

Federal Court



Cour fédérale

**Date: 20131023**

**Docket: T-2286-12**

**Citation: 2013 FC 1072**

**Ottawa, Ontario, October 23, 2013**

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

**BETWEEN:**

**ANIS HAYMOUR**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision of Suzanne Gorley, the Acting Director of the National Conflict Resolution Office of the Canada Revenue Agency [the Acting Director] pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Acting Director denied the Applicant's request for an Independent Third Party Review [ITPR] of his non-disciplinary termination on the basis that he had not filed his request on a timely basis.

I. Issue

[1] The issue raised in the present application is as follows:

A. Was the Acting Director's decision unreasonable?

[2] For the reasons that follow, I find that the Acting Director's decision was unreasonable.

II. Background

[3] The Applicant was employed with the Canada Revenue Agency [CRA] since 1994. From 1997 to 2002, he was employed as an AU-01 Auditor. In 2002, the Applicant was promoted to the position of MG-03 as a Team Leader. As a result of poor performance appraisals in 2003, 2004 and 2005, the Applicant was demoted back to an AU-01 position on April 26, 2006. The Applicant filed grievances regarding the poor performance appraisals and the demotion. These grievances were referred to an ITPR on April 24, 2008, and a hearing was held in March, 2011.

[4] On September 12, 2008, the Applicant went on leave for medical reasons. Subsequent to his going on leave, the CRA made multiple requests for updated medical information. The Applicant complied with various requests until 2011, when he failed to provide updated medical information after a request was made. As a result of not responding to this request, the Applicant was terminated for abandonment of his position on November 18, 2011.

[5] The Applicant filed a grievance regarding his termination on January 6, 2012. After pursuing the grievance process through 2012, the Applicant's grievance was denied at the final level on October 2, 2012. On October 15, 2012, a copy of the October 2, 2012, grievance response was

mailed to the Applicant. According to the Applicant's affidavit, on October 16, 2012, the Applicant's union representative, Kent McDonald, provided the Applicant with a copy of the October 2, 2012, grievance response and advised him that there was a deadline of seven days from the date on which the Applicant received it to request a referral to the ITPR, running from the date on which the Applicant received notice from his employer. The Applicant filed a request for referral to ITPR using form RC-117- Request for an Independent Third Party Review. This form was received by the CRA on October 29, 2012.

[6] In an affidavit provided in support of this application for judicial review, the Applicant states that he did not receive notice of the grievance response until November 1, 2012. The admissibility of the affidavit is challenged by the Respondent.

[7] On December 4, 2012, the Acting Director contacted the Applicant by letter and informed him that his request for referral to an ITPR was denied due to untimeliness.

[8] The Acting Director noted that form RC-117 states that it "is to be completed by the requestor and received by the National Conflict Resolution Office within 7 calendar days following the date of notice or event leading to the requestor's right to access the ITPR recourse mechanism."

[9] Based on the fact that the grievance response was sent on October 15, 2012, and Canada Post's delivery standards meant the letter would have been received no later than October 19, 2012, the Acting Director found that the Applicant's request for referral, received October 29, 2012, was

untimely, as it was received after the seven day period prescribed to request an ITPR - after the due date of October 26, 2012.

III. Standard of review

[10] The standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 62 and 47; *Girard v Canada (Attorney General)*, 2007 FC 1333; et al).

IV. Analysis

[11] At the hearing, it was agreed by counsel for both parties that in light of the relevant jurisprudence in this Court and the Federal Court of Appeal, the affidavit of Anis Haymour dated January 23, 2013, should not be considered. It was not before the decision maker, and does not meet the exceptions to the rule that evidence not before the administrative decision maker should not be considered by the Court on substantive review (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, at para 20).

[12] It was also acknowledged by the Applicant's counsel that the application before me is based solely on paragraphs 18.1(4)(c) and 18.1(4)(d) of the *Federal Courts Act*, RSC, 1985, c F-7, and not on paragraph 18.1(4)(b), which deals with procedural fairness. As such the reasonableness standard of review applies and I will not consider procedural fairness arguments.

