Federal Court  Cour fédérale

Date: 20170308

Docket: T-918-16

Citation: 2017 FC 268

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 8, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ADRIANO FURGIUELE AND JOSEPH OLIVERIO

Applicants

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, against a decision rendered on May 6, 2016 [the Decision]. In that Decision, Diane Lorenzato, Assistant Commissioner [the Assistant Commissioner] of the Human Resources Branch of the Canada Revenue Agency [CRA] denied the grievances filed by the

applicants at the final level. The Assistant Commissioner found that the applicants were not eligible for legal assistance from the CRA because they did not meet the criteria set out in the [TRANSLATION] *Policy on indemnification and legal assistance that may be granted to Canada Revenue Agency employees* [the Policy].

II. Background

[2] The two applicants, Mr. Oliverio and Mr. Furgiuele, were CRA employees for a certain number of years. Prior to his resignation on January 31, 2011, Mr. Oliverio had worked for the CRA for 25 years. For the last five years of his employment, he was an audit manager in the Small and Medium Enterprise Division.

[3] For his part, Mr. Furgiuele worked for the CRA for 18 years. For the last five years of his employment, he was a team leader on the workload development team [the Team], reporting to Mr. Oliverio. On December 14, 2009, Mr. Furgiuele was dismissed.

[4] In 2008, the company Gemmar Systems International Inc. [Gemmar] contacted Mr. Oliverio directly regarding a software purchase. Gemmar wanted to check whether the software purchase constituted a tax shelter. The respondent submits that, under the circumstances, it was abnormal for a taxpayer to contact a CRA manager directly rather than inquiring with CRA Headquarters [HQ].

[5] The applicants subsequently asked Josée Bissonnette, an auditor on the Team, to conduct an audit to determine whether the software purchase constituted a tax shelter. When she went on maternity leave, the applicants reassigned that audit to Geneviève Robillard, a junior auditor.

[6] Ms. Robillard explained that she did not feel comfortable conducting the audit and that her knowledge in that area was rudimentary. For that reason, she suggested that the file be transferred to the tax avoidance team. Nevertheless, Mr. Oliverio asked that Ms. Robillard handle the file.

[7] Ms. Robillard followed Mr. Oliverio's orders. She ultimately prepared a letter to Gemmar on December 8, 2008, in which she stated that the software purchase did not constitute a tax shelter. This resulted in significant tax consequences for Gemmar.

[8] On April 13, 2010, Mr. Oliverio and the Assistant Director, Audit, requested a review of Ms. Robillard's audit report. That review was conducted by Ralph Amar, an auditor in the Aggressive Tax Planning Division (previously "Tax Avoidance") at the Montréal Tax Services Office.

[9] Given the complexity of the file, Mr. Amar contacted his union, because he did not feel comfortable with the assignment. Despite his reservations, he ultimately produced his report on October 15, 2010, concluding that "... in the absence prima facie of any indicia as to statements or representations, I concur with the view of the previous auditor that the acquisition of the

interest in the software by the taxpayer is not an acquisition of a ‘tax shelter,’ as defined in the Act.. .” (Applicants’ Record, at page 128 [AR]).

[10] After reading the report prepared by Mr. Amar, CRA HQ was of the view that his findings were problematic. Isabelle Frappier, an auditor on the aggressive tax planning team at HQ, was therefore asked to conduct a new audit—the third, following those prepared by Ms. Robillard and Mr. Amar.

[11] On May 29, 2013, Ms. Frappier produced her report, in which she found, among other things, that Gemmar’s acquisition of the software did in fact constitute a tax shelter. Consequently, the CRA issued a notice of assessment to Gemmar and cancelled the tax consequences that had previously been granted.

[12] In response, Gemmar initiated proceedings before the Superior Court of Québec, alleging that the audit conducted by Ms. Robillard caused it significant economic damages. On January 20, 2015, the Attorney General of Canada and the CRA implicated 13 individuals, including the applicants.

[13] In February and March 2015, the applicants applied for legal assistance, in accordance with the Policy. On July 14, 2015, their applications were denied. One month later, the applicants filed a grievance challenging the denial of their applications.

[14] In December 2015, the respondent asked Nancy Tanguay, a member of the CRA's Continuous Program Integrity Review team, to prepare an expert report on the merits of the grievances filed by the applicants. Ms. Tanguay concluded, among other things, that the applicants had been negligent in their duties.

