Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 21
Date: July 17, 2020
File No.: T1656/01111

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Ruling

Member: Colleen Harrington

Table of Contents

I. Background

[1] This matter has a lengthy history, having been before the Canadian Human Rights Tribunal (Tribunal), the Federal Court, and the Federal Court of Appeal, all more than once. I will briefly summarize the file's history and explain the context in which this Adjournment Motion has arisen.

[2] The Complainant, Chris Hughes, filed his complaint with the Canadian Human Rights Commission (Commission) in January of 2008 and the Commission asked the Tribunal to institute an inquiry into the complaint in March of 2011. In its July 9, 2014 decision (Liability Decision) the Tribunal determined that the Respondent, Transport Canada, had discriminated against Mr. Hughes on the basis of his disability when staffing for Marine Security Intelligence Analyst positions within the department, contrary to subsection 7(a) of the *Canadian Human Rights Act,* RSC 1985 c H-6(*CHRA* or the *Act)*.[1] Although the Federal Court (FC) set aside the Tribunal's Liability Decision, it was restored by the Federal Court of Appeal (FCA).[2]

[3] The Tribunal then held another hearing to determine the appropriate remedy for the Respondent's discriminatory conduct. In her June 1, 2018 decision (Remedy Decision), Tribunal Member Olga Luftig ordered the Respondent to "instate the Complainant, subject to the required security clearance, on the first reasonable occasion, and without competition, to the position of Intelligence Analyst at the PM-04 group and level classification".[3] The Respondent was also ordered to pay the Complainant compensation for lost wages and benefits from the time he should have been appointed to the position in May of 2006 to the point at which the Tribunal determined that the causal link between the discrimination and the wage loss was severed, being May of 2011. The Tribunal also awarded damages for pain and suffering and for the reckless conduct that resulted in the discrimination.

[4] Both parties applied to the Federal Court to judicially review the Tribunal's Remedy Decision. Each party challenged the Tribunal's conclusion that May 2011 was the

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[1] *Hughes v. Transport Canada*, 2014 CHRT 19 (Liability Decision).
[2] *Hughes v. Canada (Attorney General)*, 2016 FCA 271.
[3] *Hughes v. Transport Canada*, 2018 CHRT 15 (Remedy Decision), at 101 (section XVI).

appropriate end date for the receipt of lost wages and benefits. Justice LeBlanc of the Federal Court granted Mr. Hughes' application in part, finding that the Tribunal's "ultimate cut-off date of May 2011 hinges on the defective presumption that Mr. Hughes would have left the Intelligence Marine Analyst position after five years."[4] The Court could find no rational connection between the Tribunal's finding and the factual record it relied on, and so concluded that the finding was unreasonable. As a result, the Court set aside the Tribunal's Remedy Decision insofar as it relates to the determination of the ultimate cut-off date of May 2011 for compensation and benefits, and remitted the matter to a differently constituted panel of the Tribunal for redetermination.

[5] I was appointed by the Tribunal's Chairperson to redetermine the issue of the cut-off date for wage loss and benefits. Dates were established for the parties' submissions and a one-day hearing was scheduled to take place in April of 2020. However, I agreed to grant the parties' request to adjourn these dates, as they had agreed to engage in mediation at the end of May 2020. I have been informed that the mediation occurred but did not result in a resolution of the matter.

[6] Following the May 2020 mediation attempt, I held a Case Management Conference Call (CMCC) with the parties, at which time Mr. Hughes advised that a judicial review application has been filed in the Federal Court with respect to another of his human rights complaints, against the Canada Border Services Agency (CBSA). Due to the Court's Covid-19 related closure, this matter has apparently been delayed to the end of July 2020. Mr. Hughes expressed his view that, once the CBSA file has been resolved, the Tribunal would then be in a position to consider both the CBSA and Transport Canada files together.

