

Federal Court



Cour fédérale

Date: 20190115

Docket: T-1315-18

Citation: 2019 FC 53

St. John's, Newfoundland and Labrador, January 15, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CHRIS HUGHES

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TRANSPORT CANADA

Respondent

ORDER AND REASONS

INTRODUCTION

[1] By Notice of Motion dated December 7, 2018, Mr. Chris Hughes (the “Complainant”) seeks the following relief:

1. An Enforcement order pursuant to Section 24.1 of the Charter of Rights that Transport Canada immediately implements the remedy order of the Canadian Human Rights as their ongoing defiance of the court order is a violation of the Rule of Law and the applicant's Charter Rights under Section 7 and 15.
2. The Remedy Orders part 1-4, 7, 9, 10 are undisputed and a simple calculation totals \$375 618 that must be paid immediately by the Minister of Finance or in the alternate the Minister of Transport Canada.
3. An Order that Remedy Orders 5, 6, 8, 11 need calculations that need to be implemented within 45 days within the assistance of an Actuary paid for by the Respondent. An Actuary is needed to calculate the complex pension figures, tax gross up and interest.
4. An order that the Minister of Finance and or the Minister of Transport Canada provide the Court with proof of payment of the \$375 618 from bullet 2 within one week of this order.
5. An order that the Minister of Transport Canada provide proof to the Court that the remaining remedy orders have been implemented or are being implemented within 45 days.
6. An order that this hearing be conducted by teleconference as the Applicant is broke.
7. An order that the Respondent immediately hire the Applicant and that he be brought "on strength" and be placed on "leave without pay" until such time as the Top Secret clearance is completed and the Applicant is instated in his position. An order that the Respondent ensure the Applicant is immediately covered by Dental and Health plans available to all other federal employees.
8. An order that the Applicant can give oral evidence by teleconference, under oath/affirmation to confirm Facts in the Motion record that occurred after the sworn affidavit of August 8, 2018. This is due to the Applicant's being broke and destitute and unable to pay for a second affidavit.
9. An order for costs.

I. BACKGROUND

[2] The Complainant is a self-represented person. He commenced the within proceeding on July 9, 2018 for the purpose of registering, as a judgment pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), an award made in his favour by a Tribunal constituted under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the “Act”). The award was made on June 1, 2018 in respect of a complaint filed by the Complainant on January 27, 2008, alleging discrimination in the workplace on the part of servants and agents of Transport Canada (“the Respondent”).

[3] A finding of discrimination was made in favour of the Complainant. Upon application for judicial review by the Respondent, the liability award was set aside and the matter remitted for another determination; see *Canada (Attorney General) v. Hughes*, 2015 FC 1302.

[4] Upon appeal by the Complainant, the appeal was allowed and the original award was reinstated by the Federal Court of Appeal in a decision made on November 8, 2016; see the decision in *Hughes v. Canada (Attorney General)* (2016), 41 C.C.E.L. (4th) 231 (F.C.A.).

[5] On July 3, 2018, the Respondent commenced an application for judicial review of the damages award, in cause number T-1286-18. On the same day, the Complainant filed his own application for judicial review in respect of the damages award, that is cause number T-1293-18. These two applications for judicial review are set down for hearing on February 6, 2019.

[6] By letter dated December 13, 2018, Counsel for the Respondent objected to the apparent challenge by the Complainant to the constitutional validity of certain Rules, in the absence of notice pursuant to section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[7] At the request of Counsel for the Respondent, a case management conference was held on December 12, 2018. Subsequently, by letter dated December 13, 2018, the Complainant advised that he was withdrawing a constitutional challenge to certain Rules but was proceeding with his motion on the grounds that he seeks a remedy pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the “Charter”).

[8] The Complainant’s motion was heard at a special sitting of the Court in Victoria, British Columbia on Thursday, December 20, 2018.

[9] At the commencement of that hearing, Counsel for the Respondent again objected to the ability of the Complainant to raise any arguments about the constitutionality of the Rules. The Complainant reiterated that he was not making such a challenge but alleged that the failure of the Respondent to pay the award in his favour amounted to a breach of his rights pursuant section 7 and section 15 of the Charter.

II. THE EVIDENCE

[10] The Complainant sought and obtained leave to rely upon affidavits that he filed in earlier proceedings, that is an affidavit dated August 8, 2018 filed in cause number T-1315-18 and an affidavit dated October 3, 2018 filed in cause number T-1292-18.

[11] For its part, the Respondent filed the affidavits of Abigail Bergen, dated December 14, 2018; Christina Quon, dated December 13, 2018; and Tracey Sametz, dated December 11, 2018.

[12] In his affidavit of August 8, 2018, filed in cause number T-1315-18, the Complainant sets out the amounts he estimates are due to him under the damages award.

[13] In his affidavit of October 3, 2018, filed in cause number T-1293-18, the Complainant outlines steps he has taken to obtain payment of the damages award, including correspondence with the Minister of Transport. He deposed that he is in “extreme financial distress” and unemployed since the summer of 2014.

[14] The Respondent filed three affidavits, as mentioned above. Ms. Bergen is a legal assistant working with the Department of Justice, Canada, Counsel for the Respondent. The exhibits attached to her affidavit include various letters written on behalf of the Complainant and replies from Counsel at the Department of Justice.