[15] After Ms. Tanguay's report was issued, Martine Houde, a senior policy and programs analyst in the Workplace Relations and Compensation Directorate, recommended in a document entitled [TRANSLATION] "final-level grievance précis" that the grievances be denied.

[16] On May 6, 2016, the Assistant Commissioner denied the grievances at the final level in accordance with section 208 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, section 2. As indicated in the decision, the Assistant Commissioner based her refusal of the grievances on the following four grounds:

> [TRANSLATION]
> ... I find that you did not meet the reasonable expectations of the CRA...
>
> [1.] by assigning this file to the workload development team, as that team was not responsible for conducting the audit work;
>
> [2.] by assuming that this team could conduct audits, you agreed to have this file audited when the taxpayer in question had not filed its returns and no notice of assessment had been issued;
>
> [3.] by failing to oversee and ensure that the audit work was entered in the Audit Information Management System (AIMS) for the taxpayer in question;
>
> [4.] by failing to refer this file to aggressive tax planning and to the Income Tax Rulings Directorate at Headquarters since the taxpayer in question wanted a letter confirming the tax consequences associated with transactions planned in 2008.
>
> (AR, at page 8)

[17] The Assistant Commissioner also considered the applicants' seniority and high rank.

[18] That decision is the subject of this judicial review.

III. Issues

[19] The applicants allege that (A) the Assistant Commissioner's conclusions are not reasonable and (B) she was too strict in her interpretation of the Policy, namely the meaning of "reasonable expectations."

IV. Analysis

[20] The parties recognize, and the Court agrees, that the standard of review applicable to these issues is that of reasonableness, as they are related to the application of a government agency's internal policy to employees (*Brauer v. Canada (Attorney General)*, 2014 FC 488, at paragraph 26 [*Brauer*]).

A. *The Assistant Commissioner's conclusions*

(1) The audits conducted by the Team

[21] The applicants argue that the Assistant Commissioner ignored four material elements when she concluded that the applicants' team was not responsible for conducting the audit of the file in question: (1) the applicants' assertions that the Team regularly audited files; (2) the expert report, in which Ms. Tanguay could neither confirm nor deny that the Team regularly audited files; (3) the testimonies of two other CRA employees, who did not contradict the applicants'

position (that their Team conducted audits); (4) the report by Ms. Robillard, which confirmed that the applicants' Team [TRANSLATION] "could conduct audits" (AR, at page 32).

[22] For its part, the respondent alleges that the Team does not audit files, citing section 8.3.2 of the Audit Manual [the Manual] and that the applicants were or should have been aware of the rules set out in the Manual. The respondent also relies on the testimonies of two employees, who stated that issues related to planned transactions or tax shelters are referred to and handled by HQ.

[23] Lastly, at the hearing, the applicants alleged that there is no evidence on record showing that, in practice, the Team did not conduct audits prior to handling the Gemmar file. The respondent, in turn, argued that there is no conclusive evidence demonstrating that, in practice, the Team did regularly conduct audits in the field.

[24] First, the Court notes that its role in a judicial review is not to reweigh or reassess all the evidence on record (see: *Vigan v. Canada (Citizenship and Immigration)*, 2016 FC 398, at paragraph 15). Instead, the Court's role is to examine whether the Assistant Commissioner's conclusions are reasonable.

[25] It must also be noted that an administrative decision-maker is not required to refer to each piece of evidence in the decision. Similarly, it is well established in Canadian law that there is a presumption that the administrative decision-maker considered all of the evidence on record and

that the burden is on the party alleging an omission to rebut that presumption (*Mughrabi v. Canada (Citizenship and Immigration)*, 2008 FC 898, at paragraph 15).

[26] To justify the Court's intervention, the applicants must prove that there was an omission and must establish that the omission makes the decision as a whole unreasonable (*Hussain v. Canada (Citizenship and Immigration)*, 2012 FC 1298, at paragraph 46). However, the omission of important evidence may warrant the Court's intervention (*Botros v. Canada (Citizenship and Immigration)*, 2013 FC 1046, at paragraph 25). For example, a situation in which an administrative decision-maker rules that a party did not submit any evidence in support of an argument or substantive point, when it is clear from the record that such evidence was submitted, can have the effect of rebutting the presumption that the administrative decision-maker considered all the evidence (*Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16, at paragraphs 23–25).

