Date: 20070807

Docket: T-1085-06

Citation: 2007 FC 822

Ottawa, Ontario, August 7, 2007

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BARRY BURSTYN

Applicant

and

CANADA REVENUE AGENCY,
JOHN JRAIGE and RON GALBRAITH

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Mr. Barry Burstyn (the "Applicant") seeks an order of *mandamus* pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, requiring the Canada Revenue Agency (the "CRA" or the "Respondent") to assign him to a permanent AU-04 position pursuant to the decision of Independent Third Party Reviewer Kathleen O'Neil (the "Reviewer"). The Applicant further seeks compensation for lost income and benefits between the date of the decision, that is March 10, 2005,

as clarified by the decision of August 8, 2005 and damages from the CRA, pursuant to the equitable jurisdiction conferred on this Court by section 3 of the *Federal Courts Act*, as well as costs on a solicitor-client basis.

II. Background

[2] The Applicant is an AU-03 level employee with the CRA. He applied for a position as an AU-04 classified Large Case File Auditor position. He participated in a competition but was not selected. Mr. John Jraige and Mr. Ron Galbraith were the successful candidates.

[3] The Applicant filed a complaint pursuant to the CRA's Staffing Program and Directives on Recourse for Staffing, claiming that the selection of these two candidates was arbitrary and inconsistent with the CRA's staffing principles of fairness and transparency. The Applicant's complaint was referred to the Reviewer on March 3, 2004.

[4] A hearing took place on February 4, 2005 and in a decision dated March 10, 2005, the Reviewer upheld the Applicant's complaint. She found that the CRA had acted in an arbitrary manner in making decisions that led to the Applicant's exclusion from placement in a permanent AU-04 position. As well, the Reviewer found that the Agency's process offended the staffing principles of fairness and transparency and accordingly, was inconsistent with the policy of the Staffing Program. She determined that "corrective action must be taken".

[5] The Reviewer identified the range of corrective measures available to her. She could order correction of the error in the process, recommend revocation of an appointed employee or recommend the involvement of another manager in the decision making. At pages 21 and 22 of her March 10, 2005 decision, the Reviewer chose the first option, that is correction of the error in the process. She set forth her conclusion as follows:

> To be meaningful, correcting the errors should put the applicant, to the extent possible, in the position he would have been in if the errors had not occurred. In this case, I consider this to be very difficult, in that the errors were cumulative, and resulted in what appears, on the evidence before me, to have been the final error of not placing the applicant in a position for which he was well qualified, because of the Agency's incorrect belief that he was not. Further, there is the unanswered evidence that is consistent with, if not conclusively determinative of, actual bias.
>
> In the circumstances of this case, I do not consider it to be an effective correction of the "error in the process" to remit the matter to the Agency to reconsider the depth and breadth of the Applicant's experience "as if" one were starting afresh. There is nothing before me that gives me reason to believe that it is possible on the facts in evidence before me. The Agency certainly had relevant information in this respect, which I am not privy to because of their decision not to attend the hearing. When a party in possession of relevant information declines to provide it in the forum provided, despite having been given notice of the potential consequences, the usual inference is that the provision of the information would not have been in its favour. This extends to the question of whether effective correction of the errors could be achieved by remitting the matter to Agency managers to begin the process afresh. Given the Agency's failure to attend the hearing, leaving the applicant's case largely unanswered, an adverse inference is justifiable. Therefore, in the unusual circumstances of this case, it is my view that the only effective way to correct the error in the process is to recommend that the applicant be given a permanent AU-04 position in the Windsor office. It is the only measure that would truly correct the error in the process, and put him in the position that he would have been in but for those errors, on the evidence before me. Given the interests of the

> incumbents, and the applicant's submission that it was not necessary to recommend their revocation, I will leave it to the Agency as to whether it wishes to implement this recommendation through revocation of one of the placements in question, which I have found to have been the result of a seriously flawed process, or by assigning Mr. Burstyn to another permanent AU-04 position that he is willing to accept. It is important to underline that these conclusions and recommendations are in no way a criticism of the evident qualification and skills of the incumbents. [Emphasis added]
>
> Further, to complete the correction of the errors, the applicant should be compensated for any losses arising from the errors, including the difference between AU03 and AU04 salary from the period of the original placements to the date of Mr. Burstyn's assignment to a permanent AU04 position.

