Federal Court Cour fédérale

Date: 20200820

Docket: T-1315-18

Citation: 2020 FC 843

Ottawa, Ontario, August 20, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CHRIS HUGHES

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TRANSPORT CANADA

Respondent

ORDER AND REASONS

UPON the Applicant seeking, pursuant to Rule 431 of the *Federal Courts Rules* (SOR/98-106) [Rule 431], the following order:

1) An Order that another person implement the Remedy Order dated June 1, 2018. The other person jointly and/or severally should be the Treasury Board of Canada and/or its Minister, the Public Service Commission of Canada and/or its Minister or President;
2) The original "person" subject to the Remedy Order, Transport Canada [TC] and by default – Minister Garneau has not complied with the appointment ("instatement") of the Applicant to the permanent position of PM04 Marine Analyst Position;
3) TC and Minister Garneau ignored the order and took steps to frustrate the implementation of the order including sabotaging the Applicant's credit score by failing to hire the Applicant in June 2018;
4) An Order that the Crown appoint the Applicant through a conditional letter of offer to a permanent PM04 Marine Analyst Position at TC, pursuant to and in keeping with the Remedy Order of June 1, 2018, subject to Section 55 of the *Public Service Employment Act*, the government Security Policy and related TBS and PSC policies;
5) An Order for lost wages and benefits from June 1, 2018, until the date the Applicant is placed on Leave with Pay;
6) An Order that the Applicant be placed on leave with pay for two years and a month to allow the Applicant's credit score to recover (a security clearance is not needed if the employee is on leave and is not accessing sensitive information or premises. The security forms can be submitted in 18 months. The Applicant can return to the workplace at the end of the two years subject to security clearance);
7) An Order that Treasury Board, the employer, immediately place the Applicant on the Government Dental plan;
8) An Order that TC allow access to internal job postings, deployment opportunities etc over the two year leave with pay timeframe.

AND UPON the Applicant's written submissions seeking slightly different relief:

> **62.** An order that that the Crown through the Minister of Treasury Board and/or Treasury Board, the President or Minister of the Public Service Commission or the PSC jointly and severally are responsible to immediately implement the Remedy Order of instatement (appointment) of the Applicant to a permanent PM04 position at TC via a written conditional job contract.
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> The job contract must be in keeping with the Treasury Board Security Policy, PSC policies and "*acquired rights*" of the Applicant cited in the Singh and Zhang cases.
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> **63.** An Order that the Treasury Board/Public Service Commission place the Applicant on Leave with Pay effective immediately, for a period of two years and one month.
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> **64.** An Order for lost wages from June 1, 2018 with all benefits and interest until the date of Leave with Pay.
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> **65.** An Order that the Applicant be enrolled in the Dental Coverage Plan of the Federal Government immediately.
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> **66.** An Order that the Applicant be given access to internal job postings, including deployment opportunities within the Federal Public Service for the Leave with Pay timeframe.
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> **67.** An Order that the Court retain jurisdiction on the remedy orders in case of a disagreement or further non-compliance.

AND UPON hearing the submissions of the self-represented Applicant and counsel for the Respondent and reviewing the written materials;

[1] TC had been found liable for discrimination against the Applicant (July 9, 2014 (file T1656/01111)) that the Federal Court of Appeal [FCA] upheld. The Canadian Human Rights Tribunal [CHRT] in 2018 reached a decision regarding the remedies for the discrimination against the Applicant (*Hughes v Transport Canada*, 2018 CHRT 15) [Remedial order].

[2] While I fully support the parties moving from their entrenched positions to reach a mediated resolution with respect to the 2018 remedy decision, that is not my role in this motion. After consideration of the parties reasoned written and oral arguments, I am not prepared to grant any relief sought for the reasons that follow.

[3] The Applicant has attempted to enforce the remedies by: settlement attempts, case management meetings, directions, motions, judicial reviews and appeals. Many of the issues argued in this motion have already been determined by this Court, or will be on appeal, or are not what the Court will exercise their discretion to do if there is even jurisdiction to do so. Detailed decisions regarding enforcing the remedial decision include:

- Justice Campbell: *Chris Hughes v Attorney General of Canada*, Order dated November 7, 2018 (T-1293-18);
- Justice Heneghan: *Hughes v Canada (Human Rights Commission)*, 2019 FC 53, Judgment dated January 15, 2019 (T-1315-18);
- Justice LeBlanc: *Hughes v Canada (Attorney General)*, 2019 FC 1026, Judgment dated July 31, 2019 (T-1286-18 and T-1293-18)) currently under appeal (TC's A-379-19) and (Hughes A-369-19); and
- Prothonotary Ring: *Chris Hughes v CHRC and Transport Canada*, Order dated November 28, 2019 (T-1315-18) considering performance and non-performance of the remedies ordered by CHRT (under appeal).

