Federal Court  Cour fédérale

Date: 20150106

Docket: T-1697-13

Citation: 2015 FC 10

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 6, 2015

Present: The Honourable Mr. Justice Shore

BETWEEN:

MARCELLE LUSSIER

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

I. Preliminary

> [55] Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of ad hoc discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem

> comprehensively and proactively, rather than incrementally and reactively on a case by case basis.
>
> (*Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para 55 (*Thamotharem*))

II. Introduction

[1] This is an application for judicial review under paragraphs 18.1(4)(*c*) and (*d*) of the *Federal Courts Act*, RSC (1985), c F-7, of a decision of the Acting Director of the National Conflict Resolution Office (NCRO) of the Canada Revenue Agency (the CRA or the respondent), in which the applicant's application for an Independent Third Party Review (ITPR) was dismissed on the ground that it was time-barred.

III. Facts

[2] The applicant has been employed at the CRA since 1988. In 2010, the applicant was appointed to the position of auditor, classified at the AU-01 level. Following a performance evaluation, the applicant was assigned to a position of compliance programs officer, at a lower level (SP-04). Not meeting the requirements of this position, the applicant was demoted to the position of office clerk, classified at the lower level SP-02.

[3] On August 23, 2013, the applicant's grievance regarding her demotion was rejected, while the applicant was on annual leave.

[4] Following this rejection, after being informed by a labour relations officer from the Professional Institute of the Public Service of Canada (the applicant's representative) of the

possibility of her ITPR remedy, the applicant presented to the respondent, on her return to work on September 10, 2013, an ITPR application.

[5] On September 19, 2013, the respondent dismissed the applicant's ITPR application on the ground that it had been presented nine days after the expiration of the time limit provided in *Form RC117, Independent Third Party Review Application* (form RC117).

[6] On September 20, 2013, the applicant's representative sent an e-mail to the respondent to dispute the dismissal and to describe the applicant's particular circumstances, showing that it was impossible for her to act before September 9, 2013. In this e-mail, the representative stated, among other things, that:

- The applicant received the reply to her grievance while she was on annual leave and that it was impossible to reach her during this period;
- The applicant does not have long-distance access to the CRA's computer network and, therefore, did not have access to the employer's policies and forms;
- The employer's policy on ITPR is ambiguous and does not mention any time limit for filing the ITPR application; only the form contains this information. As for the reply to the applicant's grievance, she was silent as to the possibility of filing an ITPR application and the applicable time limit;
- When she returned to work on September 9, 2013, the applicant met with her union representative so as to fill out an ITPR application;
- It was impossible for the applicant to act before September 9 and the fact that the applicant submitted her application on September 10 shows that she acted diligently.

(Applicant's Record, at p 9).

[7] On September 24, 2013, the respondent rejected the dispute of the applicant's representative and upheld its decision of September 19, 2013.

IV. Impugned decision

[8] The decision subject to this judicial review is the dismissal of the applicant's ITPR application by reason of lateness, dated September 19 and 24, 2013.

[9] The letter dismissing the ITPR application of September 19, 2013, is reproduced below:

> [TRANSLATION]
>
> Following your application for Independent Third Party Review (ITPR) regarding your demotion, which does not result from a disciplinary action, the National Conflict Resolution Office regrets to inform you that your application cannot be processed for the following reason:
>
> > According to *Form RC117, Independent Third Party Review (ITPR) Application*, this form must be completed by the applicant and received at the National Conflict Resolution Office within nine calendar days following the date of notification or event engaging the applicant's right to access the ITPR recourse mechanism.
>
> As indicated on the reply form of your fourth level grievance (final level), you signed this form on August 23, 2013. Your application was received at the National Conflict Resolution Office on September 10, 2013, i.e. 18 calendar days after the date of signing the reply form to your final level grievance. For this reason your ITPR application is ineligible.
>
> (Applicant's Record, at p 8)
>
> [Emphasis added.]