[6] The CRA wrote to the Applicant on May 3, 2005 and said that it could not carry out the Reviewer's decision since there was no statutory basis or mechanism under its governing legislation that is the *Canada Customs and Revenue Agency Act*, S.C. 1999, as amended (the "Act") to implement the decision.

[7] On the same day, the Applicant asked the Reviewer to clarify her decision. On August 8, 2005, the Reviewer issued a clarification of her decision. In that decision, she said that she had chosen the first option available to her, that is correction of the error in the selection process and that her initial decision had detailed how the error should be corrected. She said that the CRA's subsequent determination to proceed by "soliciting another manager" to make the decision on placement was not the corrective measure that she had found to be necessary in her decision.

[8] The Reviewer also clarified the date for the calculation of retroactive pay and said the following:

> The Agency's memo states that my decision proposed to make the appointment of the applicant retroactive to a point in time when the applicant would have been screened into the process. My finding was that the applicant should be compensated for any losses arising from the errors, "from the period of the original placements to the date of Mr. Burstyn's assignment to a permanent AU04 position." December 1, 2003 is the date permanent placements were made, and that is the date that I find to be the appropriate date for payment of retroactivity, and is what was meant by my reference to the original placements. It is important to clarify that the decision did not state or intend that the assignment should be retroactive to the date the candidates were screened into the process, which I understand as a reference to the date of October 28, 2002 when the results for screening into the pool were announced.

[9] Finally, she dismissed the CRA's argument that she had exceeded her jurisdiction in selecting the remedy. In this regard, she said that her decision was within her authority according to the "guidelines for submitting and processing a request for an independent third party review". This is a reference to the Agency's Staffing Program and Directives on Recourse for Staffing.

[10] The CRA did not seek judicial review of Ms. O'Neil's decision dated March 10, 2005 nor did it file an application for judicial review of the clarification of that decision dated August 8, 2005.

[11] By letter dated August 11, 2005, to the CRA, counsel for the Applicant demanded implementation of the Reviewer's decision. The CRA replied in a letter dated August 25, 2005 and expressed the opinion that the Reviewer had exceeded her jurisdiction. It said that it would not

implement the corrective measures recommended by Ms. O'Neil and further noted that there were currently two matters pending before the Federal Court concerning the authority of a Third Party Reviewer.

[12] On September 7, 2005, the Applicant commenced an application for judicial review in this Court in cause number T-1500-05, respecting the decision of the CRA, in its letter of August 25, 2005, not to implement the decision of Ms. O'Neil. By Order dated June 23, 2006, in *Burstyn v. Canada Customs and Revenue Agency*, [2006] F.C.J. No. 954, ("*Burstyn No. 1*") Madam Justice Layden-Stevenson allowed the application and quashed the CRA's decision of August 25, 2006 not to implement the Reviewer's decision.

[13] By letter dated July 31, 2006, counsel for the Applicant again demanded that the CRA implement the Reviewer's decision. In a letter dated August 22, 2006, the CRA said that it would not implement the corrective measures identified in the Reviewer's decision on the grounds that:

> …we continue to experience difficulty in finding a basis upon which to appoint Mr. Barry Burstyn retroactively to December 1, 2003.
>
> …there is no mechanism in either the CRA Act or the Staffing Program that would allow the Agency the requisite legal authority to effect this appointment as enunciated by the Independent Third Party Reviewer. The decision by the Reviewer to effect this appointment continues to be an illegal action that is contrary to the Staffing Program Directive of the CRA.

III. Summary of Submissions

[14] The parties agree that the test for grounding an order of *mandamus* is set out in the decision in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.). The only points in contention are whether there is a public legal duty owed to the Applicant and whether the balance of convenience lies in his favour.

