Federal Court  Cour fédérale

Date: 20201130

Docket: T-1315-18

Citation: 2020 FC 1096

Toronto, Ontario, November 30, 2020

PRESENT: Justice A.D. Little

BETWEEN:

CHRIS HUGHES

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TRANSPORT CANADA

Respondent

ORDER AND REASONS

[1] These reasons concern a motion in writing by Mr Hughes to amend an agreed statement of facts made in this proceeding and filed with the Court on October 10, 2019.

I. **Background to the Motion**

[2] The procedural background to this motion is described in the Court's reasons dated October 20, 2020 on the Rule 51 appeal in this proceeding: *Hughes v Transport Canada*, 2020 FC 986. A short outline will situate the present motion.

[3] This proceeding is rooted in a 2014 decision of the Canadian Human Rights Tribunal (the "Tribunal") which held that Transport Canada discriminated against Mr Hughes on the basis of disability in the staffing process for a Marine Security Analyst (PM-04) position: *Hughes v Transport Canada*, 2014 CHRT 19.

[4] On July 1, 2018, the Tribunal released its decision on remedies: *Hughes v Transport Canada*, 2018 CHRT 15 (the "Remedies Decision"). Among other things, it ordered Transport Canada to instate Mr Hughes as a Marine Intelligence Analyst at the PM-04 group and level classification and to pay monetary compensation. The Tribunal's Order contained the following term:

> 1. 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.
>
> [Emphasis added.]

[5] After the Tribunal released its Remedies Decision, Mr Hughes sought to have it implemented. His counsel wrote to counsel for Transport Canada demanding immediate payment

of the Tribunal's monetary award. Transport Canada, through its counsel, took the position that the amount of payment was in dispute due to its application for judicial review of the Tribunal's Remedies Decision.

[6] On August 8, 2018, the applicant filed a Notice of Motion for contempt of the Tribunal's Order, seeking an order that Transport Canada appear for a show-cause hearing pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106. Mr Hughes amended the contempt motion on November 13, 2018.

[7] The parties prepared and filed an agreed statement of facts for use at the hearing of that contempt motion, which they filed with the Court on October 10, 2019 (the "ASF").

[8] On November 8, 2019, Prothonotary Ring heard the contempt motion. In an Order with reasons dated November 28, 2019, she dismissed the motion.

[9] Mr Hughes appealed to this Court under Rule 51 of the *Federal Courts Rules*. He filed his Rule 51 Notice of Motion on December 18, 2019 and a Motion Record including written representations dated March 31, 2020. The respondent filed its responding Motion Record on July 16, 2020 and the applicant filed a reply on July 20, 2020.

[10] In early July 2020, Mr Hughes also filed a motion under Rule 431 of the *Federal Courts Rules* for an Order requiring the respondent to implement the Remedies Decision made by the

Tribunal on June 1, 2018. The Court heard that motion on August 7 and issued an Order dismissing it dated August 20, 2020: *Hughes v Transport Canada*, 2020 FC 843 (McVeigh, J).

[11] Mr Hughes raised the alleged error in the ASF with counsel for the respondent by email on August 10, 2020, stating that he was "embarrassed that I did not notice this earlier". In this email, he stated that he had been misreading paragraph 76 the "whole time", thinking that the phrase "requisite initial step" meant "subject to". He stated that the phrase is not an agreed fact, but the position or argument of Transport Canada, whereas the applicant's position has been that the first required step was a letter of offer.

[12] By letter dated August 12, 2020, Mr Hughes wrote to this Court concerning the alleged error. The respondent's counsel replied by letter dated August 21, 2020.

[13] Mr Hughes commenced this motion by Notice of Motion filed September 21, 2020, while the Court considered the Rule 51 appeal.

II. **The Applicant's Motion to Amend the Agreed Statement of Facts**

[14] Mr Hughes's Notice of Motion dated September 21, 2020, requested an order to remove a "mutual mistake" or "common mistake" by amending paragraph 76 of the ASF, which states as follows [with underlining added]:

> 76. As of the date of these Agreed Statement of Facts, Transport Canada has not received completed security forms from Mr. Hughes, a requisite initial step for appointment to the Marine Intelligence Analyst position.

