Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 34
Date: September 28, 2021
File No.: T1656/01111

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Ruling

Member: Olga Luftig

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[1] This is a ruling ("Ruling") for a motion brought by Mr. Chris Hughes (the "Complainant" or "Mr. Hughes") on December 7, 2020, with respect to his Complaint against Transport Canada (the "Respondent" or "Transport Canada"). This Complaint has a lengthy history – it has been before the Canadian Human Rights Tribunal (the "Tribunal"), the Federal Court of Canada, and the Federal Court of Appeal. A summary of that history is set out in "Background", below.

I. Preliminary Remarks

Member Seized with this Motion

[2] The Complainant directed this motion to the Chairperson of the Tribunal. However, the Chairperson has no inherent jurisdiction over cases to which he is not assigned (*Chris Hughes v. Canada Border Services Agency,* 2021 CHRT 17 (CanLII) at para 2 [*Hughes CHRT 1*]). Pursuant to subsection 49(2) of the *Canadian Human Rights Act,* RSC 1985, c.H-6 (the "*Act*"), the Chairperson is responsible for assigning to a member of the Tribunal the mandate to conduct an inquiry in each case. Once an inquiry has been assigned to a member, the Chairperson "ceases to have any conduct with respect to that case (unless the Chairperson has assigned the case to themselves)" (*Hughes CHRT 1,* at para 2). The assignment of a case to a Tribunal member severs any jurisdiction the Chairperson would have over the case "[…] and preserves the principle that the presiding member has absolute independence to decide the inquiry before them as they see fit" (*Hughes CHRT 1*, at para 2).

[3] In February 2015, the Chairperson of the Tribunal assigned case management of this case and the hearing with respect to remedies to me.

[4] On June 1, 2018, I rendered a decision on remedies cited as *Hughes v. Transport Canada,* 2018 CHRT 15 (CanLII) [*Remedies Decision*] and retained jurisdiction for two periods (*Remedies Decision*, at paras 408, 409). Although my term in office expired in December 2020, prior to its expiry, and pursuant to subsection 48.2(2) of the *Act*, the Chairperson allowed me to conclude several inquiries, including this one.

II. Background

[5] Mr. Hughes filed the Complaint with the Canadian Human Rights Commission (the "Commission") in January 2008. The Commission referred the Complaint to the Tribunal in March 2011. Pursuant to the parties' request, former Tribunal Member Robert Malo conducted the hearing and rendered his decision on liability only (*Hughes v. Transport Canada*, 2014 CHRT 19 (CanLII) at para 343 [*Liability Decision*]).

[6] Former Member Malo found the Respondent liable for discriminating against Mr. Hughes, contrary to subsection 7(a) of the *Act*, in a staffing procedure for what was then called the Marine Security Analyst position, with a classification and level called PM-04. In this Ruling, I refer to the position as "Intelligence Analyst, PM-04" as that was its name when the hearing was held. This is also how the position was referred to in the *Liability Decision*.

[7] The Federal Court set aside the *Liability Decision* in H*ughes v. Canada (Attorney General)*, 2015 FC 1302 (CanLII). On appeal, the Federal Court of Appeal restored it in *Hughes v. Canada (Attorney General),* 2016 FCA 271 (CanLII).

Remedies Decision

[8] Member Malo was no longer with the Tribunal at the time for the hearing on the remedies. As such, I was assigned by the Chairperson to conduct remaining case management and the hearing on remedies.

[9] In the *Remedies Decision*, I ordered, among other remedies, the following (the "instatement order"):

> "The Respondent shall 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, with all attendant employment benefits. The location of the position will be Esquimalt, British Columbia, or Vancouver, British Columbia, provided the Complainant is willing to relocate to Vancouver." (*Remedies Decision,* at Part XVI, para 1)."

[10] The Respondent was also ordered to pay the Complainant compensation for lost wages and benefits, overtime for a specific period, and other benefits. Additionally, the

Respondent was ordered to pay the Complainant compensation for pain and suffering and for reckless conduct.