A. *The Applicant*

[15] On August 23, 2006 the Applicant filed this application seeking an Order of *Mandamus* to compel the Respondent to implement the decisions of the Reviewer.

[16] The Applicant argues that the combined effect of the Respondent's Staffing Program, the Directive on Recourse for Staffing and the Guidelines give rise to a public legal duty for the implementation of the Reviewer's decision.

[17] The Staffing Program, Article P.5.0-9 provides that the Independent Third Party Review process results in a "binding decision". That Program also provides, in Article P.5.0-14, that the recourse for staffing "will be governed by the Directive on Recourse for Staffing".

[18] The Directive provides at page 10, that the Independent Third Party Review process will be binding upon the employer. The Respondent's Guidelines provide that the "appropriate level of management is responsible to implement the corrective measures issued by the review".

[19] The Applicant submits that the only exception to the requirement that the Respondent implement a Reviewer's decision or to challenge such a decision by means of an application for judicial review arises from the language of the Guidelines at page 7, as follows:

> The appropriate level of management is responsible to implement the corrective measures issued by the reviewer, in as much as these are contained within the authority given to the reviewer in this area, in a reasonable time frame, …

[20] The Applicant says that the Respondent unsuccessfully tried to rely on this exception, in the proceedings before Justice Layden-Stevenson, by arguing that the Reviewer had erred in law by granting a remedy that was beyond her jurisdiction.

[21] The Applicant submits that the disposition by Justice Layden-Stevenson in *Burstyn No. 1* means that the Respondent is subject to a duty to implement the Reviewer's decision. He further argues that the balance of convenience lies in his favour.

B. *The Respondent*

[22] The Respondent advances two submissions. First, it argues that the decision of the Reviewer is incorrect and illegal because the Reviewer lacked the jurisdiction to order the corrective measure of appointment to a position. The Respondent relies on the decision in *Canada (Attorney General) v. Gagnon*, [2006] F.C.J. No. 270 in support of this argument.

[23] In *Gagnon*, an employee of the Respondent applied for a promotion and upon denial of that promotion, sought independent third party review. The Reviewer concluded that the employer had acted arbitrarily in denying the employee the position to which she was entitled and ordered retroactive appointment to the position sought. Upon an application for judicial review, the Court found that the Reviewer had exceeded his jurisdiction.

[24] The Respondent submits that the decision in *Gagnon* means that the Reviewer's decision cannot give rise to a public legal duty.

[25] The Respondent also argues that the Reviewer made only a recommendation when she ordered the appointment of the Applicant to the position as a Large Case File Auditor. It submits that a discretionary decision cannot support an application for *mandamus* and relies on the decision in *Kelly v. Canada (Correctional Service)*, [1992] F.C.J. No. 720.

IV. Discussion and Disposition

[26] The principal question arising in this application is whether the decision of the Reviewer gives rise to a public legal duty upon the Respondent to act in implementing that decision. A public legal duty can arise pursuant to a statute or pursuant to guidelines issued under statutory authority; see *Jefford v. Canada*, [1988] 2 F.C. 189 and *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.); aff'd. [1990] 2 W.W.R. 69 (F.C.A.).

[27] As noted above, the Reviewer's decision was made pursuant to the Respondent's Staffing Program and Directives on Recourse for Staffing. In *Burstyn No. 1*, Justice Layden-Stevenson described the statutory authorization and genesis of the Staffing Program at paragraph 21 as follows:

> The agency is established as a body corporate under subsection 4(1) of the Act and pursuant to subsection 4(2) is, for all purposes, an agent of Her Majesty in Right of Canada. It is responsible for supporting the administration and enforcement of the program legislation (paragraph 5(1)(a) of the Act). The agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business (subsection 53(1) of the Act) and it must develop a program governing staffing, including the appointment of, and recourse for, employees (subsection 54(1) of the Act).