[7] Mr. Hughes indicated during the CMCC that he intended to file a motion clarifying the scope of the remedy the Tribunal should be considering in the redetermination hearing. Mr. Hughes said he would file that motion within a week of the CMCC. However, he subsequently informed the Tribunal that, prior to proceeding with this "clarification motion" he would be sending a demand letter to the Respondent that would require its

[4] *Hughes v. Canada (Attorney General),* 2019 FC 1026 at para.80.

immediate action. His demand relates to the aspect of the Tribunal's Remedy Decision requiring that he be instated into the Intelligence Analyst position in either Esquimalt or Vancouver, British Columbia. As this particular position apparently does not exist in Vancouver, he argues that he should be offered a similar position in Vancouver instead. Mr. Hughes advised the Respondent and Tribunal that, if he was not staffed in a different job in Vancouver immediately, he would be filing an "emergency ex parte Contempt of Court charge against the Minister and counsel for" Transport Canada. As such, Mr. Hughes proposed to the Tribunal that his "clarification motion" due date be postponed until after he had received a response to the demand letter and, if necessary, filed a contempt motion in the Federal Court.

[8] In response to Mr. Hughes' demand letter, the Respondent noted that, in her Remedy Decision, Tribunal Member Luftig ordered the Complainant to be instated as a PM-04 Intelligence Analyst on the first reasonable occasion, so long as he met all required conditions of employment for the position, including the security clearance. The Respondent stated that Mr. Hughes has not yet completed the security clearance forms that were provided to him in December of 2018 as "was confirmed by the Federal Court in various decisions since". The Respondent agrees that the PM-04 Intelligence Analyst position does not exist in Vancouver, but disagrees that the Tribunal's Remedy Decision would require him to be instated into a different position in Vancouver, even if he was willing to relocate there.

[9] Following Mr. Hughes' correspondence about the delay in filing his "clarification motion", I advised the parties that, while I felt it was reasonable to provide them with time to try to mediate the issue of lost wages and benefits, it has now been nearly one year since Justice LeBlanc ordered the Tribunal to conduct a redetermination of this issue. I noted that Mr. Hughes was essentially asking the Tribunal to stay its Federal Court-mandated proceeding until he has dealt with a different aspect of Member Luftig's Remedy Decision, as well as a separate human rights complaint against the CBSA. I advised that, unless the Federal Court ordered a stay of the Tribunal's proceedings, I would move forward with setting dates for submissions and the redetermination hearing.

[10] I also indicated that, if Mr. Hughes still wished to file a motion with respect to the scope of the remedy the Tribunal should consider (his “clarification motion”), I would be willing to discuss with the parties whether that should be brought and determined prior to the redetermination hearing, or whether he could append his motion to his submissions regarding lost wages.

[11] In response to my direction that the parties provide their availability for a redetermination hearing between September and November of 2020, the Complainant filed this Motion for an adjournment of this proceeding. Neither the Respondent nor the Commission takes a position with respect to the Motion to Adjourn.

II. Issue

[12] Is it in the interest of justice to grant the Complainant’s request for an adjournment, either indefinitely or until the summer of 2021, or for some other time period?

III. The Complainant’s Motion to Adjourn

[13] In his Motion to Adjourn, Mr. Hughes argues that requiring him to apply to the Federal Court for a stay would be “punitive and unnecessary”, and that the Tribunal can adjourn the hearing because it is the master of its own proceedings.

[14] In support of his Motion, he states that Justice LeBlanc’s decision has been appealed to the Federal Court of Appeal, which could overturn the Federal Court’s decision with respect to the appropriate end date for lost wages and benefits. He takes the position that “this file is now less urgent as the Liability and Remedy orders are out and this is only a redetermination of a remedy order.”