[15] On this motion to amend, Mr Hughes seeks to replace the underlined words with “a step in the appointment process”.

[16] To support his position, Mr Hughes relied on contract law doctrines related to mistake. In his written representations, Mr Hughes submitted that a mutual mistake “occurs when the parties to a contract are both mistaken about the same material fact within their contract. They are at cross purposes. There is a meeting of the minds, but the parties are mistaken.”

[17] In his affidavit on this motion, Mr Hughes testified that he noticed an error in the ASF on August 6 or 7, 2020 and promptly advised the Court (Justice McVeigh) hearing his motion under Rule 431. He did not notice the error when Prothonotary Ring issued her decision on the contempt motion (i.e., in late November 2019). Mr Hughes testified that he had been misreading paragraph 76 and understood it to mean, “a security clearance had to be submitted at some point, not that it had to be done first”. He explained some of the delay in noticing the error was due to a global mediation, during which all files were placed in abeyance. His written argument also submitted that the courts were “closed due to Covid until July 2020”.

[18] Mr Hughes also advised that the respondent drafted the ASF, he was not represented by counsel and no lawyer read it on his behalf, and that it was a clear error but he did not notice it. He noticed three other mistakes, but did not notice the error in paragraph 76. He also contended that two previous paragraphs contradict paragraph 76. Mr Hughes further noted that since June 2019, his position has been that a letter of offer was needed prior to security clearance and that this is reflected in paragraphs 74 and 75 of the ASF.

[19] Mr Hughes characterized this proceeding as an "enforcement file" that could be "used again for further contempt charges". He "plans to file more contempt charges shortly". In his written submissions, Mr Hughes stated that the ASF "needs to be corrected for future contempt charges and non-compliance Motions". In paragraph 29 of his written submissions, Mr Hughes stated that he "does not believe the respondent deliberately put incorrect facts into" the ASF, although if it did, it would be wrongful.

[20] The respondent submitted that Mr Hughes agreed to the ASF in October 2019 and cannot now resile from it. The respondent first observed that the applicant provided no legal basis for amending paragraph 76 of the ASF other than mutual mistake in contract law. However, the respondent did not attempt to meet the applicant's arguments on mistake. Instead, the respondent submitted that the ASF is not a contract nor is it analogous to a contract but was an admission for the purposes of a proceeding, and that admission cannot not now be withdrawn, particularly in light of the Prothonotary's decision and Justice McVeigh's decision on August 20, 2020, both of which relied on the ASF. The respondent further argued that Mr Hughes was attempting to create a "new line of attack" to undermine the Prothonotary's order and the order made by Justice McVeigh under Rule 431. Both decisions, in the respondent's submission, mentioned paragraph 76 but in neither case was paragraph 76 determinative.

[21] The applicant's lengthy reply submission raised many new arguments (to which the respondent did not have an opportunity to respond) and made additional allegations against the lawyer who apparently was a drafter of the ASF. Mr Hughes maintained that the point in paragraph 76 is highly controversial as between the parties and the respondent should not have "slip[ped] in

a controversial and non-factual statement" into the ASF. He further advised that he was away on vacation in a hotel at the time he agreed to the ASF and felt time pressure to agree.

[22] In addition, Mr Hughes argued that his agreement was due to inadvertence, error or hastiness and a lack of knowledge of what the phrase "requisite initial" meant. He denied trying a "new line of attack" to undermine the Prothonotary's and Justice McVeigh's decisions. He also submitted that the ASF was intended only for the contempt motion before the Prothonotary, and not for any subsequent motion. He further contended that the underlined phrase in paragraph 76 is, in reality, not true so it should not be relied upon.

[23] Following the filing of the applicant's Reply on this motion, the respondent objected to the applicant's reply in its entirety on the ground that it was improper. The respondent also submitted that many of the alleged facts raised by Mr Hughes in the reply were incorrect, the submissions were repetitive or irrelevant, and allegations Mr Hughes raised relating to counsel's purported conduct were baseless and vexatious.

