Federal Court  Cour fédérale

Date: 20230814

Docket: T-2019-22

Citation: 2023 FC 1107

Toronto, Ontario, August 14, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ADEEB AHMED

Applicant
(Responding Party)

and

CANADA REVENUE AGENCY

Respondent
(Moving Party)

ORDER AND REASONS

I. Background

[1] The Respondent, Canada Revenue Agency [CRA], brings this motion under Rule 369 of the *Federal Courts Rules*, SOR/98-106 to strike the within application for judicial review and suspend all timelines pending the Court's determination. In the alternative, if the motion to strike is not successful, the CRA seeks leave to file an additional affidavit as part of its evidence.

[2] The Court has reviewed the parties' motion materials and the additional letters submitted by the Applicant on July 5, 10 and 12, 2023. The Court acknowledges the request made by the Applicant in his July 12, 2023 letter to change a date in his affidavit, sworn June 26, 2023. The amendment has been accepted.

[3] The underlying application to which this motion applies relates to an extension to a temporary staffing appointment made within the CRA for a Senior Auditor position.

[4] In Spring 2021, the CRA launched a staffing process advertised through a Notice of Job Opportunity to fill Senior Auditor positions in various CRA branches. The advertised staffing process was used by one of the CRA managers [the Acting Director] to hire a Senior Auditor for a 6-month-less-a-day temporary acting position within her Risk Assessment and Workload [RAWD] Team in December 2021. The temporary appointment was communicated to the pooled candidates.

[5] At the end of the term, in June 2022, the temporary appointment was extended for a further three months. The Applicant did not receive notice of the extension as part of the appointment process, but was subsequently notified by the Acting Director in response to an inquiry from the Applicant's union representative.

[6] The Applicant initiated two requests for Individual Feedback [IF] in connection with the June 2022 staffing action, each of which was denied in decisions dated August 31, 2022 (amended September 6, 2022) and September 6, 2022. IF is defined in the CRA's Procedures for

Recourse on Staffing (Staffing Program) [PRS] section 5.9 as “a review of an employee’s concerns of arbitrary treatment”.

[7] At the time the application was filed, the Applicant sought judicial review of the CRA’s decisions not to provide him with IF with respect to the staffing extension [IF Decisions]. He requested that the IF Decisions be remitted back for redetermination. The Applicant later amended his Notice of Application and requested that the CRA’s decision to extend the employee be set aside and remitted back for redetermination [the Extension Decision]. The Applicant also requested that “serious consideration” be given to an alleged deficient Certified Tribunal Record [CTR].

[8] The Respondent asserts that this matter is now moot as the Applicant has agreed to offer IF in connection with the extension of the temporary acting appointment, which will allow the Applicant to obtain an IF decision that can itself be reviewed. Further, as the extension appointee is no longer in the position, the Respondent asserts that setting aside and redetermining the Extension Decision would have no practical effect.

[9] As set out further below, I agree and will allow the motion for the reasons that follow.

II. Analysis

[10] The legal test relating to a motion to strike an application is well established. The threshold for striking a notice of application is high: the Court will strike a notice of application for judicial review only in exceptional circumstances where it is “so clearly improper as to be

bereft of any possibility of success": *David Bull Laboratories (Canada) Inc*. v. *Pharmacia Inc*., [1995] 1 F.C. 588 (C.A.), at page 600. As summarized in *JP Morgan Asset Management (Canada) Inc.* v. *Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at para 47, "[t]here must be a "show stopper" or a "knockout punch" an obvious, fatal flaw striking at the root of the Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at para 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at para 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959."

[11] A knock-out punch can exist where a case is moot and the decision of the Court will not have the effect of resolving some controversy, which affects or may affect the rights of parties. Where the decision of the Court will have no practical effect on such rights, the Court will decline to decide the case unless there is good reason to hear the case despite its mootness: *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*] at paras 15-16.

[12] To determine whether a case is moot, it is necessary to determine if there remains a live controversy. If no live controversy exists, the onus shifts to the party seeking to have the case proceed to justify why the Court should nonetheless exercise its discretion to hear the matter. In this second part of the test, the Court will consider such factors as: (i) the adversarial context; (ii) judicial economy; and (iii) the role of the Court: *Borowski supra* at paras 31, 34-37, 40, 42; *Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* v. *Canada (Attorney General)*, 2005 FC 1027 at paras 25-29.

[13] In this case, with the Respondent's proposal, there is no longer any live or concrete issue that remains in dispute between the parties. By providing the Applicant an opportunity to have IF in association with the June 2022 staffing extension, the CRA has agreed to effectively set aside the IF Decisions that denied the Applicant IF and to proceed with IF that covers the subject-matter of the Applicant's IF requests.

