

Federal Court



Cour fédérale

**Date: 20110429**

**Docket: T-615-10**

**Citation: 2011 FC 503**

**Ottawa, Ontario, April 29, 2011**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**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 pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a final level decision by Cheryl Fraser, Assistant Commissioner Human Resources Branch of the Canada Revenue Agency (the decision), dated March 16, 2010, which denied the applicants' grievance challenging the appointment without competition of Christina Mao as a technical team leader (MG-05) at the Burnaby-Fraser Tax Services Office.

[2] The applicants request:

1. That the decision be set aside and the matter referred back to a different final level grievance decision maker for reconsideration; and
2. Costs on a solicitor and client basis.

### **Background**

[3] Christina Mao was employed by the Canada Revenue Agency (CRA) at the Burnaby-Fraser Tax Services Office (BFTSO). She commenced a one year leave of absence in May 2000 pursuant to Article 17.11 of the governing collective agreement of the Professional Institute of the Public Service of Canada (PIPSC). This absence was to pursue full time employment with the Investment Dealers Association.

[4] Immediately following this leave, Ms. Mao commenced a five year leave of absence without pay pursuant to Article 17.14 of the collective agreement, "Leave without Pay for Family-Related Needs". This leave was for the purpose of personal long term care of the employee's family.

[5] During her six year leave, Ms. Mao's position as investigator/auditor, AU-03, was converted to a management group, MG-05, team leader position.

[6] Ms. Mao returned to a term position with the CRA in September 2006 as an AU-03. In May 2007, Ms. Mao was placed without competition in an MG-05 team leader position at BFTSO.

[7] At the time that the CRA placed Ms. Mao in the MG-05 position, the CRA cancelled the three month acting assignment of Harjinder Johal (the principal applicant).

[8] Thomas Stasiewski (the applicant), who was co-chair of the audit, financial and scientific sub-group at the BFTSO from April 2006 to April 2008, inquired on behalf of Mr. Johal into why this acting assignment was cancelled and was informed that Ms. Mao was being treated as a preferred status employee.

[9] Mr. Stasiewski filed a grievance challenging the decision of the CRA to grant Ms. Mao preferred status when he learned that Ms. Mao had continued her full time employment with the Investment Dealers Association throughout the duration of her five year leave of absence for the personal long term care of her family. Mr. Stasiewski claimed that the placement of Ms. Mao in the position without competition unfairly restricted his opportunities for promotion and violated the CRA staffing principles of fairness and transparency.

[10] Mr. Johal also filed a grievance in relation to Ms. Mao's appointment and the granting to her of preferred status. Both grievances were heard together at all levels of the grievance procedure.

[11] The grievances went through five levels of the grievance procedure and were denied at each level. The applicants initiated a judicial review of the final grievance which was allowed in *Johal et al v Canada Revenue Agency*, 2009 FCA 276 and sent back to the final level of the grievance process for redetermination

[12] This case is a judicial review of the redetermination.

### **Assistant Commissioner's Decision**

[13] In an internal memorandum from Claude Tremblay, the director general of workplace relations and compensation directorate to Cheryl Fraser (the assistant commissioner), the director stated that any reply which indicated that "Ms. Mao was on approved leave and was therefore entitled to preferred status... would not address the Federal Court of Appeal's concerns that Ms. Mao flagrantly abused the leave." Despite this, the memorandum recommended that the assistant commissioner adopt this approach.

[14] The assistant commissioner found that Ms. Mao was entitled to preferred status, pursuant to the *Preferred Status Directive* at the conclusion of her approved leave. Ms. Mao was entitled to be appointed to the position in question as a result of her preferred status.

[15] The assistant commissioner also found that there was a need to re-examine the *Preferred Status Directive* as it pertains to recourse and possibly make changes. As such, she allowed the grievance in part.

### **Issues**

[16] The applicants submitted the following issues for consideration:

1. Did the Canada Revenue Agency commit a reviewable error in denying the challenge to Ms. Mao's preferred status?
2. Are costs warranted against the CRA on a solicitor and client basis?