[24] In early October 2020, Mr Hughes requested that the Court "pull" that motion to amend the ASF so the appeal under Rule 51 could be determined first, because, in his view, the disposition of the appeal would have the effect of correcting the mistake in paragraph 76. He advised the Court that he would rather wait for the outcome of the appeal and if unsuccessful, re-file an amended motion to correct the mistake. He referred (incorrectly) to Rule 397 of the *Federal Courts Rules*.

[25] The respondent objected to the applicant's proposal to "pull" the motion, calling it a waste of resources and advising that the parties would benefit from the clarity of the Court's decision.

[26] Mr Hughes did not take any immediate formal steps under the *Federal Courts Rules* to abandon his motion.

[27] On October 20, 2020, the Court issued its decision on the Rule 51 motion.

[28] After that decision, the Court issued a Direction on November 4, 2020 inviting Mr Hughes to confirm his intentions concerning his filed motion to amend the ASF. If his intentions were to abandon the motion, the Court invited him to take formal steps to do so under the *Federal Courts Rules* within 7 calendar days of the Direction. The Court advised that if such steps were not taken within that time, the Court would decide the motion based on the materials filed by the parties.

[29] On November 5, 2020, Mr Hughes advised the Court that he would be commencing a wide-ranging new motion. He did not take any steps to abandon this motion within the time in the Court's Direction. The motion to amend the ASF therefore remains filed and not abandoned.

[30] The Court will therefore decide the motion.

III. **Should the Agreed Statement of Facts Be Amended?**

A. *Agreed Statements of Fact*

[31] An agreed statement of facts is not a document expressly contemplated by the *Federal Courts Rules*. It is, however, a document well known to Canadian courts and used in this Court. Agreed statements of facts are commonly used in all manner of proceedings in Canadian courts and tribunals, from motions to trials and hearings. They can be very valuable and helpful to a trial-level court or tribunal.

[32] Through good communication and cooperation by counsel and parties, the parties to a legal proceeding may agree in writing to certain facts. The agreed facts may relate to the events giving rise to the proceeding and may also tell the procedural story of what has happened already during the lawsuit and how a pending issue arose. The parties often organize the facts into a chronological narrative that helps the Court get up to speed efficiently. The parties file their agreed facts for use on a motion, application, trial or hearing. The court or tribunal may then rely on those agreed facts in its analysis and determination of the matter.

[33] A party may agree not only to facts that assist their position, but also to facts that are not material to them or the outcome, or that involve great difficulty or cost to prove. The party may also make a concession or an admission of fact – that is, agree to a fact that harms the party's position – if it is sensible to do so (for example, it may be inevitable that the other party will establish that fact). The agreed facts may refer to documentary evidence to support the narrative. In some circumstances, an entire case may proceed on agreed facts and documents, so that the parties can focus on the issues of law that separate them.

[34] In an agreed statement of facts, parties may also state, characterize, or agree to narrow down the issues for the Court. The parties' statement may therefore include more than just the pure facts relating to who, what, where, when and why.

[35] The benefits of agreed facts are legion. The parties' agreement may relieve some witnesses from having to swear affidavits or appear to testify, or they may only testify on specific issues. Confidential personal information or data produced during discovery may be kept confidential or private if the parties agree on an aggregated summary. Litigants do not pay their lawyers to talk or write about uncontentious points. The Court requires less preparation time. Time in court is not soaked up with questions that are not in dispute. The parties' communications may lead to a better understanding of the contentious issue, and sometimes even to a consensual resolution. Agreed facts streamline the process, saving time and money for everyone.

[36] The parties in this proceeding are to be commended for having agreed to the detailed ASF they filed in October 2019, which comprised 90 paragraphs with procedural background and facts organized chronologically.

B. *Jurisdiction and Legal Requirements for an Amendment*

[37] An initial issue is whether the Court has the ability to grant the relief requested by Mr Hughes and if so, on what basis? To answer those questions, I will consider Rule 75 of the Federal Court Rules and the respondent's submission that the proposed amendment is a withdrawal of a formal admission made by Mr Hughes.

(1) **The *Federal Courts Rules***

[38] As noted, the *Federal Courts Rules* do not expressly address agreed statements of facts, nor how such an agreement may be amended after it is filed with the Court. Neither party referred to a Rule under the *Federal Courts Rules* that expressly permits amendments to an agreed statement of facts.

