

Federal Court



Cour fédérale

**Date: 20210513**

**Docket: T-921-20**

**Citation: 2021 FC 444**

**Ottawa, Ontario, May 13, 2021**

**PRESENT: Madam Justice Simpson**

**BETWEEN:**

**JOANNE PLUMMER-GROLWAY**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Background**

[1] This application is for judicial review of a decision made by a Director at Public Services and Procurement Canada on June 4, 2020, in which he revoked the Applicant's Reliability Status. The revocation followed an investigation in which it was determined that there were concerns about the Applicant's reliability and honesty.

[2] For the reasons given below this application will be allowed.

## II. **The Participants**

- i. Joanne Plummer-Grolway [the Applicant] is a 60-year-old Indigenous woman. Since 2004, she has been employed as a procurement consultant through a series of contracts with Federal Government Departments and other employers. During her career, she held two security designations: Reliability Status and a Secret Security Clearance. On February 27, 2018, she applied for an upgrade to a Top Secret Security Clearance designation. This application led to the events which resulted in the decision to revoke her Reliability Status [the Decision].
- ii. Alexandre Picard is the Director [the Director] of Industrial Personnel Security Services, Industrial Security Sector, Public Services and Procurement Canada [PSPC]. He made the Decision.
- iii. PSPC is responsible for screening applicants for security designations and for providing such designations to a variety of individuals, including consultants who work under contract with Federal Government Departments.
- iv. Michael Chua was the PSPC Security Screening Investigator [the Investigator] who interviewed the Applicant and authored a report on his investigation [the Investigation Report].
- v. Promaxis Systems Inc. [Promaxis] is an agency that employs consultants whom it supplies to meet the needs of Federal Government Departments. The Applicant worked as an employee of Promaxis for approximately six weeks from January 19 to March 2, 2015. In that period, she worked at the Department of National Defense [DND] on a contract which had been secured through Promaxis [the Promaxis/DND Contract].

III. **The Treasury Board Standard**

[3] The Treasury Board Standard on Security Screening [the Standard], is dated October 20, 2014. The Standard provides that there are the following three security designations:

1. Reliability Status;
2. Secret Security Clearance; and
3. Top Secret Security Clearance.

IV. **PSPC's Security Screening of Consultants**

[4] Reliability Status is the basic security designation. Holding this designation is a necessity for consultants who wish to secure Federal Government contracts.

[5] Reliability Status is defined in the Standard as follows:

**Reliability status (cote de fiabilité)**

The minimum standard of security screening for positions requiring unsupervised access to Government of Canada protected information, assets, facilities or information technology systems. Security screening for reliability status appraises an individual's honesty and whether he or she can be trusted to protect the employer's interests.

[6] Secret and Top Secret Security Clearances will only be considered once Reliability Status has been conferred. In other words, Reliability Status is a condition precedent to the granting of Secret and Top Secret Clearances.

[7] Before 2018, a consultant's application for an upgrade from a Secret to a Top Secret Security Clearance did not require a credit check. However, on January 29, 2018, credit checks became mandatory. This change meant that PSPC was required to check the Applicant's credit when she applied for a Top Secret Clearance. The purpose of the credit check was to assess her trustworthiness and reliability.

V. **The Applicant's Application for Top Secret Clearance**

[8] The Applicant's decision to apply for an upgrade to a Top Secret Security Clearance was motivated by her wish to be eligible for more lucrative and interesting consulting contracts. In her application [the Top Secret [TS] Application] the Applicant listed the government departments which had been her employers during the previous 10 years [the Employment List]. In section C at item 3 she provided her consent for "credit checks (financial assessment including credit record checks)". The Applicant also indicated that she had never been dismissed or asked to resign from any of the positions listed on the Employment List.

[9] The difficulties with the TS Application, which will be discussed below, were that the Applicant:

- i. failed to include on her Employment List the employment at DND she had secured through Promaxis; and
- ii. failed to disclose that she had been "terminated" by Promaxis from the Promaxis/DND Contract.

VI. **The Investigation**

[10] The Standard provides in Appendix B, section 1 that a review of an applicant's Reliability Status is the first step when considering an application for a Top Secret Clearance. The focus of PSPC's investigation is an applicant's honesty and reliability. His or her finances are assessed at this stage. The Standard states in Appendix B at point 7 that the purpose of a financial inquiry is to "assess whether an individual poses a security risk on the basis of financial pressure or history of poor financial responsibility".