[11] In paragraphs 408 and 409 of the *Remedies Decision*, I also ordered that the Tribunal retain jurisdiction on the terms set out below:

> "408. It is the Tribunal's expectation that the parties will attempt to negotiate the resolution of any dispute that may arise in connection with the remedies ordered. That said, the Tribunal hereby retains jurisdiction to decide any dispute that may arise with respect to the quantification or implementation of any of the remedies ordered. A party seeking the Tribunal's adjudication of the foregoing must serve and file a notice to this effect no later than one year following the date of the present Remedies Decision.
>
> 409. It is also the Tribunal's expectation that the parties will attempt to negotiate and agree on the resolution of the Complainant's bereavement leave, sick leave, statutory holiday, vacation leave, family leave, volunteer leave and medical dental, pharmaceutical and other health-related claims applicable during the wage compensation period of May 6, 2006 to May 7, 2011. If the parties cannot agree on the resolution of the foregoing leave and health-related claims, the Tribunal retains jurisdiction to decide any dispute that may arise with respect to these claims. A party seeking the Tribunal's adjudication of the foregoing claims must serve and file a notice to this effect no later than 90 days following the date of the present Remedies Decision."

[12] Both parties applied to the Federal Court for judicial review of the *Remedies Decision*.

May 2019 Notice of Motion

[13] On May 24, 2019, the Complainant filed a Notice of Motion ("May 2019 NOM"). The Complainant stated that he was filing that motion pursuant to paragraph 408 of the *Remedies Decision* and that the motion was for the "Tribunal's adjudication of the quantification and implementation of the remedies ordered in the [*Remedies Decision*]" (May 2019 NOM, at para 1). In support of that motion, the Complainant stated that several matters remained outstanding: "a) Return of sick leave credits; b) Restoration of vacation leave credits; c) Other leave credits; d) Severance; e) Lost wages; f) Pension entitlement gross-up; and g) Such further and other grounds as counsel may advise and the Tribunal may permit."

[14] The Complainant proposed that the parties have a case management conference call (CMCC) to decide how to deal with the May 2019 NOM, because further evidence was likely necessary "[…] to quantify the outstanding remedies".

[15] On July 17, 2019, the Tribunal and the parties participated in a CMCC regarding process for the May 2019 NOM. The Complainant was not present but his counsel was, as were counsel for the Respondent and the Commission.

[16] Complainant's counsel stated that there were a number of remedies which the Respondent had not provided, and that the instatement order had not been complied with. I remarked that instatement was not addressed in the May 2019 NOM, and Complainant's counsel acknowledged this. I stated that this would have to be included in the motion materials.

[17] Respondent's counsel noted that the instatement order was subject to the Complainant obtaining the required security clearance and that the Complainant had not received the security clearance because he had not returned the required forms to the Respondent. After Respondent counsel's statement, I said that I did not need to know more.

[18] Respondent's counsel also indicated that the Respondent was seeking clarification from the Tribunal on whether it was paragraph 408 or 409 of the *Remedies Decision* which applied to certain issues raised by the May 2019 NOM. He stated that the Respondent did not dispute that the May 2019 NOM engaged the process within the one-year period in paragraph 408. However, if the three-month period stated in paragraph 409 was also engaged, that limited the Tribunal's jurisdiction on some of the issues in the motion. As I was not going to decide jurisdictional matters during the CMCC, I informed the parties that they should include the jurisdiction issue in their materials.

[19] The Respondent was amenable to having the motion be heard in writing only. The parties agreed that the next steps would be that the Complainant's counsel would consult with and obtain instructions from the Complainant as to whether he wished the motion to proceed by way of an oral hearing or by written materials. If the decision was to proceed in writing, Complainant's counsel would then consult with the Respondent's counsel to arrive

at a proposed schedule for the filing of materials to support, respond and reply to the May 2019 motion, subject to the Tribunal's acceptance of the schedule.

Adjournments

[20] On July 31, 2019, the Federal Court released *Hughes v. Canada (Attorney General),* 2019 FC 1026 (CanLII) [*Hughes FC 1*] in which Justice LeBlanc allowed part of the Complainant's application for judicial review, and directed that a differently constituted panel of the Tribunal redetermine the issue of the cut-off date for compensation for lost wages and benefits. The Chairperson appointed Member Harrington to do so.

[21] On August 1, 2019, Complainant's counsel at that time requested that the May 2019 NOM be held in abeyance until a new Tribunal panel redetermined the cut-off date.

