

**Date: 20081218**

**Docket: T-540-08**

**Citation: 2008 FC 1397**

**Ottawa, Ontario, this 18<sup>th</sup> day of December 2008**

**PRESENT: The Honourable Orville Frenette**

**BETWEEN:**

**Harjinder JOHAL and  
Thomas STASIEWSKI**

**Applicants**

**and**

**CANADA REVENUE AGENCY and  
Christina MAO**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in the matter of a final level decision by Lysanne M. Gauvin, Assistant Commissioner, Human Resources Branch of the respondent, the Canada Revenue Agency, dated February 6, 2008, wherein she denied the applicants' grievances that challenged the appointment without competition of Christina Mao as a Team Leader (MG-05) at the Burnaby-Fraser Tax Services Office.

[2] The respondent Christina Mao was employed by the respondent Canada Revenue Agency (the “Agency”), as a Team Leader (AU-03), before commencing a one year leave without pay for personal needs in May 2000. Following this one year leave, she took a five year “leave without pay for family-related needs”, purportedly to care for her family. She gave birth to a child in September 2001.

[3] However, unknown to the Agency, during that five year leave, she worked full-time for the Investment Dealers Association for that period.

[4] In September 2006, Ms. Mao advised the Agency that she was ready to return to work. During her absence, the position was backfilled by another incumbent.

[5] Since Ms. Mao’s position had been backfilled, she was granted Preferred Status to facilitate her placement to a permanent position based upon the Directive on Preferred Status. She was given a temporary AU-03 position in Vancouver until a permanent position was available for her in Burnaby.

[6] On May 11, 2007, without competition, she was given preferential treatment and placed to a MG-05 Team Leader position in Burnaby, effective May 22, 2007.

[7] In order to accommodate Ms. Mao's appointment, the Agency cancelled the applicant Harjinder Johal's acting three-month assignment in the same position. He had been selected from a qualified pool of candidates for this acting appointment.

[8] It was only after Ms. Mao's return to work in 2007 that management and the applicants discovered she had worked full time while she was on leave for family-related needs.

[9] The applicants, in their grievances, allege that Ms. Mao abused and violated the terms of her leave without pay by occupying outside remunerated employment. She should not have been granted Preferred Status and awarded the position granted without a competition to which the applicants could have applied.

[10] The applicants allege that this illegal and unfair process prevented them from obtaining the position and prejudiced their advancement opportunities in the Agency.

[11] Their grievances passed three levels in the process and culminated in a decision at the final level, which forms the object of this judicial review.

[12] The decision by Lysanne M. Gauvin, Assistant Commissioner, Human Resources Branch, Canada Revenue Agency, denied the applicants' corrective action for two reasons:

1. Subsection 208(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, states that an employee cannot file an individual grievance in relation to a matter for which another

type of redress is provided for under any Act of Parliament (in this case, Annex S of the Agency's Staffing Program "Directive on Preferred Status", developed under the authority of subsection 54(1) of the *Canada Revenue Agency Act*, S.C. 1999, c. 17; and

2. The grievances do not concern the applicants.

[13] This application for judicial review raises the following issues:

1. Did the Agency err in concluding that subsection 208(2) of the *Public Service Labour Relations Act* precludes the applicants from presenting their grievances in this matter? More particularly, do the *Canada Revenue Agency Act* and the Agency's Staffing Program provide recourse for staffing matters?
2. Can the applicants file a grievance in respect of matters not related to their own employment?

#### The Standard of Review

[14] Questions of fact and questions of mixed fact and law are reviewable on the standard of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

[15] Questions of law and jurisdictional questions are reviewable on a standard of correctness. In

*Dunsmuir, supra*, the Supreme Court of Canada stated at paragraph 59:

. . . In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction . . .

[16] In the present case, the decision-maker rendered a three fold decision:

- A. She found that the grievors did not have the right to challenge the appointment of Ms. Mao;
- B. She found that there had been no abuse of process and/or abuse of authority;
- C. She did not possess the jurisdiction to entertain the grievances under subsection 208(2) of the *Public Service Labour Relations Act*.

[17] In my view, the standard of review in A and C is correctness and is reasonableness in B.

#### Pertinent Legislation

[18] Subsections 208 (1) and (2) of the *Public Service Labour Relations Act* read as follows:

**208.** (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

(2) An employee may not present an individual grievance in respect of which an administrative

**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de

procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.

réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

[19] Section 53 and subsections 54(1) and 56(2) of the *Canada Revenue Agency Act* read:

**53.** (1) The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.

**53.** (1) L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.

(2) The Commissioner must exercise the appointment authority under subsection (1) on behalf of the Agency.