[11] The Investigator performed a credit check and it showed a history of payday loans as well as a bankruptcy in 2010 and a consumer proposal in 2017. This was treated as adverse information and, as a result, a security screening interview was scheduled. The interview was held on October 1, 2019 [the In-Person Interview].

[12] On the day before the In-Person Interview, the Investigator sent the Applicant an email which set out the topics to be discussed. It noted that her finances would be discussed "in particular". The Investigator also sent documents for the Applicant's review, which included a Security Acknowledgement.

[13] The Security Acknowledgment was signed by the Applicant at the In-Person Interview. It listed the factors PSPC would consider when evaluating her TS Application. They included whether the Applicant:

- suffers from defects of character which may expose him or her to blackmail or other influence by any organization or individual or foreign intelligence service or which may otherwise indicate unreliability; [emphasis in original]

- has deliberately withheld, misrepresented or falsified information of security significance, or has deliberately lied during the course of a security interview;

...

- has serious financial difficulties.

[14] During the In-Person Interview, which was recorded, the Applicant was asked to explain why she resorted to payday loans. When answering the question, she said that she fell behind between contracts and faced overdue bills.

[15] The In-Person interview also involved a detailed review of the Employment List on the TS Application Form. As mentioned above, the Employment List did not include the Promaxis/DND Contract and the Applicant did not draw that omission to the Investigator's attention while the Employment List was being discussed.

[16] After the In-Person Interview, the Investigator discovered new adverse information. He learned that the Applicant had failed to disclose the Promaxis/DND Contract on her Employment List and in her In-Person Interview. He also learned that, according to the Applicant, this contract had been terminated.

[17] The source of the Investigator's information was a decision by the Canadian International Trade Tribunal [CITT] which dealt with a complaint the Applicant had filed [the Complaint]. Therein she alleged that she had witnessed bid rigging during the Promaxis/DND Contract and that she had been terminated by Promaxis in reprisal for making the Complaint. She also stated, according to the CITT, that the Promaxis/DND contract had been in place for six weeks from

January 19 to March 2, 2015. For some of this period the Employment List showed that she had been working for Aboriginal Affairs. The CITT decision states that it used the Applicant's Complaint as its source. It reads as follows:

1. The complaint indicates that Ms. Plummer-Grolway was hired by an agency, Promaxis Systems Inc (Promaxis), as a procurement officer to provide services to DND and that, on January 19, 2015, she started working at DND offices under her contract with Promaxis. [my emphasis]
2. Ms. Plummer-Grolway states that, on March 2, 2015, Promaxis informed her that her contract was terminated. She states that she feels that this termination resulted from her having witnessed the alleged bid rigging in the solicitation in issue. [my emphasis]
3. Ms. J. Plummer-Grolway alleges, in her complaint, that the process followed in the solicitation in issue was rigged. She also alleges that the contract under which she was providing services to DND, which is unrelated to the solicitation in issue, was terminated unfairly. [my emphasis]

[18] As a result of these discoveries, the Investigator arranged a second interview with the Applicant by telephone on November 26, 2019 [the Telephone Interview]. It was also recorded. In the Telephone Interview, the Investigator asked about contracts that had ended early but in answer to his question, the Applicant did not mention the Promaxis/DND contract. She did not

acknowledge it until the Investigator asked her about it by name. When asked why it had been omitted from her Employment List she said that it “slipped her mind”.

VII. **The Investigation Report**

[19] The Investigator concluded that neither the Promaxis/DND Contract nor its termination had been disclosed and that the Applicant’s explanation that the contract had “slipped her mind” was not credible because:

- the Promaxis/DND Contract was the one which caused her to complain to the CITT;
- and
- the Promaxis/DND Contract ended in a termination.

[20] The Investigator concluded that the Applicant’s failure to disclose the Promaxis/DND Contract and to provide a credible explanation for the non-disclosure undermined both her reliability and her credibility.