[22] In its August 22, 2019 letter response, the Respondent had no objection to holding the May 2019 motion in abeyance until the new Tribunal panel redetermined the cut-off date. However, the Respondent reiterated its position regarding jurisdiction. The Respondent argued that the Complainant was beyond the 90-day time limit set out in paragraph 409 of the *Remedies Decision* and was therefore barred from seeking the Tribunal's assistance thereon. The Respondent also confirmed that it had compensated the Complainant in accordance with the *Remedies Decision*, but that it continued "[…] to await the return of the completed security screening forms."

[23] The Respondent appealed *Hughes FC 1* to the Federal Court of Appeal, asking it to restore the *Remedies Decision's* cut-off date for lost wages and benefits. As at the date of this Ruling, the Tribunal has no notice that the Federal Court of Appeal has released its judgment.

[24] Member Harrington had set a date for a one-day hearing in April 2020 to redetermine the cut-off date for wages and benefits. The Complainant motioned for an adjournment of that hearing. In July 2020, Member Harrington granted the adjournment until the Federal Court of Appeal issues its judgment on the appeal of *Hughes FC 1* (*Hughes v. Transport Canada,* 2020 CHRT 21 (CanLII) at para 34).

III. The Complainant's December 2020 Motion

[25] In his December 7, 2020 motion, the Complainant asks the Tribunal to order the following:

i. that the Respondent "can hire the [Complainant] in a similar PM-04 position that has a basic security level rather than the [Intelligence Analyst] PM-04 position, due to the Respondent's delay in complying with the [Remedies Decision] that caused irreparable damage to the [Complainant's] credit-worthiness";

ii. in the alternative to (i), if the Complainant fails Top Secret clearance, that the Respondent comply with "Section 18 of the National Security and Intelligence Review Agency Act and provide a transfer to a PM-04 position at a lower security level";

iii. that the Respondent immediately place the Complainant on leave with pay or that it immediately begin paying the Complainant monthly, an amount equal to his monthly rate of pay plus 15 percent for health and dental;

iv. that "all attendant benefits" include various Treasury Board policies relating to security upgrade policies, grandparenting/acquired rights about security clearances, and other rights, including the "[…] right to be appointed in keeping with the original job poster";

v. that the Tribunal continue to retain jurisdiction over the implementation of the Remedies Decision and the final implementation of the remedy order on instatement and lost wages; and

vi. that the Respondent disclose all records relating to all PM-04 staffing in the Pacific Region at Transport Canada from January 2018 to the present.

[26] On December 8, 2020, Respondent's counsel acknowledged receipt of the Complainant's December 7, 2020 motion and stated the Respondent's position that the Tribunal did not have jurisdiction to entertain the issues in that motion.

[27] On December 16, 2020, Chairperson Thomas asked the Complainant to provide submissions addressing the issue of jurisdiction, specifically:

> a) the basis on which the Complainant asserted that any Member of the Tribunal possessed the jurisdiction to hear the motion; and
>
> b) why the Complainant believed the doctrine of *functus officio* did not bar his motion.

The Respondent also provided its submissions.

IV. Parties' Positions

Complainant

[28] The Complainant argues that the Tribunal has jurisdiction to deal with his December 7, 2020 Motion for the reasons set out below.

[29] The Complainant asserts that he is not requesting a reconsideration of the Tribunal's remedy order. Instead, he claims his request falls within the Tribunal's jurisdiction retained in the *Remedies* Decision, that is, the implementation of the remedy order.

[30] In paragraph 408 of the *Remedies Decision,* the Tribunal retained jurisdiction for one year as of June 1, 2018. On May 24, 2019, the Complainant filed the May 2019 NOM which sought the Tribunal's assistance for the implementation and quantification of the remedies. In that May 2019 NOM, when listing the specific remedies sought, the Complainant inserted at the end of the list, specifically at sub-paragraph 1(g), "Such further and other grounds as counsel may advise and the Tribunal may permit". In doing so, the Complainant argues this type of "catch-all" phrase would include the remedies he seeks in the December 7, 2020 motion. In other words, his December 7, 2020 motion would constitute a mere "follow-up" of his May 2019 NOM which would allow for additions and amendments to what was originally sought in his May 2019 NOM.