[10] Following the e-mail sent by the applicant's representative, explaining the reasons for which it was impossible for the applicant to act before September 9, 2013, the respondent replied on September 24, 2013:

> [TRANSLATION]
>
> We regret that our decision relating to Ms. Lussier's application was not what you had hoped for.
>
> The role of the National Conflict Resolution Office (NCRO) is to administer the recourse mechanism of the Independent Third Party Review (ITPR). The NCRO determines the eligibility of applications received and ensures that all parties involved respect the roles and responsibilities described in the directives and the ITPR form. Although we acknowledge the difficulties that Ms. Lussier encountered in the process, we cannot do anything other than respect the time limit stated on the form. [Emphasis added.]
>
> The NCRO, as the administrator in the ITPR process, must apply the directive as it exists and the time limits resulting from it; these time limits are identified on the ITPR form included in the directive. The application was received after the time limit of nine (9) days, and is thus ineligible for the ITPR process. Unfortunately, we cannot change our decision regarding this case. [Emphasis in the original.]
>
> (Applicant's Record, at p 11)

V. Issue

[11] The application raises the following issue: Is the respondent's decision to dismiss the applicant's ITPR application on the ground that it was time-barred reasonable?

VI. Parties' position

a) The applicant' position

[12] First, the applicant argues that the respondent's categorical dismissal of her ITPR application was decided without regard for the applicant's particular circumstances and is thus unreasonable (*Haymour v Canada (Revenue Agency)*, 2013 FC 1072, at para 20 (*Haymour*)).

[13] Then, the applicant alleges that the respondent unduly restricted its discretion by strictly applying the not mandatory time limit referred to by the CRA's *ITPR Processing Directive* (the Directive) (*Harnum v Canada (Attorney General)*, 2009 FC 1184, at paras 38 and 39; *Gandy v Canada (Canada Customs and Revenue Agency)*, 2006 FC 862, at para 19).

[14] Further, the applicant argues that by refusing to consider the applicant's individual circumstances surrounding the time-barred filing of her ITPR application, the respondent violated the principles of natural justice and procedural fairness (*Ching-Chu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 855 (*Ching-Chu*); *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras 21 and 22 (*Newfoundland and Labrador Nurses' Union*); *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 126 and 129 (*Dunsmuir*).

b) The respondent's position

[15] Furthermore, the respondent argued that the dismissal of the applicant's late ITPR application is reasonable. In support of its claim, the respondent argued that there was no reason explaining the delay accompanying the applicant's original ITPR application dated September 10, 2013. The respondent alleged that the reasons of its decision suggest that the respondent read the explanations communicated by the applicant's representative, by indicating that it recognized [TRANSLATION] "the difficulties encountered by Ms. Lussier in processing her ITPR application" (Applicant's Record, at p 11).

[16] Moreover, the respondent alleged that the adequacy of reasons cannot, in itself, justify the Court's setting aside of an administrative body's decision (*Newfoundland and Labrador Nurses' Union*, above, at para 12).

VII. Standard of review

[17] The respondent's decision to dismiss the ITPR application for being time-barred raises a question of mixed fact and law that must be reviewed on the reasonableness standard (*Haymour*, above at para 10).

[18] So as to determine whether the decision falls within the parameters of reasonableness, the Court must analyze the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range

of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47). Furthermore, the Court cannot substitute its own reasons for those of the respondent, but may, if it considers it necessary, examine the file to assess the reasonableness of the decision under review (*Newfoundland and Labrador Nurses' Union*, above at para 15; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54).

[19] Finally, the Court must also examine the context in which the decision was made (*Haymour*, above at para 18; *Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 42 to 45).

VIII. Analysis

[20] The applicant's ITPR application was dismissed for the reason that it was filed beyond the time limit of nine days provided in form RC117.

[21] At the outset, it is timely to give an overview of the ITPR application procedure so as to analyze the reasonableness of the respondent's exercise of discretion, in light of its mandate.

[22] The ITPR procedure, which was initiated by filing form RC117 with the NCRO, is a dispute resolution mechanism established by the CRA for employees who wish to dispute the rejection of a grievance and who do not have access to arbitration provided by the *Public Service Labour Relations Act*, SC 2003, c 22, s. 2 (PSLRA).