[39] Rule 75 of the *Federal Courts Rules* permits a party to amend a "document", under certain conditions:

> **75** (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
>
> (2) No amendment shall be allowed under subsection (1) during or after a hearing unless
>
> (a) the purpose is to make the document accord with the issues at the hearing;
>
> (b) a new hearing is ordered; or
>
> (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

[40] Rule 75 is in Part 3 of the *Federal Courts Rules*, which applies to all proceedings. A party may file a motion requesting that the Court allow the party to amend a "document". That term is not defined for general purposes in the Rules. But the frequent and varied use of "document" in the *Rules* suggests a broad meaning: see e.g., Rules 21 and 23, Rules 65-70 on the form of documents, Rule 71 on filing of documents, and Rules 198(2) and 192(2). The *Rules* contemplate different types of documents, such as pleadings (defined as "a document in a proceeding in which a claim is initiated, defined, defended or answered") originating documents (see Rules 62-63) and documents to be listed in an affidavit of documents and produced in discovery ("document" is defined in Rule 222 but only for the purposes of discovery of documents in Rules 223 to 232 and for Rule 295). The contents of a pleading may refer to a document (Rule 177). There are other examples, too.

[41] The cases decided under Rule 75 generally deal with amendments to pleadings, consistent with the contents of Rules 76-79: see *Janssen Inc. v. AbbVie Corporation*, 2014 FCA 242; *Canada (National Revenue) v. Friedman*, 2019 FC 1583 (Pamel J.), at para 19; *Boakye v Canada (Citizenship and Immigration)*, 2018 FC 831 (Southcott J.), at paras 17 and 19.

[42] The broad use of "document" in different provisions of the *Federal Courts Rules* does not necessarily imply that a party may amend any document by motion under Rule 75. Prothonotary Aronovitch found in *Sun World International Inc. v Parmalat Dairy & Bakery Inc.*, 2007 FC 641, [2008] 2 FCR 120, at paragraphs 22-29 that a "document" under Rule 75 refers to a pleading, originating document or document required by the *Federal Courts Rules* to be filed in this Court. The Prothonotary stated at paragraph 26:

> It is clear from a fair reading of rules 71-79 that a "document" within the meaning of rule 75 is a pleading, an originating document, or a document required to be filed pursuant to the *Federal Courts Rules*, in a Federal Court proceeding. It does not include the statement of opposition, which is an originating document that is required to be filed and, indeed, can only be filed in the Canadian Trade-mark Office for the purposes of an opposition proceeding. Accordingly, the Federal Court, in my view, has no jurisdiction under rule 75 to amend the statement of opposition, a document that is not filed in this Court, and forms part of the record on which the decision under appeal is based.

While Justice Harrington allowed an appeal from this decision, he agreed that Rule 75 did not permit the proposed amendment and made no express comment on the meaning of a "document" in Rule 75: *Sun World International Inc. v. Parmalat Dairy & Bakery Inc.* 2007 FC 861, at para 22.

[43] The question, then, is whether an agreed statement of facts filed with the Court by the parties in a proceeding is a "document" that may be amended under Rule 75. In my view, it is. An agreed statement of facts is sufficiently akin to and performs important functions like the documents that are expressly contemplated or required to be filed by the *Federal Courts Rules* such as pleadings. The agreed facts are prepared and agreed by the parties, usually through their legal counsel, specifically for the purposes of the proceeding. It is filed with the intention that it will be relied upon by the Court. Given its preparation, uses and functions, discussed above, it would be anomalous if the Court could not address proposed amendments to an agreed statement of facts filed with it.

[44] Importantly, an agreed statement of facts is inherently quite different from a commercial agreement that two parties enter in the course of doing business, prior to litigation, which is later

produced in a proceeding during discovery and filed as evidence. My conclusion does not imply that Rule 75 may be used to amend such an agreement (or any other documents that are created by a party prior to litigation and produced during discovery).