[31] In support of his argument that he is asking the Tribunal to finish its mandate rather than asking for a new inquiry, the Complainant relies on cases such as Attorney *General of Canada v. Canadian Human Rights Commission,* 2013 FC 921 *[Berberi FC 1]* which he claims supports the proposition that the Tribunal has the authority, at any time, to ensure that its remedy orders are implemented.

[32] The Complainant also argues that the Respondent should provide him with an offer of employment to a position equivalent in kind and in level to the Intelligence Analyst PM-04 position. The Complainant claims that the Respondent should send him a written letter of offer for that new equivalent position before the Complainant should be asked to submit the application forms for the required security clearance. The Complainant submits that the

Respondent has failed to fulfill its obligations under the *Remedies Decision* and that this is the reason the Complainant has not applied for his security clearance. For example, the Complainant submits that the Respondent made late payments, to the detriment of his credit score. The Complainant fears that this will affect his chances of obtaining the required security clearance for the Intelligence Analyst, PM-04 position.

Respondent

[33] The Respondent argues that the Tribunal does not have the jurisdiction to entertain the Complainant's December 7, 2020 motion for the reasons set out below.

[34] First, the Respondent claims that the Complainant's December 7, 2020 motion is not related to the implementation or clarification of the instatement order in the *Remedies Decision*. Rather, what the Complainant seeks is a redetermination or reconsideration of the instatement order. The Complainant is not entitled to that.

[35] The Respondent agrees that the filing of the May 2019 NOM was within the one-year retention of jurisdiction period, as stated in paragraph 408 of the *Remedies Decision*. However, the May 2019 NOM addressed quantification or adjudication of the remedies ordered. The Complainant did not take issue with the instatement order. In fact, when the Complainant applied for judicial review of the *Remedies Decision,* he had not formally taken issue with the instatement order. The Respondent argues that the instatement order should have been disputed at that time and that the Federal Court has since affirmed the instatement order on various occasions.

[36] Second, the Respondent argues that the cases on which the Complainant relies in bringing the December 7, 2020 motion are distinguishable from the present situation. For instance, in *Berberi FC 1*, the agreement to instate Ms. Berberi into a position was not part of the Tribunal's order. The present case is different because the Tribunal's order instating Mr. Hughes was clear and explicit.

[37] Third, the Respondent asserts that it has complied with the instatement order as much as it can. The Complainant must obtain the required security clearance as a prerequisite to instatement to the Intelligence Analyst PM-04 position. The Federal Court

has also confirmed that it is “pure speculation” whether the Complainant would pass the security clearance required for that position (*Hughes v. Canada (Transport)*, 2020 FC 843 (CanLII) at paras 13 to 18; and *Hughes v. Canada (Human Rights Commission),* 2020 FC 986 (CanLII) at paras 78–98. Consequently, the Complainant cannot bypass this step towards instatement.

V. Issue

[38] The issue to be decided in this motion is whether the Tribunal has the jurisdiction to consider the Complainant’s December 7, 2020 motion or whether the Tribunal is *functus officio* and barred from considering the issues raised in the motion.

VI. Analysis and Reasons

Functus Officio

[39] Black’s Law Dictionary defines the Latin phrase “*functus officio*” as follows:

> “[Latin “having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and function of the original commission have been fully accomplished. The term is sometimes abbreviated to *functus,* as in “the court was ***functus”***
>
> (Bryan A Gardner, ed, *Black’s Law Dictionary*, 11th ed (Thomson Reuters, 2019).

[40] The leading Canadian case on *functus officio* as applied to administrative tribunals is the Supreme Court of Canada judgment in *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 [*Chandler*], which dealt with a decision of one of the administrative boards which governed Alberta architects. In short, the board was found to have made orders against the architects which were beyond its jurisdiction, and at the same time, the board failed to make the findings it was mandated to make by its governing statute. The issue was whether the board could return to the matter after it had released its decision or whether it was without jurisdiction to do so.