[28] In my opinion, the fact that the Staffing Program was enacted pursuant to legislation favors a finding that processes created in that program give rise to a legal duty. The Respondent authorized

the Staffing Program and it is reasonable to find that it deliberately chose the steps and processes identified in that Program.

[29] A decision was made by the Reviewer, pursuant to the Staffing Program and processes created by the Respondent. At paragraph 27 of her reasons, Justice Layden-Stevenson characterizes the decision as having a "judicial" character, having regard to processes before the Reviewer, including the authority to hold a hearing with witnesses. I see no reason to disagree and note that the characterization of the decision in that way also tends in favour of finding that it gives rise to a public legal duty.

[30] The decision in *Gagnon* is largely irrelevant, in my opinion, to the issues raised in this application. It is undisputed that the Respondent did not seek judicial review of the Reviewer's decision nor of the clarification decision. The Respondent cannot challenge the well-foundness of that decision in this proceeding, having failed to do so at the appropriate time and in the appropriate manner, pursuant to the *Federal Courts Act* and the *Federal Courts Rules*, SOR/98-106.

[31] I refer again to *Burstyn No. 1*. It seems that the Respondent attempted to challenge the Reviewer's decision in that case as well. Justice Layden-Stevenson briefly described that attempt in paragraph 1 as follows:

> Can the respondent agency, having failed to seek judicial review of an Independent Third Party Review (ITPR) decision, achieve that objective in this proceeding, where the agency's refusal to implement

> the ITPR decision is being challenged? I have determined that, on the facts and circumstances of this particular matter, the answer is no.

[32] At paragraph 20, under the heading “The Concessions”, she commented further as follows:

> As noted, the agency has no quarrel with the underlying reasons of the reviewer. Its only issue is with the recommendation for correction of the error in the process. Although not expressed in these terms, I take that concession to mean that the agency does not dispute that the reviewer had jurisdiction to conduct the inquiry and to order a remedy. The agency also concedes that it should have applied for judicial review and declined to do so because it was awaiting the outcome in *Gagnon*. In retrospect, the agency considers its chosen course of action to have been taken in error. It does not suggest that its decision not to seek judicial review in this matter was anything other than deliberative.

[33] Finally, I must consider the consequences of the Respondent’s deliberate choice to not pursue an application for judicial review. That choice means that there is a decision in place that presumptively, is entitled to be enforced. The jurisdictional validity of that decision has not been challenged and I adopt the words of Justice von Finckenstein in *Sherman v. Canada (Customs and Revenue Agency)* (2005), 269 F.T.R. 294 (F.C.) at paragraph 19 as follows:

> Having set up the ITPR process, having participated in the hearing, having started to implement the award (as interpreted by CCRA), having failed to object to the award and having failed to seek judicial review of the award, the CCRA is now estopped from asserting at this late date that the Reviewer lacked jurisdiction to make the award. As succinctly stated by Campbell J. In Ontario Provincial Police (Commissioner) v. Silverman (2000, 49 O.R. (3d) 272 at paragraph 25:

> … A basic principle of our law estops a party who invites a tribunal to accept jurisdiction from saying, when he finds that the tribunal decides against him, that the tribunal lacked the very jurisdiction he invited it to exercise: Ex p. Pratt, Re Pratt (1884), 12 Q.B.D. 334 at p. 341, 53 L.J. Ch. 613, per Bowen L.J., quoted by Gliders J.A. in Imperial Tobacco v. Imperial Tobacco Sales, [1939] O.R. 627 at p. 644, 72 C.C.C. 321 at p. 346.

[34] Is the decision of the Reviewer a "decision" or a "recommendation"? If the later, it cannot be enforced by an order of *mandamus*. In making its submissions that the decision is no more than a recommendation, the Respondent focuses on the use of the words "recommended" at pages 21 and 22 of the decision.

[35] I am not persuaded, having regard to the totality of her decision, that the Reviewer was only making a recommendation. In my opinion, she had identified a remedy for the Applicant and intended that it be implemented. This argument on the part of the Respondent is rejected.