[45] I also recognize that Rule 75 enables the Court to permit "a party" (singular) to amend a document filed with it. An agreed statement of facts is inherently a joint document agreed by two parties (or more in a multi-party proceeding). One would expect that an amendment of a jointly-prepared document would normally be made on the consent of both parties (or without opposition by the non-moving party) and be proposed to the Court by motion on terms acceptable to both (or again, at least unopposed). However, particularly given the nature of the issues raised here relating to mistake, in my view the use of "a" party in Rule 75 is not an insurmountable barrier to the present motion.

[46] In my view, therefore, Rule 75 by its own terms or, if necessary, by analogy through Rule 4 of the *Federal Courts Rules*, enables the Court to resolve the current motion to amend the ASF.

[47] On what basis may an amendment be allowed under Rule 75? The Federal Court of Appeal's decision in *Janssen* provides guidance on factors to consider in allowing an amendment of a document, in that case, a pleading. Those factors include the timeliness of the motion to amend; the extent to which proposed amendment may delay the proceeding; reliance on the contents of the document by the responding party, and prejudice to that party; whether the amendments will facilitate the court's consideration of the truth and substance of the dispute on its merits; whether any injustice to the other party is capable of being compensated by an award of

costs; and whether the interests of justice will be served: see *Janssen*, at paras 3-9 and 15-17. In the end, the court must consider simple fairness, common sense and that justice be done: *Janssen*, at para 3, quoting *Continental Bank Leasing Corp. v. R.*, [1993] T.C.J. No. 18, (1993) 93 DTC 298 at p. 302; *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, at paras 19-21. As Stratas JA noted at paragraph 18 of *Janssen*, no single factor is determinative and the list of factors is not exhaustive.

[48] I conclude therefore that the Court has jurisdiction under Rule 75 (or by analogy under Rule 4, if necessary) to amend an agreement statement of facts. The factors described by Stratas JA in *Janssen* guide the Court in considering whether to allow a proposed amendment.

(2) **Withdrawal of a Formal Admission?**

[49] The respondent contended that paragraph 76 of the ASF contained a formal admission that the applicant cannot withdraw without leave of the Court. For present purposes, I will assume that the phrase “requisite initial step” in paragraph 76 was in substance a formal factual admission by Mr Hughes.

[50] A party may make a formal admission of fact in several ways, for example in a pleading filed with the Court as contemplated by Rule 183, or in response to a request to admit served under Rule 255. The respondent submitted that the applicant did not meet the test for withdrawing a formal admission, relying on cases involving admissions in a pleading: *Apotex Inc. v. Astrazeneca Canada Inc.*, 2012 FC 559, at para 19; and *Morin v R*, 2002 FCT 1312, at para 109, which relied on the test in *Andersen Consulting v R*, [1998] 1 FC 605 (CA), at paras 13-14.

[51] In *Andersen*, the Federal Court of Appeal considered amendments that included the withdrawal of admissions made in a Statement of Defence. The Court of Appeal preferred a test for withdrawal of admissions that considered whether "in all the circumstances of the case, there be a triable issue which ought to be tried in the interests of justice and not be left to an admission of fact. Under such a test, inadvertence, error, hastiness, lack of knowledge of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice": at para 13. This test provided "the needed flexibility to ensure that triable issues are tried in the interests of justice without injustice to the litigants": at para 14. The Court of Appeal applied this passage in *Charette v. Delta Controls*, 2003 FCA 425. Federal Court cases also refer to on this passage, including *Morin* and *Apotex Inc. v. Astrazeneca Canada Inc.*

[52] The Court of Appeal's reasons in *Andersen* also went on to refer to amendments to pleadings generally and the need for "flexibility" in granting such amendments "including … the withdrawal of admissions" (at para 16), setting out the following test from *Canderel Ltd. v. Canada*, [1994] 1 FC 3, at p. 10:

> while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.
>
> [Emphasis added.]

[53] The Court of Appeal in *Andersen* applied that test to the proposed amendments withdrawing admissions, noting that it was in the interests of justice that the real questions at issue be determined, it was "still early in the process" before discoveries were complete, and there was no prejudice to the responding party (at paras 17-18).