(2) Les attributions prévues au paragraphe (1) sont exercées par le commissaire pour le compte de l'Agence.

**54.** (1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.

**54.** (1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.

**56.** (2) The Public Service Commission may periodically review the compatibility of the principles governing the Agency's staffing program with those governing staffing under the *Public Service Employment Act* and may report its findings in its annual report.

**56.** (2) La Commission de la fonction publique peut vérifier périodiquement la compatibilité des principes du programme de dotation de l'Agence avec les principes régissant la dotation sous le régime de la *Loi sur l'emploi dans la fonction publique* et faire état de ses conclusions dans son rapport d'activités.

[20] The Agency is a corporate entity created under subsection 4(1) of the *Canada Revenue Agency Act*:

4. (1) The Canada Customs and Revenue Agency is continued as a body corporate under the name of the Canada Revenue Agency.

(2) The Agency is for all purposes an agent of Her Majesty in right of Canada.

(3) The headquarters of the Agency must be at such place in Canada as may be designated by the Governor in Council.

4. (1) L'Agence des douanes et du revenu du Canada, dotée de la personnalité morale, est prorogée sous le nom d'Agence du revenu du Canada.

(2) L'Agence ne peut exercer ses pouvoirs qu'à titre de mandataire de Sa Majesté du chef du Canada.

(3) L'Agence a son siège au lieu au Canada fixé par le gouverneur en conseil.

[21] Pursuant to subsection 54(1), the Agency has implemented a Staffing Program and related directives that provide recourse to its employees. Amongst the directives, the Agency adopted Annex S – Directive on Preferred Status. This directive states that “the purpose of granting Preferred Status is to endeavour to provide continued employment to permanent employees of the Canada Revenue Agency [...]”.

[22] The Staffing Program, at P6.2, mandates that the Agency place employees with Preferred Status:

As part of the Staffing Program, Authorized Persons are responsible for ensuring the placement of persons with Preferred Status, as per the Directive on Preferred Status.

[23] The applicants in this case did not have Preferred Status. The Directive on Preferred Status provides that employees without Preferred Status have no recourse when an employee with Preferred Status is placed. At 5.2.3 it states:

Employees without Preferred Status are not entitled to any recourse when an individual with Preferred Status is appointed except as part of the recourse normally applicable to a selection process (see article 2.3.2).

[24] The applicants rely upon paragraph 208(1)(b) of the *Public Service Labour Relations Act*. However, this paragraph is limited by subsection 208(2).

[25] The applicants refer to the decision of the Federal Court of Appeal in *Canada (Treasury Board) v. Boutilier*, [2000] 3 F.C. 27, leave to appeal to the S.C.C. denied, [2000] S.C.C.A. No. 12.

[26] In this decision, the Court of Appeal concluded that an aggrieved employee will only be disentitled from presenting a grievance because another redress is provided if a “real remedy” is not available to the grievors. At paragraph 23, the Court of Appeal states that there must be a remedy that can deal “meaningfully and effectively with the substance of the employee’s grievance.”

[27] In an earlier decision, *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354, at paragraph 20, the Court of Appeal reasoned that an administrative procedure in redress “must be capable of producing some real redress which could be of personal benefit to the same complainant.”

[28] The applicants plead that, based on the Federal Court of Appeal’s reasoning, they have no recourse at all under the *Canada Revenue Agency Act* permitting them to challenge Ms. Mao’s Preferred Status and her resulting appointment pursuant to that Status.



[29] The respondents invoke the Directive on Preferred Status denying the applicants any recourse on the attribution of the Preferred Status. They also submit that the applicants could have challenged Ms. Mao's appointment by an application for judicial review to the Federal Court. (Respondent's counsel for the Canada Revenue Agency stated in open Court that she would not object to the presentation of such an application even beyond the prescribed delays).

[30] The Canada Revenue Agency further submits that Parliament intended to provide the Agency with the authority to create an exclusive regime to deal with all staffing matters. There was no intention to subject staffing matters to the *Public Service Labour Relations Act* and collective agreement grievance procedure. Furthermore, section 34.04 of the collective agreement between the Agency and the Professional Institute of the Public Service of Canada indicates that a grievance cannot be presented if there is another administrative process which addresses the recourse. Section 34.04 reads:

Subject to and as provided in Section 91 of the *Public Service Staff Relations Act*, an employee who feels that he has been treated unjustly or considers himself aggrieved by an action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 34.02, except that:

- (a) where there is another administrative procedure provided by or under any Act of Parliament to deal with his specific complaint such procedure must be followed,
- (b) where the grievance relates to the interpretation or application of this Collective Agreement or an Arbitral Award, the employee is not entitled to present the grievance unless the employee has the approval of and is represented by the Institute.