[23] The ITPR procedure was established under paragraph 51(1)(*g*) of the *Canada Revenue Agency Act*, SC 1999, c 17 (CRAA), below, which gives a wide grant of authorities to the CRA with respect to the development of the ITPR's parameters, including the question of applicable time limits. It should be noted that neither the CRAA nor the PSLRA imposes a limitation period with respect to the ITPR procedure.

51. (1) The Agency may, in the exercise of its responsibilities in relation to human resources management, […] (*g*) provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;	**51**. (1) L'Agence peut, dans l'exercice de ses attributions en matière de gestion des ressources humaines : […] *g*) prévoir, pour des motifs autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

[24] Case law suggests that the directives and soft law from administrative agencies are used to define the policies that in turn help structure the decision-makers' exercise of discretion and to guide the interpretation of their enabling legislation (*Thamotharem*, above, at para 56; *Ainsley Financial Corp. v Ontario Securities Commission*, [1994] OJ 2966). However, without minimizing the importance of the directives and soft law, which ensure some consistency and efficiency in the decision-making process, the administrative decision-makers must examine the circumstances and particular facts in each case (*Ha v Canada (Minister of Citizenship and*

Immigration), 2004 FCA 49 at para 71). The Federal Court of Appeal set out in *Thamotharem*, above at para 62:

> [62] Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, Maple Lodge Farms, at page 7. ...

[25] In the context of a request for an extension of time to a visa officer, the Court set out the importance of administrative decision-makers showing flexibility and discernment in the exercise of their discretion, as appropriate (*Ching-Chu*, above):

> [25] The visa officer fettered his discretion by categorically stating he never grants extensions of time to file additional information. If the officer had considered the request for an extension, exercised his discretion, and then concluded that no extension will be granted for the following reason, then this decision would be legal. But by fettering his discretion, the visa officer is refusing to consider exercising his discretion, which is illegal. See *Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722 (T.D.) per Jerome A.C.J. at page 739:
>
> > The importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion is highlighted by D.P. Jones and A.S. de Villars in *Principles of Administrative Law*, where the difference between "general" and "inflexible" policy is described at page 137:
> >
> > > ... the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything,

> therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.
>
> [Emphasis added.]

[26] It follows from this logic that in the absence of a mandatory limitation period provided by law, the respondent had the discretion to relieve the applicant of the application of the time limit it had created, based on the particular circumstances of the ITPR application. However, in articulating its decision, the respondent interpreted the time limit provided in form RC117 as mandatory, without weighing the explanations and particular circumstances of the applicant, as provided by her representative.

[27] Specifically, the respondent narrowly assessed the scope of its discretion, by concluding that it could not [TRANSLATION] "do otherwise but to respect the time limit indicated on the form" despite the fact that its mandate does not pose a risk to its discretion in accepting a late application, as appropriate. The respondent also stated in its reasons that [TRANSLATION] "the NCRO, as administrator of the ITPR process, must apply the directive as it exists and the time limits that result from it" (Applicant's Record, at p 11). [Emphasis added.]

[28] Furthermore, the harm caused to the applicant and the absence of harm caused to the respondent are factors that must be considered in assessing the reasonableness of the respondent's decision (*Haymour*, above at para 20). In this view, it is important to point out that

in this case, the strict application of the short time limit of nine days provided by form RC117 deprives the applicant of the only remedy granted to her in relation to her grievance.

[29] The Court considers that the respondent erred by neglecting to interpret the limitation period provided in form RC117 in a manner that allows it to reach its objective and by neglecting to consider the explanations provided by the applicant regarding her particular circumstances (*Haymour*, above at para 18).

IX. Conclusion

[30] Given the reasons above, the respondent's decision is unreasonable.

[31] Costs are awarded on a party-and-party basis, under subsection 400(4) of the *Federal Courts Rules*, SOR/98-106 (*Girard v Canada (Attorney General)*, 2007 FC 1333 at para 52; *Reed v Canada (Attorney General)*, 2007 FC 1237).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;
2. The decision of the Canada Revenue Agency's National Conflict Resolution Office is set aside;
3. The application of the applicant's Independent Third Party Review be reconsidered by the National Conflict Resolution Office in accordance with these reasons;
4. Costs are awarded to the applicant.

"Michel M.J. Shore"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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