[41] The Supreme Court found that the *functus officio* principle applied to administrative tribunals as well as to courts and held that an administrative tribunal could not revisit a final decision if: the tribunal changed its mind, had made an error within jurisdiction, or there had been a change of circumstances (*Chandler,* at 861). The principle of *functus officio* has also been confirmed in subsequent Court decisions (*Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252 (CanLII) at 46; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII) at paras 113–17). In *Chandler*, the Court further explained that if a tribunal failed to complete its "statutory task", it ought to be allowed to complete it (*Chandler,* at 862). This would include for instance, failing to deal with an issue that was fairly raised in the proceedings and which the tribunal can dispose of by its enabling statute. The Court saw the circumstances in *Chandler* as amounting to the failure of the board to dispose of the matter before it "[…] in accordance with its enabling statute" (*Chandler,* at 862).

[42] The Court stated however that once an administrative tribunal had made a final decision in accordance with its enabling statute, the doctrine of *functus officio* applied and it could not reconsider or change that order unless one of the following circumstances existed:

a) it was authorized to do so by its enabling statute;
b) there had been a slip or error in drawing up the decision;
c) there was an error in expressing the manifest intent of the tribunal. (*Chandler,* at 861).

Cases on which the Complainant relies

[43] The Complainant relies on several cases to support his submission that the Tribunal has the jurisdiction to hear this motion. This next section addresses the cases relevant to that determination.

A) *Berberi*

[44] In *Berberi v. Canada (Attorney General)*, 2009 CHRT 21 (CanLII) [*Berberi CHRT 1*] the Respondent RCMP, admitted liability for discrimination on the prohibited ground of disability and offered a job to the Complainant, Ms. Berberi, on the condition that she obtain top secret security clearance. She accepted. The hearing was held on remedies only and the Tribunal ordered specific remedies. However, the Tribunal did not include an order

referring to the job agreement as the parties had agreed it was not necessary to include it (*Berberi FC 1,* at para 33).

[45] The RCMP did not honour the job agreement. Ms. Berberi applied for judicial review to the Federal Court, which dismissed her application on the basis that the Tribunal had discharged its responsibilities once it had adjudicated the issues of remedies (*Berberi v. Canadian Human Rights Tribunal*, 2011 FC 485 (CanLII) at paras 64, 65 [*Berberi FC 2*]). The Federal Court stated that Ms. Berberi was free to seek an order from the Tribunal "[…] with respect to implementation of the remedy" (*Berberi FC 2*, at para 65).

[46] Ms. Berberi returned to the Tribunal seeking that and other relief (*Berberi v. Attorney General of Canada,* 2011 CHRT 23 (CanLII) at paras 9, 10 [*Berberi CHRT 2*]). Both the Respondent and the Commission argued that the Tribunal was *functus officio* because it had already issued a final order. However, both also agreed that the RCMP's job offer had formed part of the Tribunal's decision.

[47] Based on the unique circumstances, the Tribunal decided it had jurisdiction "[...] to return to the matter to address questions related to the implementation of the remedial offer" (*Berberi CHRT* 2, at para 23). On judicial review, the Federal Court agreed and characterized the circumstances as a "unique situation" (*Berberi FC 1*, at para 44).

[48] Although the Federal Court found that the situation in *Berberi* did not fall within the defined exceptions to *functus officio*, it reminded the parties that the Supreme Court of Canada's decision in *Chandler* instructed administrative tribunals to apply the *functus officio* doctrine flexibly (*Berberi FC 1,* at para 43). The Federal Court found that the Tribunal's decision in *Berberi CHRT 1* had failed to make the parties' agreed transaction [the RCMP's job offer and Ms. Berberi's acceptance of it] enforceable, even though the decision was "clearly premised" on that transaction (*Berberi FC 1,* at para 44). The Federal Court decided this was a situation where it was reasonable to return to the matter (*Berberi FC 1,* at para 44).

[49] The Complainant places significant reliance on the Federal Court's decision in *Berberi FC 1*. However, the present situation differs from the circumstances in *Berberi* in several material ways. First, the Tribunal in *Berberi* failed to include in its order a

fundamental and undisputed employment agreement between the parties. As a consequence of the Tribunal's omission, Ms. Berberi could not enforce the accepted job offer, thus defeating the remedial purpose of the *Act*. In other words, the Tribunal denied the victim of the discriminatory practice the ability to enforce the remedy (*Berberi FC 1*, at para 44).

