failure to act. The CRA appointed a new manager, Ms. Hébert, who was of the opinion that the disclosure of the results obtained by the successful candidate was enough to demonstrate the fairness of the appointment, the fact that the successful candidate had in fact obtained the best score, and the lack of arbitrary treatment. Ms. Hébert provided justifications for this decision, most notably the fact that: 1) only the results of the assessment were relevant at the appointment stage and not the content; 2) Ms. Gagnon's request did not contain any indication of arbitrary treatment in support of her allegations; and 3) Ms. Gagnon could have obtained the content of the assessment if she had sought recourse after the assessment stage, but she had failed to do so. Consequently, a decision was made to address Ms. Gagnon's concerns about the average of the results, and this average confirmed the merits of the choice of the candidate selected for appointment and the lack of arbitrary treatment at the appointment stage. In light of the discretionary nature of the CRA's duty to act, issuing a writ of *mandamus* under these circumstances would be inappropriate, as this would amount not to compelling performance of a duty which has yet to be carried out, but to compelling the exercise of a "fettered discretion" in a particular way.

[48] The CRA has already complied with the Reviewer's order, and the Court cannot order the execution of a duty to act which the CRA has already performed (*Hong v Canada (Attorney General)*, 2018 FC 1208 at para 34).

IV. Conclusion

[49] For the above reasons, Ms. Gagnon's application for judicial review is dismissed.

[50] The AGC is entitled to its costs.

JUDGMENT in T-1795-18

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, with costs.

"Denis Gascon"
Judge

Certified true translation
This 23rd day of January 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1795-18
STYLE OF CAUSE:	ANDRÉE GAGNON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 30, 2019
JUDGMENT AND REASONS:	GASCON J.
DATED:	DECEMBER 31, 2019

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