[21] Turning to her finances, the Investigator focussed on the Applicant’s repeated use of payday loans. They were disclosed as follows:

In her 2010 bankruptcy Statement of Affairs:

- i. \$500 – Blue Hog (Pay Day Loan)
- ii. \$1000 – Cash Advance
- iii. \$1000 – Cash Stop
- iv. \$1000 – Cash Store



- v. \$1000 – Easy Home
- vi. \$1700 – MOGO
- vii. \$1000 – Money Mart
- viii. \$22,607 – Serve U (Pay Day Loan)

In her 2017 Consumer Proposal:

- i. \$1500 – Cash 4 You
- ii. \$1400 – Cash Max
- iii. \$1500 – Cash Money
- iv. \$1500 – Cash Stream
- v. \$1500 – Cash Street
- vi. \$1500 – Money Mart
- vii. \$994 – Money Mega Mart

[22] The Applicant also acknowledged that she took out a further payday loan after making her Consumer Proposal.

[23] Due to an error by the Applicant's Insolvency Trustee, the final figure on the 2010 Bankruptcy Statement of Affairs was incorrect. \$22,607 should have been \$300.00 [the Error]. The Error was not corrected by the Applicant until after the Decision was released so an inaccurate amount also appears in the Decision.

[24] The Federal Government's notoriously defective Phoenix Pay System erroneously continued to pay the Applicant after the completion of one of her contracts. She received

approximately \$8,000 in overpayments and that amount was a debt she was required to repay [the Phoenix Debt]. However, PSPC agreed that the Phoenix Debt would not be considered as an outstanding debt during the Investigation.

[25] The Investigator reached the following conclusions and recommended the revocation of the Applicant's Reliability Status.

28. During the course of the interviews, on the balance of probabilities, PLUMMER-GROLWAY was not found to be credible with regards to her employment history. PLUMMER-GROLWAY failed to accurately disclose her employment history on the security screening form, during the face to face interview, and during the telephone interview and only made mention of her position with DND via Promaxis when she was directly questioned about the information. PLUMMER-GROLWAY alleged that it had "slipped her mind" however, given that she had filed grievance during this incident it was deemed unlikely that she did not recall this noteworthy employment termination. Her response was assessed as not being credible and reflected negatively on her honesty, trustworthiness, and reliability as she was given multiple opportunities to be forthcoming about the information and failed to disclose it.

29. With regards to her finances, PLUMMER-GROLWAY has experienced financial difficulties for what appears to be from the early 2000's until present. This is confirmed by the financial documents produced by PLUMMER-GROLWAY and self-admitted over-extension of credit. This demonstrates a security concern as someone with longstanding financial troubles, especially one working in procurement, is susceptible to be bribed or coerced into acting against the best interests of the Government of Canada. It also appears that PLUMMER-GROLWAY has been living outside of her means and overextending her credit as her Statement of Liabilities from both her current and previous bankruptcy and Consumer Proposal indicate that she has consistently been withdrawing funds from predatory short-term loan companies and did not provide a valid reason for this activity. The combination of living outside of her means and the repetitive pattern of acquiring loans and applying for financial relief raises significant questions to her judgement and reliability. In the ten year period from 2010 to 2020, PLUMMER-GROLWAY sought a bankruptcy in 2010, a Consumer Proposal in 2017 and amassed

approximately \$39,000 in payday loans that have ultimately been included in her Statement of Liabilities.

[26] Due to the Error, the Investigator unknowingly overstated the total payday loans. The correct figure was approximately \$17,000, not \$39,000.

### VIII. The Decision

[27] The Decision was based on the Investigation Report. The Director revoked the Applicant's Reliability Status and administratively closed her Secret Clearance and TS Application. Two reasons were given.

[28] The first reason was the Applicant's financial history, which the Director characterized as a "recurring pattern of overextending [her] credit". He indicated that the Applicant's "frequent and repetitive use of predatory, short-term loans raises questions with regards to [her] judgement". He specifically noted that the Applicant had amassed \$39,000 in payday loan debts. (As noted above, he was unaware that the correct figure was \$17,000.)

[29] The second reason was the Applicant's failure to be honest when preparing the Employment List and when discussing her employment history during her screening interviews. The Director indicated that this issue arose because the Applicant failed to mention her position at the Department of National Defence until directly asked about it during the Telephone Interview. Her claim that it "slipped [her] mind" was deemed not credible, given that the Applicant had brought a grievance about bid rigging while in that position.