[54] I observe that the Federal Court of Appeal's decisions in both *Andersen* concerning admissions made in a pleading, and *Janssen* under Rule 75, described and applied similar considerations, including the timeliness of the motion; the circumstances giving rise to the error to be amended; the truth-seeking purpose of the Court's process; and whether the other party may be compensated by costs, always having regard to the overall interests of justice: *Janssen*, at para 3; *Andersen*, at para 16; see also *Canderel* at p. 10*c*-e and p. 12d-*h*, quoting *Continental Bank Leasing Corporation*, at p. 302.

[55] I turn now to analyze the issues in the motion.

C. *The Motion to Amend Paragraph 76 of the ASF*

[56] Mr Hughes submits that the Court should order a correction to the ASF to remove a mutual or common mistake in paragraph 76. In my view, the Court should not do so. Whether the Court applies the factors from *Janssen* under Rule 75 or the similar test from *Andersen* for the withdrawal of a formal admission, it is not in the interests of justice to permit the proposed amendment to the ASF. On Mr Hughes's legal submissions concerning mistake in particular, there are insufficient legal and factual grounds to do so. There are four reasons for this overall conclusion.

[57] First, considerable time has passed since the parties filed the ASF on October 10, 2019. Since then, the parties used the ASF to make submissions on Mr Hughes's motion for contempt (the purpose for which it was originally prepared). Mr Hughes appealed and did not raise any issues concerning an amendment to the contents of paragraph 76 in his appeal. He took no steps with the Court to attempt to amend paragraph 76 until September 2020. His motion to amend the ASF is not timely.

[58] Second, since its filing, both the parties and this Court have relied upon the ASF generally and specifically have relied upon paragraph 76. Prothonotary Ring referred to and relied upon paragraph 76 specifically in her reasons in November 2019 (at para 57). Mr Hughes appealed that Order and filed written representations and a written reply argument without raising any concern about paragraph 76. Both parties have fully argued the Rule 51 appeal, which the Court has decided (after Mr Hughes filed this motion then requested that it be "pulled"). In addition, the ASF was used on Mr Hughes's motion under Rule 431 and Justice McVeigh referred to paragraph 76 in her reasons: see 2020 FC 843, at para 16.

[59] At this stage of the proceeding, after motions have been argued and determined on the basis of an agreed statement of facts and with at least some reliance on paragraph 76, the proposed amendment to the ASF would cause prejudice to the responding party and would have an apparent impact on the Court's decisions and process. Having agreed to the ASF to assist the Court to determine the contempt motion, the parties cannot go back and re-argue it unless one party successfully appeals (as in *Janssen*). I note there is also no allegation or evidence of fraud or serious misconduct to support the proposed amendment.

[60] Third, both of these reasons imply that it is not possible to fashion terms under Rule 75(1) that will protect the respondent's rights. The circumstances do not fall within Rule 75(2).

[61] The fourth reason for dismissing the applicant's motion considers the nature of the alleged error, the circumstances giving rise to the error to be amended, the reasons for the proposed amendment to the ASF and the general need to ensure that the Court relies on accurate evidence. As I will explain, the circumstances and evidence do not support Mr Hughes's submissions in substance concerning a mistake related to paragraph 76 of the ASF.

[62] Mr Hughes seeks to remove the words "requisite initial step" from paragraph 76. It is important to understand that phrase within paragraph 76 and in the ASF overall.

[63] Earlier in the ASF, at paragraph 51, the parties agreed that on December 10, 2018, counsel for Transport Canada "sent copies of the required security clearance and personnel screening forms to counsel for Mr Hughes". At paragraph 67, the ASF stated that on January 17, 2019, counsel for Transport Canada "wrote to counsel for Mr Hughes to provide further information related to the delivery of the security clearance forms" and to confirm that Mr Hughes would be either reimbursed for any fees associated with obtaining fingerprinting once a receipt could be provided or Transport Canada could make a direct payment at the location where Mr Hughes elected to have his fingerprinting taken.

[64] Paragraph 72 of the ASF stated that since June 1, 2018, "a PM04 opening has been available" at Transport Canada. Paragraph 74 stated that on June 26, 2019, counsel for Mr Hughes

asked counsel for Transport Canada to "provide Mr Hughes with a signed letter of offer pursuant to the Remedial Decision". Paragraph 75 stated that on September 13, 2019, counsel for Mr Hughes wrote to counsel for Transport Canada asking why "it was taking so long to address [the appointment to a Marine Intelligence Analyst position]".

