

Federal Court



Cour fédérale

**Date: 20110211**

**Docket: T-1482-10**

**Citation: 2011 FC 163**

**Ottawa, Ontario, February 11, 2011**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**MOHAMMED TIBILLA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision made by Ms. Cheryl Fraser, Assistant Commissioner, Human Resources Branch, at the Canada Revenue Agency (CRA) dated June 9, 2010, in which she denied the applicant's grievance at the final level.

[2] For the reasons below, this application for judicial review shall be denied.

[3] The respondent requested and it is agreed by the applicant that pages 28 to 184 of the applicant's record (exhibits "A" and "B") be sealed because of personal information that are included in these pages. The Court agrees and an order shall follow.

#### I. Facts

[4] The applicant worked for CRA in both the Collection and Audit departments on a term basis from March 2006 and June 2009.

[5] His employment contract was terminated on June 30<sup>th</sup>, 2009.

[6] During that time, Mr. Michel Adam was the applicant's manager from December 6, 2006 until June 30, 2009 and Mr. Francois Blais was his team leader from December 6, 2006 to October 10, 2008. Mr. Christian Dion was his second team leader from October 2008 until June 2009.

[7] During the time of his service, the applicant was evaluated three times. One was made by Mr. Blais and another one made by Mr. Dion.

[8] In the applicant's Employee Performance Management Report (EPMR) covering the period from September 1, 2007 until August 31, 2008 (2008 EPMR), Mr. Blais determined that the applicant's global results "mostly met expectations".

[9] On April 29, 2009, Mr. Dion signed the applicant's 2009 EPMR and put a check mark in the box "results do not meet expectations", therefore indicating that the performance was

unsatisfactory. Mr. Dion attached an Annex to the 2009 EMPR which refers among other things, to 11 different files the applicant was working on during the period in question (October 13, 2008 to March 31, 2009).

[10] Prior to the meeting to discuss the 2009 EMPR, Mr. Adam and Mr. Dion offered to the applicant to be accompanied by a union representative.

[11] During the meeting (April 29, 2009) to discuss his 2009 EMPR, Mr. Adam told the applicant that the term of his contract would not be extended, which was confirmed by letter dated May 21, 2009. The applicant's employment ended on June 30, 2009.

[12] On June 3, 2009, the applicant, with the support of his bargaining agent, filed a grievance, challenging his 2009 EMPR. The applicant alleged in his grievance that management did not act in accordance with the CRA internal policy and guidelines. The grievance was denied at the first, second and third level of the grievance process.

[13] The grievance was then heard at the fourth and final level by Mr. Marc-André Cousineau, Labour Relations Advisor. The applicant was represented by Ms. Lyson Paquette, Labour Relations Advisor for the Union.

[14] Following the hearing, Mr. Cousineau prepared a document entitled "précis de grief au palier final", in which he recommended to dismiss the grievance (see Tab "I" of Volume 1 of the respondent's record, page 77). This document was sent to the decision-maker, Ms. Cheryl Fraser.

On June 9, 2010, Ms. Fraser denied the grievance at the final level. This is the decision under review.

## II. Decision under Review

[15] The CRA representative reviewed the applicant's file and found that management did provide the applicant with training and coaching and sufficient time to improve his performance, but that despite all this, the applicant was not able to meet the expectations set for him for the period of October 13, 2008 to March 31, 2009, as was indicated in his evaluation on April 29th, 2009.

## III. Issues

[16] The sole issue here is the following:

- a) Does the June 9, 2010 decision by the CRA, warrants the intervention of the Court?

## IV. Standard of Review

[17] The applicant did not make any submissions with respect to the applicable standard of review. However, the respondent submits that the applicable standard is reasonableness, given that the Federal Court has already applied that standard to non-adjudicative final level grievance decisions which interpret and apply internal policies and procedures (*Cox v Canada (Attorney General)*, 2008 FC 596 at para 11; *Hagel v. Canada (Attorney General)*, 2009 FC 329 at para 27, *aff'd* 2009 FCA 364).

[18] I agree with that proposition. Therefore, the Court will intervene only if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47, [2008] SCJ No 9.

*A. Does the June 9, 2010 decision by the CRA Assistant Commissioner, Human Resources Branch, warrant the intervention of the Court?*

[19] The applicant alleges falsification of documents, conspiracy, bad faith and racism on the part of the respondent. He submits that the respondent connived in an ill manner to issue a poor evaluation for the sole objective of unduly terminating his employment. He also argues that management did not follow its own policies and guidelines.

*B. Falsification of documents, conspiracy, bad faith and racism*

[20] The applicant alleges that both of his superiors falsified documents and artificially created errors in order to discredit him. He states that inferences based on these falsified and dubious evidences were made and used to assert the applicant's work performance from which he was given a poor evaluation.

[21] The applicant submits that he was never told that he had to improve his performance to the point that his job was at risk.

[22] He also alleges that management ignored exhibits "A" and "B" of his affidavit (pages 28-184 of the applicant's record) "in order to conceal the inherent weakness and irregularities therein embodied which rendered them unconvincing, unreliable and insignificant in this manner" (para 123 of the applicant's arguments and page 19 of the applicant's record).