[50] Here, in contrast, nothing fundamental which would make the Tribunal's order unenforceable is missing, because the *Remedies Decision* contains an instatement order to a specific position, subject to conditions being met, including the specified condition of obtaining the security clearance required for the position (*Remedies Decision,* at para 272, and Part XVI, para 1). In seeking an order that the Respondent instate him in a different position then what was ordered in the *Remedies Decision*, the Complainant is in fact asking the Tribunal to change its instatement order.

[51] In *Berberi*, the Complainant was not asking the Tribunal to change the order on remedies but was asking for the opportunity to argue for the "effective implementation of part of the remedy decision" (*Berberi FC 1*, at para 14). In *Berberi*, returning to the matter of the job offer did not raise any new obligation, it was simply holding the respondent to its original promise (*Berberi FC 1,* at para 44). It was the fact that the Tribunal had made its decision based on an agreed transaction between the parties but failed to make it enforceable by including it in the order, which allowed the Tribunal to retain jurisdiction.

B) *McKinnon*

[52] The Complainant cites the Ontario case of *McKinnon* as support for his position that the Tribunal has jurisdiction to hear this motion. Briefly, the Ontario Board of Inquiry ("BOI"), the predecessor to the Ontario Human Rights Tribunal, had found that the individual respondents and the respondent Ministry discriminated against Mr. McKinnon and that the Ministry had done so by permitting the existence of a work environment that was "poisoned" by systemic racism and discrimination (*McKinnon v. Ontario (Ministry of Correctional Services) (No.3)*, 1998 CanLII 29849 (ON HRT) at para 349 [*McKinnon 1*]). The Ontario BOI made a total of 12 compensatory and other types of awards. In its 12th award, the BOI ordered the respondent Ministry to implement workforce training on human rights within six

months of the decision, and to take other actions to repair the discriminatory work environment (*McKinnon 1*, at para 353, n 12).

[53] The Ontario BOI retained jurisdiction as follows:

> "I shall retain jurisdiction of this matter until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise with respect to the implementation of any aspect of them […]" (*McKinnon*, at para 354).

[54] Mr. McKinnon eventually brought his complaint back to the Ontario BOI on the basis of continuing harassment, reprisal, and because the workplace environment remained racially poisoned (*McKinnon v. Ontario (Ministry of Correctional Services) (No. 4),* 1999 CanLII 35204 (ON HRT) at para 3 [*McKinnon 2*]). A full hearing was held with the same Adjudicator, who stated that one of the main purposes of the workforce human rights training order was to remedy the systemic racism and poisoned workplace. (*McKinnon 2*, at para 21). The Adjudicator confirmed his retention of jurisdiction and that he remained seized of the matter until all the orders had been fully complied with (*McKinnon 2*, at para 2; *McKinnon 1*, at para 354).

[55] The facts in *McKinnon* are materially distinguishable from the circumstances of the present case. The reservation of jurisdiction in *McKinnon 1* was open-ended both in terms of time – there was no limit - and in terms of its wording. The Ontario BOI retained jurisdiction until all the orders had been fully complied with. Contrary to that case, the reservation of jurisdiction in paragraph 408 of the *Remedies Decision* was limited to one year from June 1, 2018; and, as previously stated, the instatement order is specific and explicit. The Respondent was ordered to instate the Complainant at the earliest reasonable occasion into the Intelligence Analyst PM-04 position, subject to the Complainant obtaining the requisite security clearance.

C) *Grover*

[56] The Complainant cites the Tribunal's decision in *Grover* as another authority for his position that the Tribunal has jurisdiction to decide this motion. Several decisions arose from the complaint in *Grover*. In short, the Tribunal found that the complainant, Dr. Grover had been discriminated against and it stated that a certain promotional position - section head

or group leader, should be made available to him at the earliest possible opportunity. It also included a section retaining jurisdiction. Specifically, the Tribunal ordered that "[i]n the event that this Order respecting promotion is resisted by the Respondent, the Tribunal shall retain jurisdiction to hear further evidence in this regard." (*Grover v. National Research Council of Canada*, 1992 CanLII 629 (CHRT) at 66, ss d [*Grover 1*]). The respondent eventually appointed Dr. Grover to a group head position, but Dr. Grover felt that position did not comply with the promotion order. As the parties were unable to agree on outstanding matters concerning the promotion order, they consented to have the Tribunal hear evidence as to what had transpired after the issuance of the promotion order.