[65] Paragraph 76 of the ASF then stated that as of its date, October 10, 2019, "Transport Canada has not received completed security forms from Mr Hughes, a requisite initial step for appointment to the Marine Intelligence Analyst position".

[66] There is no debate that Transport Canada had not received the completed security forms from Mr Hughes as of October 10, 2019. Paragraph 76 stated that the receipt of those completed security forms is a requisite initial step for the appointment. In the context of the previous statements in the ASF, paragraph 76 provided the reader with the current status of the security forms that had been sent to Mr Hughes ten months earlier in December 2018. Paragraph 76 also provided a partial answer to the natural question a reader would ask about why Mr Hughes had not been appointed to the position that, according to paragraph 72, had been open since June 1, 2018.

[67] Indeed, that is the question asked in ASF paragraph 75: why was it taking so long to address Mr Hughes's appointment to the position? The answer in paragraph 76 is that Transport Canada had not yet received the completed security forms, which were a requisite initial step for Mr Hughes's appointment.

[68] The evidence on this motion does not explain in detail all of the steps towards the appointment of a person to the position of Marine Intelligence Analyst with Transport Canada. However, it is not surprising that an individual must complete one or more forms so that an employer may make conduct inquiries and checks for a security clearance. It is also abundantly clear that security clearance is necessary to the instatement ordered by the Tribunal. The Tribunal's Remedies Decision, at paragraph 1, ordered that Transport Canada instate Mr Hughes "subject to the required security clearance, on the first reasonable occasion, and without competition, to the position of Intelligence Analyst …" It is clear from this statement that the security clearance is required, and the instatement of Mr Hughes to the position is "subject to" that required security clearance. To the same effect is paragraph 272 of the Remedies Decision, in which the Tribunal concluded that "subject to Mr Hughes meeting all the required conditions of employment for the position, including the security clearance", Transport Canada must instate him on the first reasonable occasion as a PM-04 Intelligence Analyst.

[69] Mr Hughes's arguments on this motion raised issues concerning the conduct of the negotiation of the ASF and alleged a common or mutual mistake in the agreement about the phrase in paragraph 76. I will address each one in turn.

[70] The parties prepared the ASF at the suggestion of Prothonotary Ring as the Case Management Judge for this proceeding. They agreed to finalize it by October 10, 2019. The evidence adduced on this motion reveals that the respondent's counsel prepared a first draft of the ASF. There were emails back and forth between the parties before they finalized it. Based on those emails:

- An initial draft ASF was prepared and sent to Mr Hughes by the respondent's counsel by email on October 4, 2019.
- Mr Hughes advised by email on October 8 that his review of the draft ASF was "taking longer than I thought" and asked whether the parties could advise the court that the ASF be filed a week later than planned. The respondent's counsel advised by reply email on October 8 that he had no problem with an extension of time, though it could cause a delay in the hearing of Mr Hughes's upcoming contempt motion.
- However, by the next morning (October 9), Mr Hughes advised by email that he thought "we can get it done on time". He proposed some minor changes to the then-current draft statement and a number of facts he wished to add. Soon after, he requested several other additions, again by email.
- Counsel for the respondent replied in substance to the proposed changes on October 10. Some changes were satisfactory, while others required changes for could not be incorporated for another reason (for example, one point could be the subject of argument to the Court by both parties).
- There was no specific discussion or negotiation of the phrase "requisite initial step" or about paragraph 76 as a whole.
- By late in the afternoon of October 10, the respondent tabled the final draft ASF by email, requesting a signature from Mr Hughes.
- Mr Hughes advised by email at approximately 4:00 PM on October 10, 2019 that he agreed to that version and asked that the respondent accept his email as an electronic signature.
- The final ASF was filed with the Court that day.

