

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151013

Docket: A-10-15

Citation: 2015 FCA 217

**CORAM: TRUDEL J.A.
SCOTT J.A.
BOIVIN J.A.**

BETWEEN:

KELLY PLATO

Appellant

and

CANADA REVENUE AGENCY

Respondent

Heard at Ottawa, Ontario, on October 13, 2015.
Judgment delivered from the Bench at Ottawa, Ontario, on October 13, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

SCOTT J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 13, 2015).

SCOTT J.A.

[1] This is an appeal from a judgement of Boswell J. (the Judge) of the Federal Court, dated December 19, 2014 which dismissed on grounds of mootness a second application for judicial review brought by Mr. Kelly Plato (the appellant) that challenged the Canada Revenue Agency's (CRA) measures to correct an error in a staffing process conducted in 2007.

[2] The Judge found the application for judicial review to be moot primarily because neither the appellant's rights nor those of any other candidate could be affected by a decision in this application; the appellant having admitted that he could never have been successful in the staffing process at issue, and because the pool of candidates for the AU-2 tax auditor position ceased to exist in 2010. Notwithstanding the appellant's opposition, the Judge allowed new evidence in the form of an affidavit executed by Ms. Lin Lian, employee of the CRA, establishing that the appellant was promoted to the position of tax auditor AU-03 on March 17, 2014 because it was relevant to the issue of mootness.

[3] The Judge declined to exercise his discretion to hear the case even if it was moot because the rights of the appellant or those of any other candidate could not be affected by the case since the assessment tool, that is the standardized assessment tool for Legislation Policies and Procedures was not used anymore by the CRA.

[4] The identification of the legal factors to determine if a case is moot is a question of law reviewable under the standard of correctness (*Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, [2013] 4 F.C.R. 155, at paragraph 57). Once it is established that a case is moot, the Judge has a broad discretion to hear the matter or not, but must properly weigh the criteria established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (*Borowski*). This fine exercise of balancing is a mixed question of facts and law. Deference is owed to that decision.

[5] Before us, the appellant challenged the Judge's decision on three grounds. Firstly, he submits that the affidavit establishing that he had been promoted to a higher classified position than the one at issue in his application for judicial review should not have been admitted into evidence. He argues that it failed to meet the four-prong test to admit new evidence since it was irrelevant on the issue of mootness and was not submitted in a timely manner. He also asserts that the Judge erred in declining to decide the case after concluding that his application for judicial review was moot since there is still a tangible dispute that could affect the outcome of the selection process at issue. Finally, he claims that the Judge failed to address the reasonableness of the corrective measures taken by the CRA.

[6] Despite able arguments by counsel for the appellant, we are of the opinion that this appeal must fail for the following reasons.

[7] Even if the Judge would have erred in allowing the affidavit as new evidence, as it was not filed in a timely manner, it does not impeach his finding that the appellant's application for judicial review is moot.

[8] The appellant conceded before us that, even without this affidavit, the Judge could have reached the same conclusion. The Judge applied the criteria established by the Supreme Court of Canada in *Borowski* when he determined there was no live controversy.

[9] We are satisfied that the Judge chose the proper test and made no error in applying it to the particular facts of this case.

[10] The Judge did not err either when he declined to use his discretion to hear this case notwithstanding that it was moot. We see no error in his assessment that the appellant does not have a personal stake in the outcome of his judicial application. The CRA had used a locally developed assessment tool in the selection process, as opposed to the standardized assessment tool used in the selection process, which is no longer in place and the pool of qualified candidates no longer exists. Consequently, his conclusion on the lack of a live controversy or concrete dispute stands and therefore, it was not necessary that he address the reasonableness of the corrective measures implemented by the CRA.

[11] Having consideration to whether there is an adversarial context, to the lack of practical effect of any decision of this Court on the appellant, to the interests of judicial economy and to the role of the courts in the legal system as a whole, we find no error in the Federal Court judgment that warrants the intervention of this Court.

[12] For these reasons, this appeal will therefore be dismissed with costs.

"A.F. Scott"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-10-15
STYLE OF CAUSE: KELLY PLATO v. CANADA
REVENUE AGENCY

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: OCTOBER 13, 2015

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DELIVERED FROM THE BENCH BY: SCOTT J.A.

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