[57] At the hearing, the respondent argued the Tribunal was *functus officio* and thus unable to revisit the promotion order because the respondent had complied with that order by promoting Dr. Grover to a group head position (*Grover v. Canada (National Research Council)*, 1994 CanLII 189 (CHRT), at 7 [*Grover 2*]). The Tribunal decided that it had the jurisdiction to hear more evidence on the appropriateness of the "group head" appointment for several reasons. First, the circumstances dictated that additional clarifications were required from the Tribunal as to what constituted an appropriate position to which Dr. Grover could be appointed (*Grover 2*, at 24, 25). For instance, the respondent's infrastructure was undergoing significant changes and many of the position titles did not reflect their true responsibilities. Second, the Tribunal noted that it was not being asked to vary or change its decision, nor to implement a different remedy (*Grover 2*, at 12, 13).

[58] I find that the facts in *Grover* significantly contrast with the circumstances of the present case. In *Grover,* the retention of jurisdiction did not have a time limit (*Grover 1,* at 57, ss d*).* The promotion order also stated that the respondent was to promote Dr. Grover to an "appropriate position", which left room for further interpretation and called for clarifications from the Tribunal as to what constituted an "appropriate" position. In the case at hand, as previously explained, the instatement order in the *Remedies Decision* not only has a one-year time limit for retained jurisdiction, unlike the open-ended retention of jurisdiction in Grover 1, but also states the specific position to which the respondent was to instate the Complainant, and the conditions required for instatement. The instatement order did not contain any general language that left room for interpretation or clarification.

The Tribunal is *functus officio*

[59] From a plain reading of paragraph 408 of the *Remedies Decision*, it is clear that the one-year period for the Complainant to request the Tribunal's assistance in the implementation and quantification of the remedies ordered had elapsed by the time the Complainant filed this motion.

[60] As previously mentioned, the Complainant argues that the phrase at subparagraph 1(g) in the May 2019 NOM in fact extends that one-year period. However, the inclusion of this phrase does not give the Complainant an opening to indefinitely add further requests. The fact that the Complainant added "[s]uch further and other grounds as counsel may advise and the Tribunal may permit" to his list of requested relief in his May 2019 NOM does not authorize him to unilaterally extend the time-limit set out in paragraph 408 of the *Remedies Decision.* The inclusion of this phrase in his submissions did not implicitly grant him an extension of time. In other words, the Complainant cannot use that general sentence to now bring up new issues beyond the one-year period. This not only goes against the interest of finality in decisions, but also ignores that parties do not have the authority to extend or modify the Tribunal's retained period of jurisdiction.

[61] The Tribunal retained jurisdiction to oversee the implementation of the remedies for a period of one year. The instatement order was final and conclusive. Parties need to be able to rely on the finality of decisions. If courts and tribunals could continuously revisit and vary their decisions, the administration of justice would not work the way it was meant to, and it would be procedurally unfair to the parties. When a party is not satisfied with a decision of this Tribunal, it can bring an application for judicial review at the Federal Court.

[62] It is only in very limited situations that a court or a tribunal can vary, amend, or reconsider an order or a decision. The exceptions to the doctrine of *functus officio* do not apply here. The instatement order accurately and correctly expressed the Tribunal's manifest intent; there are no clerical or technical errors or slips; and the Tribunal's enabling statute does not authorize it to revisit its decisions. The Tribunal also does not have inherent jurisdiction to vary or reconsider its decision once it is finalized. Additionally, as previously

explained, the cases the Complainant relies on involved unique circumstances clearly distinguishable from the present case

[63] The Tribunal discharged its statutory mandate – it completed its task in the instatement order - and there is nothing more for the Tribunal to do to complete the purpose of the instatement order. In the present circumstances, the Tribunal does not have the power to vary, amend or reconsider its final decision regarding the instatement order.

Conclusion

[64] The Tribunal is *functus officio* with respect to the Complainant's December 7, 2020 Motion, and therefore does not have the jurisdiction to decide it.

VII. Order

[65] For the above reasons, the Tribunal dismisses the Complainant's December 7, 2020 Motion.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
September 28, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1656/01111

Style of Cause: Chris Hughes v. Transport Canada

Ruling of the Tribunal Dated: September 28, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Chris Hughes, for himself

Malcolm Palmer, for the Respondent