[4] Knowing there is a complex matrix of decisions on this matter that touch on some of the same or similar issues rather than go into great detail, this motion can be summarized as: the Applicant wanting a letter of offer for the position of PM04 Marine Analyst before he completes

the security clearance forms; and the Respondent insists on the security clearance forms to be completed and his security clearance determined before they provide a letter of offer. As a result, the Applicant seeks to have the Court enforce the order using Rule 431.

[5] Rule 431 states:

> **431** Where a person does not comply with an order to perform an act, without prejudice to the powers of the Court to punish the person for contempt, on motion, the Court may order that
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> **(a)** the required act be performed by the person by whom the order was obtained or by another person appointed by the Court; and
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> **(b)** the non-complying person pay the costs incurred in the performance of the act, ascertained in such a manner as the Court may direct, and that a writ of execution be issued against the non-complying person for those costs.

[6] Regarding the request that I order Treasury Board (see relief sought at para 62 above) to put the Applicant in the position of PM04 at TC, the Applicant provided two cases to support his position that given that the CHRT's Remedial order was filed with the Federal Court Registry by the Applicant I should have him appointed. The Applicant's position is that the Respondent, in failing to issue a letter of offer in the two years since the CHRT's Remedial order, is attempting to avoid performance of reinstatement so Rule 431 can be used to enforce it.

[7] The cases the Applicant says support for the Federal Court to order the relief he asks for are: *Express Hâvre St-Pierre Ltée c Leblanc*, 2001 FCT 951 ("*Express Hâvre"*) and *Société de transport de l'Outaouais c SUT, unite 591*, 2016 FC 1008 ("*Société de transport*"). While I agree that these cases suggest that the Federal Court has some equitable jurisdiction to enforce an order when it is filed with the Federal Court Registry, they are also distinguishable from this situation.

[8] In *Express Hâvre*, above, because the applicant's position no longer existed, the Federal Court and FCA ordered a specially managed proceeding to determine compensation, in lieu of reinstatement. In *Société de transport*, above, the Federal Court ordered performance of certain measures in a collective agreement, in part because of the employee association's continued attempts to avoid performance.

[9] *Express Hâvre* is distinguishable as unlike that case the job does still exist and Prothonotary Ring has interpreted that remedial order as saying a condition of offering the job is that the security clearance forms be completed and the security clearance be assessed otherwise it is speculation that the applicant will not obtain the security clearance necessary for the job. While I am not bound by Prothonotary Ring's decision regarding the "condition precedent", it is clear that in this case the job as ordered in the Remedial order still exists and is available to the Applicant once he obtains the security clearance. *Société de transport* is distinguishable as there is no employee association that is not performing certain required measures. Another distinguishing factor is that no Certificate of Judgment was issued for the Applicant pursuant to Rule 474 unlike *Société de transport.*

[10] Contrary to the cases relied on by the Applicant we have the Respondent saying they have complied with everything within their control including paying $352,970.07 for calculable compensation, and that they even provided the security forms to the Applicant to complete. The Respondent states that once the security clearance is obtained, the Applicant can subsequently be instated, as set out in the Remedial order: "…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…" (Emphasis added).

[11] I also think it is pertinent to be reminded that in the Remedial order the tribunal clearly anticipated that there may be problems implementing the order and retained jurisdiction to decide disputes (2018 Remedy decision at paras 408 & 409). The Tribunal expected the parties to negotiate a resolution but if they could not then they were to file a notice within the year. There was a mechanism to resolve quantification or implementation of the remedies decision.

[12] It seems to me in hindsight to go back to the Tribunal would have been the obvious solution given the Tribunal anticipated they may need to be involved to implement their order.

[13] When asked why he did not go back to the Tribunal the Applicant explained his position. I understand that the Applicant did file a motion with the Tribunal seeking adjudication and quantification of a number of outstanding remedies, but then requested that the motion be held in abeyance until the FCA's decision. The parties, after appealing to the FCA, then sought adjournments of the FCA hearing until July 31, 2020, so as to attempt mediation. The mediation attempt failed so it appears the appeals will be going forward at some future time. As noted above a number of other motions and judicial reviews have been pursued but it appears that going back to the tribunal is not going to afford the relief sought by the Applicant.

[14] The Applicant submits that for TC to comply with the Remedial order, it must provide an employment letter before he will complete the security forms. The Applicant at the hearing indicated that the "the security form is a red herring as they do not want to hire him" (from my

notes not an exact quote) and that as he had previously had in another government job the security clearance of reliable he has grandfathered rights and should be given an indeterminate position even if he does not obtain the required top secret clearance needed for the PM04 position at TC. The Applicant is sure he will not obtain it given his current financial difficulties which he blames TC for as they have not implemented the Remedial order.