IX. **The Reconsideration**

[30] On receipt of the Decision, the Applicant sent an email to the Director correcting the Error and making several other submissions. They were considered by the Director but the Decision was confirmed [the Second Decision].

X. **The Determinative Issues**

[31] Procedural fairness is the determinative issue and for this reason, it is not necessary to consider many of the other issues raised by the Applicant. I will deal only with the following additional questions because the answers may assist during the reconsideration.

XI. **The Additional Questions**

1. Did the Director have jurisdiction to make the Decision?
2. Was the Phoenix Debt counted in spite of assurances given to the Applicant?
3. Should alternatives to the revocation of her Reliability Status have been considered?
4. Should the Applicant's constitutional rights have been considered?
5. Was the CITT decision relevant?
6. Should her discharge following the bankruptcy in 2010 have been considered?

XII. **Issue 1 – Procedural Fairness**

[32] The Standard provides in section 5.2.4 that individuals must have an opportunity to explain adverse information before a decision is reached. The Standard also provides in Appendix D, section 8, that an interview provides an individual with an opportunity to explain

matters of concern before a decision is reached. In this case, the interviews did provide that opportunity. The Investigator asked why the Applicant had relied on payday loans and why the Promaxis/DND Contract had not been included on her Employment List.

[33] However, an interview is not a consultant's only opportunity to address adverse information. The Standard also provides the following:

In Appendix D, point 1:

When consideration is being given to rendering a negative decision, individuals must be informed, provided with reasons for the decision (unless the information is not to be disclosed under the *Privacy Act* or other applicable legislation) and given an opportunity to respond to the information.

In Appendix D, point 2:

When consideration is being given to denying or revoking a security status or clearance, individuals must be informed in writing and be provided with reasons, unless the information is not to be disclosed under the *Privacy Act* or other applicable legislation. They must also be given an opportunity to validate or refute adverse information.

In Appendix D, point 8:

Individuals are to be provided with a statement summarizing the information available to enable them to be reasonably informed of the adverse or missing information.

[my emphasis throughout]

[34] The Standard does not provide a meaning for the phrase "when consideration is being given" in the above provisions. In my view, it describes a period which begins when a negative investigation report is forwarded to a decision maker and ends before a negative decision is made.

[35] It appears that the Standard contemplates a step in that period which involves providing a consultant with a written statement [the Statement of Adverse Information] setting out the adverse information and giving the consultant an opportunity to provide a response. In other words, because the loss of a security designation can effectively terminate a consultant's career with the Federal Government, a consultant is given two chances to explain adverse information: both during an interview and in response to a Statement of Adverse Information once a negative decision is under consideration.

[36] Because a Statement of Adverse Information was not provided to the Applicant while the negative Decision was under consideration, the application for judicial review will be allowed.

### XIII. **The Additional Questions**

#### 1. Jurisdiction

[37] The Standard provides that only PSPC's Deputy Head has authority to revoke security clearances and that that authority cannot be delegated. However, section 9 of Appendix D of the Standard provides that a Deputy Head may delegate authority to make decisions to revoke Reliability Status. The Director was the decision maker in this case and he had delegated authority to make the Decision because it revoked the Applicant's Reliability Status.

[38] However, the Applicant submits that because the revocation of her Reliability Status effectively revoked her Secret Security Clearance, the delegation to the Director was impermissible. I am not persuaded by this submission. In my view, the legality of the delegation

of authority depends only on the decision actually made. Since the Decision did not revoke the Applicant's Secret Clearance, the Director had jurisdiction.

## 2. The Phoenix Debt

[39] The Applicant was told that the Phoenix Debt would not be counted in the Investigation. Further to this promise, the Phoenix debt is not listed as a debt owing in the Investigation Report.

[40] The Applicant says that since the Phoenix Debt caused her to make the Consumer Proposal, the Consumer Proposal itself should not have been considered. Again, I am not persuaded. According to the Investigation Report, all that was agreed was that the Phoenix Debt would not be included in her total liabilities. There was no agreement that the payday loans described in the Consumer Proposal or the fact that the Proposal was made would be overlooked.