[27] Moreover, although some evidence mentioned by the applicants is not explicitly addressed in the Assistant Commissioner's letter, Justice Strickland stated, at paragraph 44 of *Taticek v. Canada (Border Services Agency)*, 2014 FC 281 [*Taticek*] that "[j]urisprudence establishes, however, that a précis or an internal memorandum with recommendations to the decision-maker may serve as reasons." The Court therefore finds that the reasons set out in the final-level grievance précis prepared by Ms. Houde [the Précis], to recommend that the requests for legal assistance be denied are also relevant to this case.

[28] In this case, the Court is of the view that the applicants' argument does not hold up. The two applicants were senior public servants, and they had a duty to apply the rules set out in the Manual. It is clear from section 8.3.2 of the Manual that auditing files and handling issues related to tax shelters are not part of the Team's mandate.

[29] The simple fact that the applicants allege that the common practice when Mr. Furgiuele was leading the group allowed them to audit the Gemmar file does not mean that the Assistant Commissioner's conclusions are unreasonable. Similarly, the argument that Ms. Tanguay could neither confirm nor deny the common practice in her expert report and that the responses regarding the matter from two employees were not [TRANSLATION] "categorical" in no way undermines the reasonableness of the Decision.

[30] Lastly, Ms. Robillard's statements quite simply explain that, when Mr. Furgiuele was leading the Team, audits were conducted, while that practice ceased when a new leader took over. That testimony in no way undermines the Assistant Commissioner's reasons.

[31] The Court is of the view that the applicants failed to establish that the Assistant Commissioner unreasonably assessed or omitted the evidence on record. The conclusion that it was not up to the Team to audit the Gemmar file was reasonable. Moreover, the Précis prepared by Ms. Houde took into account the applicants' position and the relevant evidence, including the Report by Ms. Frappier and the statement by Ms. Robillard, concluding that the applicants were conducting or ordering audits contrary to the rules set out in the Policy.

[32] For all these reasons, the Court rejects the applicants' argument regarding the first issue.

(2) Failure to issue a notice of assessment

[33] The applicants argue that the finding that the file was not the subject of a notice of assessment was unreasonable, since the transaction had not yet taken place and, therefore, it was evident that the file would not be subject to a notice of assessment.

[34] However, it is clear from section 9.5.0 of the Manual that typically only files that have received a notice of assessment are audited. That is why Ms. Houde concluded, at page 7 of the Précis, that [TRANSLATION] "it appears that the complainants assigned an audit file when that file should not normally have been subject to an audit" (AR, at page 33). That conclusion is reiterated by the Assistant Commissioner in her reasons. The conclusions drawn by Ms. Houde and the Assistant Commissioner are entirely reasonable.

(3) Entry in AIMS

[35] At the hearing, the applicants argued that the Assistant Commissioner's ground regarding the failure to enter the audit work in AIMS is unreasonable, because this omission was simply a human error rather than an act that was intentional or carried out in bad faith.

[36] The respondent submits that the entry of audits in AIMS is crucial, as it enables other CRA auditors to monitor the file and understand the merits of the audit.

[37] The Court recognizes that, considered in isolation, the failure to enter the audit work in AIMS, when it is required under section 8.3.9 of the Manual, could represent a simple human error made in good faith. However, the Assistant Commissioner does not rely solely on this fact; she lists four grounds, considered in light of the applicants' rank and seniority. The Court therefore finds the Assistant Commissioner's consideration of the failure to enter the audit work in AIMS as being one of the determining factors to be reasonable.

(4) Ms. Frappier's report

[38] Lastly, the applicants argue that Ms. Frappier's report reached a different conclusion than the reports previously prepared by Ms. Robillard and Mr. Amar because Ms. Frappier was better informed and equipped to draw conclusions regarding the issue of whether Gemmar's acquisition of the software constituted a tax shelter. The applicants allege that, when the facts were assessed in 2013, Gemmar had already acquired the software, meaning that Ms. Frappier was better positioned to conduct the audit. According to the applicants, it goes without saying that there would be a significant difference between the conclusions reached in Ms. Frappier's audit report and those in the reports by Ms. Robillard and Mr. Amar.