[15] However, rather than guessing in a vacuum, it is only when the Applicant submits the security clearance that it will be known whether he obtains the necessary level or not instead of speculating. The Respondent indicates the position is available once he has the security clearance.

[16] As well, the Applicant appeared to acknowledge, in an Agreed Statement of Facts dated October 10, 2019 at paragraph 76, that the security forms are a "requisite initial step for appointment to the Marine Intelligence Analyst position". In stark contrast, he now takes the opposite position that he does not have to have his security clearance determined first. It appears his change of position results from his current financial situation of which he blames on TC.

[17] But given he has not completed the forms, it is pure speculation of whether he will or will not obtain the security clearance that is required before instatement. The Remedial order states "1. The Respondent shall instate the Complainant, subject to the required security clearance…" While there is evidence that a divorce has negatively affected his financial situation, I note that on the positive financial side he was paid $352,970.07 on February 22, 2019.

[18] As discussed above, he has not presented compelling legal reasoning as to why the security forms and clearance are not a condition precedent to his instatement.

[19] Further support that these facts are not appropriate for applying Rule 431 is found in *Chédor v Canada (Citizenship and Immigration)*, 2016 FC 1205 [*Chédor*], where the Federal Court describes – albeit in *obiter* – Rule 431 as one of several provisions that allows for enforcement of an order by "committal", and says (again in *obiter*) that orders of committal are exceptional and not issued as a matter of convenience. *Chédor*, above, also states that according to Rule 429, leave of the Court is required and the original order must set forth specifically the time within which the act is ordered to be done:

> **429 (1)** Where a person who is required by an order to perform an act within a specified time refuses or neglects to do so within that time, or where a person disobeys an order to abstain from doing an act, the order may, with the leave of the Court, be enforced by
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> **(a)** a writ of sequestration against the property of the person;
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> **(b)** where the person is a corporation, a writ of sequestration against the property of any director or officer of the corporation; and
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> **(c)** subject to subsection (2), in respect of an order other than for payment of money, an order of committal against the person or, where the person is a body corporate, against any director or officer of the corporation.

[20] In *Chédor*, the Federal Court saw Rule 429 and Rule 431 as two parts of the same whole, and that Rule 431 could not be used without satisfying Rule 429. That would pose a problem for the Applicant, because the CHRT's order here did not specify a time within which the reinstatement was to occur.

[21] Three FCA decisions have touched on, but not decided under Rule 431. In *Canada (Minister of Health) v Pfizer Canada Inc*, 2004 FCA 402, the FCA “left open” the question of whether it would ever be appropriate to have recourse to Rule 431 in the context of disclosure orders in prohibition proceedings under the *Patented Medicines (Notice of Compliance) Regulations*. In *Assiniboine v Meeches*, 2013 FCA 114, the FCA notes a decision of Justice Strickland finding that a declaratory judgment was not enforceable under Rule 431 (note that in a Federal Court case, *Gallant c Télécommunications Sans Fil (TSF) Inc.*, 2003 FCT 120, Justice Pinard found that Rule 431 is not available for declaratory relief). In *Lanno v Canada (Customs & Revenue Agency)*, 2006 FCA 220, the FCA only commented on Rule 431 to say that if the applicant wanted to apply under Rule 431, he should pursue it at the Federal Court rather than the FCA.

[22] Further, the use of “person” in Rule 431 precludes the Crown. Under section 2 “Interpretation” of the *Federal Courts Rules*, “person” “includes a tribunal, an unincorporated association and a partnership”. It does not explicitly mention the Crown or branches of the Crown which are arguably not “persons” under Rule 431.

[23] I will not exercise my discretion to order the relief sought by the Applicant.

[24] The Applicant sought no costs and the Respondent provided a Bill of Costs including fees and disbursements in the amount of $1417.50. The Applicant’s assertion of his impecuniosity and that he represented himself are factors that I considered and thus will order minimum costs. I will order the Applicant to pay the Respondent the lump sum inclusive of fees and disbursement in the amount of $250.00 payable forthright.

ORDER IN T-1315-18

THIS COURT ORDERS that:

1. The motion is dismissed;

2. Costs in the lump sum amount of $250.00 are payable to the Respondent by the Applicant forthwith.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1315-18
STYLE OF CAUSE:	CHRIS HUGHES V TRANSPORT CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 7, 2020
ORDER AND REASONS:	MCVEIGH J.
DATED:	August 20, 2020

APPEARANCES:

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