[14] While the Applicant raises the issue of procedural fairness in connection with scheduling the IF, I am not satisfied that any procedural unfairness has been established. The invitation to participate in IF has not been time restricted, but remains open and can be scheduled at a time convenient to the Applicant. Similarly, although the Applicant now raises concerns of bias associated with the individual suggested as the decision-maker, the Respondent confirms in its reply submissions that the named individual was only a proposal and that it remains open for the Applicant and the CRA to agree on another decision-maker. I accept these submissions as part of the Respondent's offer.

[15] I agree with the Respondent, the circumstances here are distinct from those in *Gerus v Canada (Attorney General)*, 2008 FC 1344 [*Gerus*] on which the Applicant relies. In *Gerus*, the contentious issue involved a request to make submissions as part of the "Decision Review" process. It was unclear whether the offer to allow the applicant to file submissions after the decision was in a reconsideration context or if the offer was restricted to allowing submissions in an effort to overcome the decision already made. Here, the IF will result in its own determination, which can subsequently be reviewed further. The circumstances raised in *Gerus* do not apply.

[16] While the Applicant notes that the judicial review was amended to include the Extension Decision, the individual that had been extended employment in the RAWD Team is no longer in the position. Thus, the request in the amended Notice of Application to set aside the Extension Decision relating to her appointment and to have it redetermined would have no practical effect. The Applicant has not established how a determination on the reasonableness of the Extension Decision would advance its concerns in these circumstances.

[17] Further, there is an underlying issue as to whether in view of the IF procedure and the original application, the addition of the Extension Decision to the application and the request for its review is even properly before the Court. As also noted by the Respondent, an application for judicial review is only to be limited to a single order in respect of which relief is sought (Rule 302, *Federal Courts Rules*). All parties directly affected by the order must be named (Rule 303, *Federal Courts Rules*).

[18] In my view, with the provision for IF, there is no live controversy between the parties of any practical effect.

[19] As to the second part of the *Borowski* test, the Applicant has not established why the Court should nonetheless exercise its discretion to hear this matter. Rather, in my view, such a request in the context of this case runs contrary to the factors set out in *Borowski* and those of Rule 3 of the *Federal Courts Rules*, which promotes the just, most expeditious and least expensive determination of proceedings.

[20] The Applicant's assertion that there are deficiencies with the CTR cannot ground the basis for the judicial review as it pertains to steps within the application and does not relate to the underlying administrative decision. A proceeding cannot be held open on the sole desire to obtain further disclosure where the foundation for the application no longer exists.

[21] The Applicant argues that there was a duty to accommodate him at the CRA. This assertion does not relate to the Application as filed and as such is not properly before the Court. As noted by the Respondent, the judicial review is about the IF Decisions that denied the Applicant IF regarding the staffing extension. The Application cannot be expanded to include other grounds for which judicial review was not sought.

[22] Likewise, I do not find the Applicant's argument that the Respondent has engaged in sharp practice in bringing this motion to have merit. A responding party is entitled to bring a motion to strike and ask that it be addressed on written submissions following the procedure set out in the *Federal Courts Rules*: *Oleynik v Canada (Attorney General)*, 2023 FCA 162 at para 39. The Applicant was provided with an opportunity to respond to the motion and obtained a rule 7 extension from the Respondent to do so. While the Applicant suggested in later correspondence that he might wish to file further evidence, there is no provision for additional evidence on a motion and in particular, on a motion to strike where the admissible evidence is limited: *JP Morgan* at paras 51-54. A hindsight request to revise evidence is not a basis for reopening a motion or maintaining the application.

[23] I am not persuaded that any of the procedural fairness arguments raised by the Applicant justify continuance of the application.

III. Conclusion

[24] For all of these reasons, the motion is allowed and the application will be struck.

[25] In view of the outcome of the motion, I agree that some costs are warranted. Bearing in mind that the Applicant is a self-represented litigant, in my view costs in the amount of $500 are appropriate.

ORDER IN T-2019-22

THIS COURT ORDERS that:

1. In accordance with the Respondent's offer and further submissions on this motion, the Applicant is entitled to schedule Individual Feedback in respect of the June 2022 staffing extension at a mutually convenient date and time before a decision-maker to be agreed to by the parties. On this basis, the motion is granted and the application for judicial review is dismissed as moot.

2. Costs are awarded to the Respondent in the amount of $500.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2019-22
STYLE OF CAUSE:	ADEEB AHMED v CANADA REVENUE AGENCY

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	FURLANETTO J.
DATED:	AUGUST 14, 2023

WRITTEN REPRESENTATIONS BY:

Adeeb Ahmed	FOR THE APPLICANT (RESPONDING PARTY) (ON HIS OWN BEHALF)
Adam Feldman	FOR THE RESPONDENT (MOVING PARTY)

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT (MOVING PARTY)