[15] In further support of his Motion, Mr. Hughes notes that there have been numerous adjournments in this file, including one in 2016 when the complaint was at a similar stage to the present one. At that time, the Federal Court had judicially reviewed the Tribunal’s Liability Decision and remitted the matter to a different member of the Tribunal for a new

determination.[5] After the Federal Court's decision was appealed to the Federal Court of Appeal, the Tribunal apparently granted the Complainant's adjournment request during a CMCC in January of 2016. That adjournment lasted until December of 2016, by which time the Federal Court of Appeal had set aside the order of the Federal Court and upheld the Tribunal's Liability Decision as being reasonable.[6]

[16] Mr. Hughes argues that requiring him to proceed with the redetermination hearing now, while he is dealing with other matters in the Federal Court would be "greatly prejudicial" to him. These other matters include the judicial review of the CBSA complaint and the above-mentioned anticipated contempt motion relating to his recent demand letter. He says he is at a distinct disadvantage in other legal proceedings until he is back at work, and he believes that the Respondent has been frustrating the instatement aspect of the Tribunal's Remedy Decision for two years. He says:

> The Courts on numerous occasions have blocked a Party that was frustrating a Court Order (Remedy Order) from proceeding with litigation until they complied with the Order.
>
> This is a similar issue. The Respondent should not be allowed to make Remedy arguments at a redetermination Remedy Hearing that are detrimental to the Complainant while they have still not abided by the Original Remedy Order on job instatement.

[17] Mr. Hughes takes the position that he should be permitted to complete all of these matters at the Federal Court, as well as the appeal to the Federal Court of Appeal, before dealing with the present matter, because he believes that these Courts will rule in his favour. In his view, this will ultimately change the nature of the determination the Tribunal will need to make. He frames his argument as follows: "To prevent fragmentation of this case it is imperative this file be adjourned until the other files at the FC and FCA are dealt with then a Motion to consolidate can be done at the Tribunal combining the Remedy Hearing for CBSA and TC for the entire time frames involved – 2001-2020 resulting in one decision on lost wages, cut off dates if any, promotions, pensions and medical bills."

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[5] *Canada (Attorney General) v. Hughes*, 2015 FC 1302.
[6] *Supra* note 2.

[18] Finally, Mr. Hughes argues that, if I deny his Motion to Adjourn and he has to file for a formal stay, that would end up taking months, as the Federal Court will be very busy when it re-opens on June 29th, following its closure due to Covid-19. He concludes, "I think it is more prudent to adjourn the file *sine die* or in the alternate set dates in the summer of 2021."

IV. Positions of the Other Parties

[19] The Commission and Respondent both advised the Tribunal that they take no position with respect to Mr. Hughes' Motion for an adjournment. However, the Respondent has added the following information:

> The Respondent acknowledges the Order of Mr. Justice LeBlanc, dated July 31, 2019, ordering the redetermination of that issue by the Tribunal. The Respondent also acknowledges that Mr. Hughes has filed an appeal of that decision (A-369-18) and he seeks relief in the form of a directed verdict that, if allowed, would eliminate the need for a Tribunal redetermination. The Respondent also has filed an appeal of the same decision (A-379-19) which seeks relief in the form of reinstating the order of Member Luftig regarding the cut-off date for lost wages and benefits. If allowed, that appeal would also eliminate the need for the Tribunal's redetermination of that issue. Both of those appeals are currently in abeyance to allow time for the mediation, which has already taken place, until July 31, 2020, at which time they are very likely to be continued.

V. Analysis

[20] I accept that the granting of an adjournment falls under the Tribunal's large discretion as master of its own proceedings, although I note that the Tribunal has clearly stated that adjournments should only be granted in exceptional circumstances.[7] This is because there is a public interest in having Tribunal matters resolved expeditiously, as is required by subsection 48.9(1) of the *CHRA*: "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

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[7] *Canadian Association of Elizabeth Fry Societies and Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para.14.

[21] In a case such as this, where the Tribunal is asked to exercise its discretion to adjourn its proceedings pending the decision of a Court, the Tribunal must consider whether, in all the circumstances, the interests of justice support such a delay. The "interest of justice" approach was endorsed by the Tribunal in the *Duverger* case[8], in which the Tribunal denied a motion for a stay pending a judicial review of the Commission's referral of the complaint to the Tribunal. The interest of justice approach relies on a "reasonable and flexible assessment of factors relevant to stay requests including, but not limited to natural justice and principles of procedural fairness, irreparable harm, the balance of convenience between the parties, and the public's interest in dealing with human rights complaints expeditiously". [9] The factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances of each case.