## 3. Alternatives to Revocation

[41] The Applicant says that the Standard provides that alternatives to revocation of a consultant's Reliability Status, such as training, should have been considered by the decision maker. However, this submission is inaccurate. The only time alternative remedies are discussed in the Standard is in the context of dealing with employees at PSPC who fail to implement the Standard. This is found in section 8. There is no suggestion in the Standard that there is any remedy but a revocation of Reliability Status for consultants who are dishonest and unreliable.

## 4. *Charter* Rights and Section 35 Rights

[42] On this topic I can do no better than quote from the Respondents' Memorandum of Fact and Law which I adopt. It states:

81. PSPC's decision does not engage the Applicant's equality rights under subsection 15(1) of the *Charter*. The Applicant has failed to demonstrate that the decision created a distinction based on an enumerated or analogous ground and that this distinction has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such a claim requires evidence. There is no evidence in this case that the decision was based on discriminatory attitudes about Indigenous peoples or flowed from a security screening process with disproportionate impacts on groups protected by section 15.

82. A fair reading of the decision shows that it is based on security concerns that apply to anyone who holds a reliability status, regardless of race or ethnic origin. The decision maker engaged in an individualized assessment of the Applicant's particular circumstances, lacking any of the hallmarks of discrimination.

83. Further, the Federal Court of Appeal has consistently declined to recognize poverty or financial vulnerability as analogous grounds under section 15. Consequently, PSPC's assessment of the Applicant's financial history does not engage section 15.

...

85. Finally, section 35 of the *Constitution Act, 1982* does not form part of the *Charter*. The Applicant has cited no authority requiring the decision maker to consider section 35 nor articulated how any specific right under this section is engaged by PSPC's decision.

##### 5. The Relevance of the CITT Decision

[43] In my view, the CITT's decision was relevant because it indicated that, in her Complaint to the CITT, the Applicant said she had been terminated by Promaxis in connection with the Promaxis/DND contract. As noted in paragraph 25 above, this, in part, led the Investigator to conclude that she was not being truthful when she explained that the contract "slipped her mind".



6. Discharge from Bankruptcy 2010

[44] This fact was not referred to in the Decision but it was noted in the Investigation Report. While it is true that the discharge gave the Applicant a fresh financial start, the salient point was that her practice of taking payday loans continued after the discharge. In these circumstances, the discharge was not particularly significant, and therefore did not need to be referred to in the Decision.

XIV. **The Remedy on Judicial Review**

[45] The Applicant asks me to restore her Reliability Status and Secret Security Clearance. However, on judicial review, orders directing an outcome are only made in very exceptional situations. In view of the concerns expressed in the Investigation Report, I am unwilling to make such an order. It will be for the Director to evaluate any explanations that Applicant may offer once she receives a Statement of Adverse Information. Accordingly, the usual order directing a reconsideration will be made.

XV. **Costs**

[46] Counsel for both parties have asked me to reserve on the issue of costs. Their hope is to reach a settlement. If they fail to do so by Friday, June 12, 2021, they are to submit written submissions on Friday, June 19, 2021 (Applicant's Counsel) and Friday, June 26, 2021 (Respondents' Counsel). Thereafter, I will make an order as to costs. The submissions from Applicant's counsel should include reference to the law and facts justifying a costs award in favour of *pro bono* counsel.

**JUDGMENT IN T-921-20**

**THIS COURT'S JUDGMENT is that**

1. The application is hereby allowed;
2. The Decision and the Second Decision are set aside and the Applicant's application for a Top Security Clearance is to be reconsidered;
3. The reconsideration may (but need not) involve further investigation and interviews and a further investigation report;
4. If there comes a time when a negative decision is under consideration, the Applicant is to be given a written statement setting out any adverse information. She is to be given at least 30 days to respond;
5. The Decision is to be reconsidered taking the Applicant's response into account;
6. The Style of Cause is to be amended to show that the Attorney General of Canada as the sole respondent;
7. Costs are reserved on the basis described in the final paragraph of the reasons for this decision.

"Sandra J. Simpson"

Judge

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

**DOCKET:** T-921-20

**STYLE OF CAUSE:** JOANNE PLUMMER-GROLWAY v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** BY VIDEOCONFERENCE USING ZOOM

**DATE OF HEARING:** APRIL 21, 2021

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** MAY 13, 2021

**APPEARANCES:**

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