[39] That argument had previously been put forth by the applicants during the grievance process. At page 13 of the Précis, Ms. Houde notes the following:

> [TRANSLATION]
> ... despite the complainants' allegation that Ms. Frappier had access to new information, it appears instead that Ms. Frappier conducted her audit based on the same documents that had been provided to the auditors (Ms. Bissonnette and Ms. Robillard) at the time. The expert states that the difference is that Ms. Frappier conducted her audit with care, using the appropriate and relevant

> audit techniques and the tools available to all auditors... It is important to note that Ms. Frappier's task was to redo the audit from 2008–2009 and did not involve identifying problems in the 2008–2009 audit or in the initial audit.
>
> (AR, at page 39)

[40] Nothing in the record indicates that these conclusions are unfounded or otherwise unreasonable. Regardless, the issue the Court must address is not whether Ms. Frappier relied on the same documents as Mr. Amar or Ms. Robillard, but rather to determine whether the Assistant Commissioner's conclusions are reasonable. The Court is of the view that they are.

B. *Interpretation of "reasonable expectations"*

[41] The Policy stipulates that legal assistance *may* be granted if, in the course of his or her duties, the employee (i) acted honestly and without malice and (ii) met the reasonable expectations of the CRA.

[42] The applicants argue that the Assistant Commissioner unreasonably interpreted and applied the meaning of the expression "reasonable expectations" used in the Policy in a manner that was overly rigid and strict. The applicants allege that the purpose of the Policy is to provide assistance to employees who, despite their errors, acted in good faith. According to the applicants, refusal of legal assistance under the Policy would be warranted only in exceptional circumstances, where the employee in question allegedly acted in a manner that was malicious or in bad faith.

[43] First, it is important to note that our Court, at paragraph 19 of *Taticek*, ruled that it should normally show deference to the interpretation of policies and procedures established by the employer.

[44] Regarding the interpretation of internal policies applicable to employees of government agencies, Justice Mosley, in *Brauer*, applied the purposive approach adopted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 to interpret an internal policy applicable to the Canadian Armed Forces. In applying that method, Mosley J. concluded that the administrative decision-maker's interpretation of the word "community" used in the policy was unreasonable, because it contradicted the very meaning of the policy. In that case, the administrative decision-maker's interpretation was too rigid, meaning that the policy would apply only in exceptional circumstances.

[45] In the case at hand, the Court is of the view that the Assistant Commissioner's interpretation is not the same as the administrative decision-maker's interpretation in *Brauer*.

[46] The Policy establishes a two-part conjunctive test subject to the CRA's discretion. The Policy does not define the scope of the expression "reasonable expectations" of the CRA. The fact that it sets forth two requirements suggests that the first may refer to criminal acts or intentional acts committed in bad faith, and the second may reasonably include, for example, negligence, wrongdoing, unreasonable laxity or an accumulation of several faults or errors, evaluated in light of the employee's rank and seniority.

[47] In this case, it was not unreasonable to conclude that the CRA could expect the applicants, employees with a high rank and considerable seniority, to know, respect and follow the rules set out in the Manual. However, given the numerous errors committed by the applicants, regardless of whether or not they were made in bad faith, as well as their rank and seniority, the Court is of the view that the Assistant Commissioner's interpretation of the Policy does not result in an overly strict or rigid application. In fact, the Court does not find it unreasonable that the multiple failures to respect the Manual could constitute unacceptable laxity.

[48] Unlike in *Brauer*, the Court is of the view that the interpretation of the Policy does not in any way undermine its purpose and does not render it "inapplicable in all but the most exceptional circumstances" (at paragraph 65). On the contrary, the Court is of the view that the Assistant Commissioner's interpretation of the Policy reasonably fulfils its purpose: granting legal assistance *if* the employee acted honestly and without malice and *if* the employee met the reasonable expectations of the CRA.

[49] The Court also notes that the Policy is discretionary in nature. In *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2, at pages 7–8, the Supreme Court stated that "[w]here the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere." That same reasoning applies to the internal policies of government agencies (*Wanis v. Canadian Food Inspection Agency*, 2013 FC 963, at paragraphs 31–34).

[50] In the case at hand, there is no evidence on record to suggest that the Assistant Commissioner acted in bad faith or that she considered irrelevant evidence. Thus, under such circumstances, the jurisprudence instructs that the Court should show deference to the administrative decision.

V. Conclusions

[51] Consequently, the application for judicial review is dismissed. On consent, the parties proposed that costs be awarded to the respondent in the amount of $3,000.00. The Court accepts the parties' proposal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs in the amount of $3,000.00 will be awarded to the respondent.

"Alan S. Diner"
Judge

Certified true translation
This 11th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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