[22] In several published rulings the Tribunal has denied adjournment requests, often in cases where the adjournment was sought at an early stage in the Tribunal's proceedings, usually prior to the inquiry into the complaint taking place.[10] In some of these cases, the Tribunal has considered that the more time that passes, the more difficult it will be to preserve evidence related to the case, including the memories and recollections of witnesses.[11]

[23] In *Constantinescu*, a case in which the Complainant was requesting an indefinite stay of the proceedings based on her belief that the Respondent was not complying with its disclosure obligations, the Tribunal stated: "The more time that passes, the greater the prejudice for the public. It is not in the public interest for complaints related to discrimination to remain unresolved over a long period of time".[12] In that case, the Tribunal did not find that the alleged prejudice suffered by the Complainant justified a stay of proceedings based on the interest of justice test.

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[8] *Laurent Duverger v 2553-4330 Québec Inc. (Aéropro), 2018 CHRT 5.*
[9] *Egan v. Canada Revenue Agency*, 2018 CHRT 29 at para.8.
[10] For example, see *Duverger*; *Gilbert Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2019 CHRT 9; *Constantinescu v. Correctional Service Canada*, 2018 CHRT 10 ["Constantinescu"].
[11] For example, see *Duverger* and *Constantinescu.*
[12] At para.38.

[24] However, in other cases, the Tribunal has found that, "short term delay can achieve long term gain, and a better final result."[13] These tend to be cases in which adjournments can prevent unnecessary hearings or judicial reviews or appeals where the same or substantially similar issues are working their way through the administrative justice or judicial system. Such was the case in *Bailie* in which the Tribunal agreed to grant an adjournment in the absence of natural justice concerns. In that case, the Tribunal stated that, "the 'admonition' to proceed as expeditiously as possible must be seen in the larger context."[14] The Tribunal also noted that "expeditious", which is the term used in subsection 48.9(1) of the *Act*, means more than simply being "done with speed", stating: "The *Canadian Oxford Dictionary* defines 'expeditious' as '…acting or done with speed and efficiency…' As a legal term, in French, 'procédure expéditive' is defined as 'rapide et efficace' (*le Petit Robert 2012*)."[15]

[25] In deciding whether to grant Mr. Hughes' adjournment request, I must consider whether his arguments, in and of themselves, discharge the burden of the interest of justice test.

[26] The argument that I should grant this adjournment request because the Tribunal has agreed to delay its proceedings before is not compelling on its own, given that an adjournment should only be granted in exceptional circumstances. Additionally, I could find no reported decision relating to the 2016 adjournment and so have no reasons to rely on in that regard. However, we do know that allowing the adjournment at that time did prevent the Tribunal from convening a second hearing, since the FCA overturned the decision of the FC ordering a redetermination of liability, and reinstated the Tribunal's decision. This obviously saved the Tribunal and the parties time and resources.

[27] In deciding that it is in the interest of justice to adjourn this redetermination proceeding for a period of time, I have taken into account several factors. I consider the stage at which we find ourselves in the proceeding to be relevant. Although the complaint was filed in 2008, the issue of liability has been decided following a full hearing, and a

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[13] *Bailie et al. v Air Canada and Air Canada Pilots Association,* 2012 CHRT 6 ["*Bailie*"] at para.22.
[14] *Ibid* at para. 22.
[15] *Ibid* at para.23.

remedy hearing has also taken place and a decision rendered. As such, the concern about preserving evidence is not relevant in this case.

[28] Most of Member Luftig's Remedy Decision has been upheld by the Federal Court or is simply not in dispute. The only issue that remains outstanding with respect to this complaint is the appropriate end date for lost wages and benefits. The Federal Court determined that the Tribunal's reasoning in that regard was flawed, and so quashed that aspect of the decision and remitted that limited issue to the Tribunal for a redetermination.