[23] The applicant also contends that his first team leader, Mr. Blais, demonstrated a racist attitude towards him by using racist slurs and by deliberately and disrespectfully distorting the names of immigrants in a mocking manner.

[24] The applicant further alleges that Mr. Dion treated him in a harsh, threatening, intimidating and harassing manner by retorting to his questions (para 18, page 10 of the applicant's record). These attitudes towards him played a role in the issuance of a poor evaluation for the sole purpose of terminating his employment.

*C. The respondent did not follow its own Policy and Guidelines*

[25] The applicant argues that in a fair and objective situation, management would have established an action plan for him.

[26] He also states that in any case, he contests the determination by Mr. Cousineau that he received ample classroom training or that he received the stated 37.5 hours of mentoring and direct coaching.

[27] At the hearing, the applicant submitted a new argument, alleging a breach of procedural fairness.

[28] The respondent argues that the Court should not conclude that exhibits "A" and "B" (mentioned by the applicant) were ignored by the decision-maker because they were not before her. The applicant was duly represented by Ms. Paquette and she did not submit them.

[29] The respondent submits that numerous paragraphs from the applicant's arguments should not be considered because they are not supported by the evidence.

[30] Finally, the respondent underscores that he did not have the obligation to establish an action plan for the applicant because the 2008 EMPR did not conclude that the applicant had not met expectations and in that evaluation, measures were mentioned to be taken to improve the applicant's performance. Therefore, CRA was not in breach of its own Policy and Guidelines.

#### V. Analysis

[31] The Court is of the opinion that the decision rendered by the Assistant Commissioner is reasonable. She gave cogent reasons to dismiss the grievance at the final level. She considered all the circumstances in the applicant's file and the submissions made by his union representative.

[32] She analyzed the CRA *Performance Management Policy* (Policy) and *Employee Performance Management Guidelines* (Guidelines) and came to the conclusion that the applicant had been provided with appropriate support and counsel to increase his performance but in fact did not meet the expectations for the period of October 13, 2008 to March 31, 2009 as mentioned in his evaluation of April 29, 2000. The basis for that conclusion stems from the "Précis de grief au palier final" prepared for the Assistant Commissioner by Mr. Marc-André Cousineau who heard the parties at level 4 of the grievance process (respondent's record, pages 78 and 79).

[33] The Court is not satisfied that the applicant demonstrated a reviewable error in the application of the Policy and the Guidelines by the decision-maker in this case.

[34] The applicant is contesting the fact that exhibits “A” and “B” were ignored or not examined by the Assistant Commissioner. However, Ms. Sylvie Bolduc’s affidavit shows that these exhibits were not submitted at the final level (para 13 of Ms. Sylvie Bolduc’s affidavit, page 10 of Vol. 1 of the respondent’s record). Even if these exhibits were submitted at the first and second levels of the grievance process as alleged at page 21 of the applicant’s factum (para 142, page 21 of the applicant’s record), it is not the decisions from these levels that that the Court has been called to review. The Court shall not consider evidence that was not before the decision maker (*Assn. of Architects (Ont) v Assn. of Architectural Technologists (Ont.)*, 2002 FCA 218 at para 30, leave to appeal to SCC refused [2002] SCCA No 316).

[35] With regards to the contentions alleged by the applicant of falsification of evidence, conspiracy, bad faith and racism, these issues were no raised in the grievance and therefore cannot be decided on an application for judicial review as stated in *Nametco Holdings Ltd v M.N.R.*, 2002 FCA 149 at para 2:

One cannot rely in such a motion on precedents involving the amendment of pleadings before or during a trial, where the trial court will ultimately have all the necessary evidence and both parties can examine or cross-examine witnesses on the amended issues. Nor is it like seeking leave to introduce new evidence on appeal. There are strict requirements for that special measure, even if it applied here (which it does not), and the applicant has not met the criteria for such introduction. Instead this is a judicial review whose purpose is to see if the tribunal whose decision is under review committed any reviewable error in the way it dealt with the case before it, not some other case it might have heard but did not. New evidence is admitted



on judicial review only on occasions where it is relevant to some issue concerning the hearing procedure, or jurisdiction, of a tribunal.

[36] The same reasoning is applied to the applicant's new argument at the hearing on the issue of breach of procedural fairness.

[37] The Court notes that the applicant was represented at each and every level of the grievance process and cannot tender new evidence in this application for judicial review.

[38] He also amended his application at the hearing to ask for \$4,000 for costs and agreed that he would be ready to pay \$3,500 if the application was dismissed.

**JUDGMENT**

**THIS COURT ORDERS** that the application for judicial review be dismissed. The applicant shall pay costs to the respondent in the form of a lump sum for an amount of \$3,500. Pages 28 to 184 of the applicant's record (exhibits "A" and "B") are to be kept under seal.

"Michel Beaudry"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1482-10

**STYLE OF CAUSE:** MOHAMMED TIBILLA and  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 10, 2011

**REASONS FOR JUDGMENT:** BEAUDRY J.

**DATED:** February 11, 2011

**APPEARANCES:**

Mohammed Tibilla	FOR THE APPLICANT (ON HIS OWN BEHALF)
Anne-Marie Duquette	FOR THE RESPONDENT
Richard Fader	FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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