[36] I am satisfied that the Applicant has shown that a public legal duty lies upon the Respondent to give effect to the decision of the Reviewer and that the decision is not a recommendation.

[37] The next issue is whether the balance of convenience lies in favour of granting an order of *mandamus*. Such an order, as is with all forms of relief available upon an application for judicial review, is wholly within the discretion of the Court, pursuant to subsection 18.1(3) of the *Federal Courts Act*.

[38] In *Apotex*, at paragraphs 107 and 108, the Federal Court of Appeal discussed some of the factors that are to be considered in assessing the balance of convenience. Those factors include administrative cost or chaos and patented health or safety risks to the public.

[39] The present case does not involve public interests. The duty arises in relation to the Applicant personally. The Respondent has not expressed a concern about administration chaos but has focused instead on what it calls the "illegality" of the decision in issue. That question is not properly raised in this proceeding and in my opinion, does not enter into consideration of the balance of convenience.

[40] I am satisfied that the Applicant has shown that the balance of convenience lies in his favour. He pursued the Independent Third Party Review in accordance with governing processes that were established by the Respondent. The Respondent chose not to participate in that proceeding and subsequently, chose not to challenge the Reviewer's decision. The Applicant pursued the process in the expectation of a remedy and having met the only other part of the test that was in dispute, that is the existence of a public legal duty, he is entitled to the benefit of the decision. I find that the balance of convenience lies in his favour.

[41] I turn now to the Applicant's requests for collateral relief, that is for an order that he be compensated in accordance with the Reviewer's decision for any losses sustained up to the date of

his appointment together with interest, an order for damages payable by the Respondent pursuant to the equitable jurisdiction of this Court, and costs on a solicitor-client basis.

[42] As noted above, the Reviewer addressed the question of compensation in her clarification decision. For ease of reference, I repeat her comments in that regard:

> The Agency's memo states that my decision proposed to make the appointment of the applicant retroactive to a point in time when the applicant would have been screened into the process. My finding was that the applicant should be compensated for any losses arising from the errors, "from the period of the original placements to the date of Mr. Burstyn's assignment to a permanent AU04 position." December 1, 2003 is the date permanent placements were made, and that is the date that I find to be the appropriate date for payment of retroactivity, and is what was meant by my reference to the original placements. It is important to clarify that the decision did not state or intend that the assignment should be retroactive to the date the candidates were screened into the process, which I understand as a reference to the date of October 28, 2002 when the results for screening into the pool were announced.

[43] I decline to make the order requested by the Applicant. I am not prepared to dissect the decision of the Reviewer, including the clarification decision, and the order of *mandamus* will issue with respect to the decision as a whole.

[44] In any event, damages are not available as relief in an application for judicial review; see s. 18.1(3) of the *Federal Courts Act* and *Tench v. Canada (Attorney General)* (1999), 179 F.T.R. 126.

[45] The same objection with respect to the exercise of this Court's equitable jurisdiction which is conferred by section 3 of the *Federal Courts Act*.

[46] The only issue remaining is the question of costs. The award of costs is governed by Rule 400 of the *Federal Courts Rules*. The Court has full discretion over costs, including an award of solicitor-client costs. Such costs are available in rare instances, for example where one party has acted in a reprehensible, scandalous or outrageous manner; see *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405.

[47] I am not persuaded that such is the case here. I refer to the decision in *Sherman* where the applicant also sought solicitor and client costs. In denying that request, the Court found that the issue raised was one of jurisdiction and reasonable arguments were advanced by the respondent.

[48] In the present case, the Respondent has recited arguments that were apparently raised and rejected before Justice Layden-Stevenson. In my view, costs here should be assessed in the full discretion of the Assessment Officer.

ORDER

The application for judicial review is allowed and an order for *mandamus* shall issue relative to implementation of the Order of the Independent Third Party Reviewer Kathleen O'Neil, that is the decision dated March 10, 2005 as clarified by her decision dated August 8, 2005. The request for corollary relief is denied. The Applicant shall have his costs to be taxed in the full discretion of the Assessment Officer.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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