### **Applicants' Written Submissions**

[17] The applicants submit that Ms. Mao flagrantly breached the terms of her leave in contravention of article 2.6.1 of the *Directive on Preferred Status*, as was held by the Federal Court of Appeal in *Johal* above, at paragraph 43.

[18] Article 2.6.1 of the *Directive on Preferred Status* states that:

Employees on leave may occupy another position temporarily within the Agency on the condition that it is not inconsistent with the type of leave granted (dual employment). For example, an employee who is taking leave for the care and nurturing of children should not occupy another position. If that employee chooses to occupy another position, the leave should be terminated.

[19] The applicants submit that based on this abuse of her leave, Ms. Mao should not have been granted preferred status. Granting her preferred status violated the CRA's staffing principles of fairness and transparency.

[20] The applicants submit that the CRA's redetermination of the grievance is contemptuous of the Federal Court of Appeal's decision in *Johal* above. The CRA failed to address the Court of Appeal's concerns and its decision was wholly conclusory, making no mention of Ms. Mao's use of

family related leave for a different purpose. The decision was not justified, transparent or intelligible and should be judicially reviewed.

[21] Based on the above, the applicants submit that costs should be awarded on a solicitor client basis. The CRA acted in bad faith in deliberately flouting the Court of Appeal's decision and intentionally repeating the fundamental mistakes made in the first grievance. This conduct is reprehensible, scandalous and outrageous and warrants costs to be awarded to the applicant.

### **Respondents' Written Submissions**

[22] Neither responding party submitted responding materials.

[23] Counsel for the respondent CRA indicated in a letter dated August 3, 2010 to this Court that:

The Applicants and Canada Revenue Agency (CRA) are attempting to settle this Application for judicial review.

If we cannot reach a settlement, it is CRA's position that the decisions of the CRA dated March 16, 2010, should be set aside and reconsidered by another decision-maker within CRA pursuant to Section 18.1(3)(b) of the *Federal Courts Act*. CRA agrees that the Applicants should be granted the relief requested at paragraph 2 of the Notice of Application (Please see Application Record, Notice of Application, Tab 1, page 4, para 2). We are willing to pay the Applicants' costs associated with this Application in the fixed amount of \$2000.

[24] This was followed by a letter to this Court from counsel for the CRA dated October 25, 2010 which stated that:

The parties are still in negotiations to settle this application.

The Respondent is of the view that this application should be re-determined pursuant to Section 18.1(3) of the *Federal Courts Act*.

[25] Christina Mao filed a notice of appearance on April 29, 2009 but submitted no further documentation. She did not attend the hearing.

### **Analysis and Decision**

[26] As neither responding party has made submissions defending the decision of the assistant commissioner and the CRA explicitly stated that it was willing to settle with the applicants, the judicial review must be allowed.

[27] Both parties made submissions with respect to costs. The applicants seek costs on a solicitor and client basis while the respondents are prepared to pay costs to the applicant according to Tariff B Column 3. I have considered the submissions of the parties and I do not believe that an award of costs on a solicitor and client basis is justified in this case. The conduct of the respondents did not reach the level of being reprehensible, scandalous or outrageous. I am of the view, however, that based on the facts of this case, the applicants should be awarded costs according to the high end of Tariff B Column IV.

**JUDGMENT**

[28] **IT IS ORDERED that:**

1. The application for judicial review is allowed, the decision of the final level of the grievance process is set aside and the matter is referred back to a different final level grievance decision maker for reconsideration.

2. The applicants shall have their costs of the application to be assessed at the high end of Tariff B Column IV.

“John A. O’Keefe”

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-615-10

**STYLE OF CAUSE:** HARJINDER JOHAL and  
THOMAS STASIEWSKI

- and -

CANADA REVENUE AGENCY and  
CHRISTINA MAO

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** November 9, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** April 29, 2011

**APPEARANCES:**

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FOR THE APPLICANTS

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FOR THE RESPONDENT  
CANADA REVENUE AGENCY

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