[71] In my view, the email correspondence during the negotiation of the ASF does not support the allegation that counsel for the respondent took advantage of Mr Hughes's lack of legal representation, or that Mr Hughes did not have sufficient time to review the draft ASF. On the latter point, Mr Hughes initially asked for additional time and could have had it with the support of the respondent's counsel. But soon after, he said he did not need it. In addition, he proposed additions and changes to the ASF, which the respondent's counsel addressed reasonably, accepting some and not others. Based on the emails between the parties, the parties negotiated and agreed to the contents of the ASF.

[72] On the allegation of a mistake, the evidence does not support an amendment or correction to the ASF due to a mistake, whether mutual or common. The way the ASF came into existence, the context for paragraph 76 within the ASF, and how the parties negotiated the ASF, all indicate that there was no mutual or common mistake. Rather, there was a meeting of the minds to agree to the ASF and to paragraph 76. There is no evidence of a mistake about paragraph 76 in the October 2019 communications between the parties. Specifically, there was no common mistake (the parties did not both make the same mistake about something fundamental that would vitiate their agreement) and there was no mutual mistake (both parties were not mistaken about different things; the existence of the ASF overall is not at issue).

[73] It appears from the applicant's motion record and his submissions that Mr Hughes now believes, with the benefit of hindsight, that he should not have agreed in October 2019 to include the phrase "a requisite initial step" in paragraph 76 of the ASF. He advised that he misunderstood that phrase and agreed in error, in haste and inadvertently. However, based on his submissions on

this motion, that phrase also seems to be inconsistent with arguments the applicant now wishes to make in this proceeding, including that Transport Canada was required to provide him with an offer letter prior to security clearance (a position he says he raised in June, 2019). That phrase in paragraph 76 also seems to be inconsistent with the applicant's intention to file future motions for contempt or "non-compliance" with the Remedies Decision. I accept that a "mistake" may be discovered after an agreement is made; that is part of what makes it a mistake. However, the doctrine of mistake does not permit a party to resile from an agreed statement of facts filed with the Court, long after it has been relied upon by the parties and the Court, on the grounds that the party realizes that something in it may harm their most recent litigation strategy.

[74] For these reasons, therefore, Mr Hughes has provided no basis to permit him to do amend paragraph 76 of the ASF based on a mistake.

[75] For completeness, I will add that the circumstances of this case also do not fulfil the requirements for rectification of an agreement in equity based on a mistake. In particular, there is no evidence of a mistake made by both parties at the time the agreement was entered into, so that paragraph 76 of the ASF could be rectified today to reflect their common intent in October 2019. In other words, there is no evidence of a transcription type of error in paragraph 76 of the ASF. I also could not conclude that the circumstances (set out above) call for rectification based on a unilateral mistake, given the demanding preconditions for that remedy. In short, there is no basis to amend paragraph 76 to restore the parties to their original intended bargain: see *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720, at paras 12-15;

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 SCR 678.

IV. **Conclusion**

[76] I am unable to find on the evidence in the record that there is a reason to justify intervention by this Court to amend paragraph 76 of the ASF, whether under Rule 75 or considering the phrase "requisite initial step" as a formal admission that requires leave of the Court to withdraw. It is not in the interests of justice to amend the ASF filed with the Court on October 10, 2019.

[77] Accordingly, the applicant's motion to amend paragraph 76 of the ASF is dismissed, with costs.

ORDER in T-1315-18

THIS COURT ORDERS:

1. The applicant's motion to amend paragraph 76 of the Agreed Statement of Facts filed with the Court on October 10, 2019, is dismissed.
2. The applicant shall pay costs of the motion to the respondent, fixed in the amount of $250.00

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1315-18
STYLE OF CAUSE:	CHRIS HUGHES v CANADIAN HUMAN RIGHTS COMMISSION and TRANSPORT CANADA
PLACE OF HEARING:	TORONTO, ONTARIO

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	NOVEMBER 30, 2020

WRITTEN SUBMISSIONS BY:

Chris Hughes	FOR THE APPLICANT SELF-REPRESENTED
Malcolm Palmer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chris Hughes	FOR THE APPLICANT SELF-REPRESENTED
Daniel Poulin	FOR THE COMMISSION
Malcolm Palmer Attorney General of Canada	FOR THE RESPONDENT