[31] The respondent also submits that the applicants are trying to jump to the *Public Service Labour Relations Act* and invoke the grievance process to circumvent a redress mechanism provided for under subsection 54(1) of the *Canada Revenue Agency Act*.

[32] I have to agree with the respondent's position on this point. It would subvert the Agency's Staffing Program to permit the applicants to have recourse to a grievance process for staffing matters that are addressed and governed by the *Canada Revenue Agency Act*.

[33] The Staffing Program is an administrative process for recourse, even though it has its remedial limitations on the applicants in this case; it is the complete code that governs recourses for the Agency's employees.

[34] I believe my position is supported by Justice James Russell's decision in the case *The Professional Institute of the Public Service of Canada v. Canada Customs and Revenue Agency*, 2004 FC 507. In that case, the Staffing Program of the respondent, the Canada Customs and Revenue Agency, was challenged on the basis it provided an inadequate recourse procedure which did not respect the principle of procedural fairness.

[35] Justice Russell dismissed the application as "speculative, premature" and because the *Canada Customs and Revenue Agency Act* did not support the conclusion that it provided an "unreasonable" recourse mechanism.

[36] In another case, *Anderson v. Canada Customs and Revenue Agency*, 2003 FCT 667, Justice Eleanor Dawson had to deal with an application from an employee of the Canada Customs and Revenue Agency who was unsuccessful in obtaining a position of Team Leader and who challenged the Agency's staff recourse procedure. The applicant invoked the process provided for by the *Public Service Employment Act* and its interpretation and application of the merit principle. Justice Dawson found that the then recourse mechanism by means of an "Individual Feedback", complied with the requirements of procedural fairness. The point she made about "staffing practices" and the word "recourse", is useful here. Justice Dawson found that the Agency respected the letter and the intent and the objective of the Act. It was therefore not necessary or useful to consider other legislation, such as the *Public Service Employment Act* which formerly regulated such matters, to determine the interpretation of the new legislation or to equate employee recourse as under the *Public Service Employment Act* (at paragraphs 30 to 33 of her decision).

[37] An analysis of the submissions of the parties on the question of "recourses", and differences between the *Public Service Labour Relations Act*, the *Canada Customs and Revenue Agency Act* and the *Canada Revenue Agency Act* legislations on this point, leads to the conclusion that the applicants' point of view cannot be accepted.

[38] In essence, in creating the *Canada Revenue Agency Act*, Parliament intended to provide this Agency with exclusive authority to create a complete regime to deal with all staffing matters. Recourse relating to staffing matters is provided to every Canada Revenue Agency's employee in every foreseeable situation relating to the full spectrum of employer-employee relationship.

[39] Concerning the second issue in this case: “Can the applicants file a grievance in respect of matters not related to their employment?”, the short answer to this question, in my opinion, is “no”. However, particularly in the case of the applicant Harjinder Johal, the grievance did directly affect his employment, since he acted in the sought-after position for a period of three months and he was interested in occupying it on a more permanent basis. Ms. Mao’s appointment prevented the applicant Johal from achieving this goal.

[40] Notwithstanding this conclusion, it remains that the applicants had to file an application for judicial review after being notified that Ms. Mao had been placed at the MG-05 Team Leader position in May 2007, to challenge this appointment.

[41] Considering the above reasons, the applicants’ basis for a judicial review relying on the grievance process and their recourse, must fail.

[42] However, the applicants have obtained the respondent’s consent to present an application for judicial review of the decision appointing Ms. Mao to the above described position, after the expiry of the time limit.

## **JUDGMENT**

THE COURT ORDERS AND ADJUDGES THAT:

This application for judicial review is dismissed with costs.

The applicants are authorized to present an application for judicial review of the decision to appoint Christina Mao to the Canada Revenue Agency's position MG-05 – Team Leader, in May 2007, beyond the time limit, provided it is filed within thirty (30) days of the present Judgment.

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“Orville Frenette”  
Deputy Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-540-08

**STYLE OF CAUSE:** Harjinder JOHAL and Thomas STASIEWSKI v. CANADA  
REVENUE AGENCY and Christina MAO

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 9, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** The Honourable Orville Frenette

**DATED:** December 18, 2008

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