[13] There are three conditions that must be met prior to a court intervening on judicial review pursuant to 18(4)(d): (i) an erroneous finding of fact, (ii) made in a perverse or capricious manner or without regard to the material before the tribunal, and (iii) the decision must be attacked based on

the erroneous finding (*Rohm & Haas Canada Ltd v Canada (Anti-Dumping Tribunal)*, [1978] FCJ No 522 (FCA) at para 5). Even if the first and third points were conceded, the Respondent argues that the Applicant still would not have succeeded in having the Court find that the decision unreasonable, as he has not demonstrated that the Acting Director's findings were made without regard to the evidence.

[14] The Acting Director considered the following three pieces of information in her decision: the date on which the final grievance reply was sent to the Applicant, the Canada Post delivery standard for delivery of four days from the date the response was sent by the Applicant, and the date on which the response was received by the Acting Director.

[15] The Acting Director decided to adopt the Canada Post four-day delivery standard for delivery of the grievance reply in the absence of an explicit or deemed delivery date provided for under the CRA's National Conflict Resolution Office [NCRO] rules concerning referrals of termination grievances to an ITPR.

[16] As stated above, the NCRO mailed the Grievance Response to the Applicant on October 15, 2012. The Acting Director asserts that, according to the Canada Post delivery standard, the Grievance Response would have been received no later than October 19, 2012, and that therefore the Applicant's Response should have been received by Friday, October 26, 2012. It was not received until Monday, October 29, 2012.

[17] The Respondent's position is that given the facts as above, the Acting Director's refusal to refer the grievance to ITPR was reasonable and a possible, acceptable outcome. While the application of a seven day limitation period to comply with the NCRP procedure for Independent Third Party Review seems harsh, the finality of that period should not obscure its value (*Novak v Bond*, [1999] 1 SCR 808, at para 8).

[18] I must disagree. In order to give colour to the question of reasonableness, the Court should look at the decision in the context in which it was made (*Canada (Attorney General) v Abraham*, 2012 FCA 266, at paras 42-45). Firstly, the Acting Director adopted the delivery standard of Canada Post, which necessitates delivery of the referral response by October 19, 2012. The allegation of the Applicant is that he did not receive the grievance response by that date, but there was no evidence before me as to exactly when he received it. However, time limit provisions should be interpreted in a manner that gives effect to their purposes. Here, if I am to accept as reasonable the NCRO's unilateral reliance on a Canada Post delivery standard, which may or may not actually be met, the consequence is that an individual may be required to submit their referral request before they actually receive notice that a referral is necessary or even available. In effect, the Canada Post delivery standard, according to the Respondent, would be determinative in any event. Such a result is simply not reasonable.

[19] Further, as argued by the Applicant's counsel, the Acting Director could have confirmed receipt by the Applicant by sending the Grievance Response by registered mail, which would have avoided the whole question as to effective date of receipt, but did not do so. Alternatively, the Acting Director could have requested confirmation of receipt by the Applicant, but again, chose not

to do so. If she had applied the ten-day standard of delivery under section 141(1) of the *Federal Court Rules*, SOR/98-106, a requirement that was suggested by the Applicant's counsel as being reasonable, the Applicant's response would have certainly been received in the prescribed time period. This standard was not applied.

[20] The result of the deadline established is that the Applicant is denied his opportunity to engage in the ITPR process because his request for a referral to an ITPR was late by one business day. Bearing in mind the length of these proceedings, the prejudice to the Applicant, lack of prejudice to the Respondent, and the other factors set out above, such a result is unreasonable.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Applicant is allowed and the NCRO's decision is set aside and the matter is referred back to the NCRO for a redetermination, in accordance with this judgment.
2. Costs to the Applicant.

"Michael D. Manson"

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-2286-12

**STYLE OF CAUSE:** Haymour v. CRA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** October 21, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** MANSON J.

**DATED:** October 23, 2013

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