[29] However, the Federal Court's decision has been appealed to the Federal Court of Appeal. According to the Respondent, the Complainant is seeking relief in the form of a directed verdict that, if allowed, would eliminate the need for a Tribunal redetermination, while the Respondent is asking the FCA to reinstate Member Luftig's order. If the FCA does disagree with the FC's decision, this will change the nature of the Tribunal's continuing role in this matter. If the FCA upholds the FC's decision, and the matter is ultimately returned to the Tribunal for a redetermination, it will still be with respect to the limited issue of the end date for lost wages and benefits. Although a delay will have occurred, no party takes the position that they will be prejudiced by such a delay.

[30] I also note that, according to a decision of the FC with respect to a contempt motion brought by Mr. Hughes against the Respondent, "[o]n February 22, 2019, following the release of Justice Heneghan's decision, Canada issued a cheque for $352,970.07 to Mr. Hughes as payment of the calculable costs ordered in the Remedies Decision."[16] At paragraph 78 of this decision, Case Management Judge Kathleen M. Ring describes this payment "as substantial partial payment to Mr. Hughes, notwithstanding that it was not compelled by law to do so". The FC concluded that Mr. Hughes had "not met the onus of presenting a *prima facie* case that any of the alleged contemnors are in contempt of court by disobeying the" instatement order or the monetary award in the Tribunal's Remedy Decision.[17]

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[16] *Hughes v. Transport Canada,*2019 CanLII 118898 (FC) at para.29.
[17] *Ibid* at para.80.

[31] I view the fact that Mr. Hughes has received at least partial payment of the monetary award provided for in Member Luftig's Remedy Decision as relevant in deciding to grant his adjournment request. The Complainant also takes the position that becoming re-employed, as per the Tribunal's instatement order, is his current priority, more so than dealing with the lost wages redetermination. He has indicated that he intends to file yet another contempt motion in the FC and, while that is his choice, I would not agree to hold the redetermination of lost wages and benefits in abeyance pending the outcome of that issue.

[32] I am of the view that the interest of justice favours adjourning the matter pending the decision of the FCA with respect to the appeal of Justice LeBlanc's decision. This will provide judicial clarity regarding the final outstanding remedial issue in this complaint. I accept that this is one of the exceptional cases in which a further finite delay is justified in order to achieve the resolution of the complaint that is required by the *Act*. Nothing about this case has been speedy, but in order for it to eventually end, I believe that granting this adjournment now will likely lead to a more efficient final resolution of the complaint than denying the adjournment. The certainty that will be provided by the Federal Court of Appeal's decision is what is required to finally resolve this complaint. The Court will determine what, if anything, the Tribunal must ultimately decide with respect to lost wages and benefits. Following the Court's decision, if the Tribunal is required to convene another hearing, it will do so in a timely manner.

[33] The Complainant has requested that I adjourn the matter sine die, or without a fixed return date. This is based in part on his speculation about the eventual outcome of his CBSA complaint and that the Tribunal will ultimately agree to combine both the Transport Canada and CBSA matters into one remedy hearing. This level of speculation does not allow for a realistic end date for this complaint. As such, I do not agree that this matter should be adjourned until all of his applications to the Courts have been resolved. At this time, I agree to adjourn only until the Federal Court of Appeal has rendered its decision with respect to the appeal of Justice LeBlanc's decision in this matter.

VI. Order

[34] The Complainant's motion to adjourn the proceeding pending the decision of the Federal Court of Appeal in the Chris Hughes v. Transport Canada complaint is granted, with the following conditions:

1) The parties shall keep the Tribunal apprised of the status of the appeal, including any Reasons for Judgments; and

2) Any party or the Tribunal may request the scheduling of a Case Management Conference Call after the release of Reasons for Judgment in the appeal referred to in clause (1) in order to determine the status of this complaint before the Tribunal.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
July 17, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1656/01111

Style of Cause: Chris Hughes v. Transport Canada

Ruling of the Tribunal Dated: July 17, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Chris Hughes, for the Complainant