[15] Ms. Quon is also a legal assistant employed with the Department of Justice, Canada. The exhibits to her affidavit consist largely of pleadings and Orders in cause numbers T-1286-18, T-1293-18 and T-636-18. The Complainant is a party to all three proceedings.

[16] Ms. Quon also attached, as an exhibit, a copy of the Treasury Board Directive on “Payments and Guideline and Ex Gratia Payments” by the Federal Government.

[17] Ms. Sametz is the Director General of the Human Resources Directorate for Transport Canada. In her affidavit, she addressed the security requirement for the position for which the Complainant is seeking appointment, in compliance with the damages award made by the Tribunal.

III. SUBMISSIONS

[18] A summary of the parties’ arguments is set out below, referring to the main issues addressed in the hearing of the motion.

[19] The Complainant argues that he is not challenging the constitutional validity of rules 424 and 474 of the Rules or section 30 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50. Rather, he submits that insofar as the Respondent relies on these provisions to deny implementation of the damages award, this amounts to a breach of his rights under section 7 and section 15 of the Charter.

[20] Relying on the affidavits filed in support of his motion, the Complainant pleads that his mental and physical health are impacted by the Respondent's failure to pay even a part of the damages award. He claims to be suicidal and argues that when state action leads to risk of suicide then a breach of section 7 is established.

[21] Relying on the finding of discrimination made by the Tribunal, the Complainant pleads that non-payment of the damages award by the Respondent is also a breach of his rights pursuant to section 15 of the Charter.

[22] The Complainant says that since he is not raising an issue of constitutional validity, he is not required to give notice of a constitutional question pursuant to section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[23] The Complainant then argues that once he registered the damages award in the Federal Court, pursuant to Rule 424 of the Rules, that award became a judgment of the Court and in the absence of a stay of execution, the award must be implemented.

[24] The Complainant submits that the Respondent, by failing to pay the damages award in part or in full, is in breach of a lawful Order and accordingly, is in contempt of Court.

[25] The Complainant further submits that since the Respondent did not appeal the damages award, he is not required to act pursuant to Rule 474. He argues that an application for judicial

review is not an “appeal” within the meaning of the Rules, referring to the definition of “appeal” in Rule 2.

[26] The Complainant argues that in seeking partial payment of the damages award and appointment to a lower class position in the federal public service, pending assessment for the security clearance required for the position of a Marine Intelligence Analyst as ordered in the damages award, he is not trying to amend the damages award. Rather, he is looking for an income and the financial means to support himself.

[27] The Respondent takes the position that the Complainant is challenging the constitutional validity of certain Rules and section 30 of the *Crown Liability and Proceedings Act, supra* when he complains about the effect of those provisions upon him and accordingly is required to give notice under section 57 of the *Federal Courts Act, supra*. In this regard, the Respondent relies on the decision in *The Queen v. Wetzel* (2006), 266 D.L.R. (4th) 753 (F.C.A).

[28] The Respondent then argues it is inappropriate for the Complainant to raise a question of constitutional validity in a procedural motion. It submits that in any event, the Court should not entertain the claims about a breach of section 7 and section 15 in the absence of a full evidentiary record including evidence of both legislative and adjudicative facts, as well as expert evidence.

[29] The Respondent submits that it is not obliged to act upon the damages award since that award has been challenged by way of an application for judicial review that will be heard shortly. Relying upon section 30 of the *Crown Liability and Proceedings Act, supra*, it argues

that since the damages award was made by a federal tribunal whose decision can be reviewed only by means of an application for judicial review, the word “appeal” should be read broadly and the limitation imposed by section 30, should apply.

[30] The Respondent submits that the policies of the Federal Government about *ex gratia* payments have been repealed and do not assist the Complainant.

IV. DISCUSSION AND DISPOSTION

[31] The heart of the Complainant’s present motion is for a means to compel the Respondent to satisfy, in whole or in part, the damages award made in his favour by the tribunal.

[32] It is not necessary for me to address the objections raised by the Respondent about the lack of notice pursuant to section 57 of the *Federal Courts Act, supra* or the appropriateness of raising a Charter breach by way of motion.

[33] The Complainant filed affidavits setting out the negative effects upon him about the failure of the Respondent to implement the damages award. He alleges suicidal feelings. He refers to his mental condition. There is no record of cross-examination of the Complainant. In any event, the decision of the Federal Court of Appeal in *Hughes, supra* appears to recognize, as a fact, that the Complainant suffers from the disability of a mental illness.

[34] However, there is insufficient evidence before me to make any decision about alleged breaches of section 7 and section 15 of the Charter. According to the decision in *Danson v.*

Ontario (Attorney General), [1990] 2 S.C.R. 1086 at page 1099, the Supreme Court of Canada instructed that a Court should not engage in deciding a breach of Charter Rights in the absence of a “proper factual foundation.” Such a foundation has not been provided in this motion by the Complainant and his arguments about breach of his Charter Rights will not be considered.

[35] The Complainant has registered the Tribunal’s damages award pursuant to Rule 424 of the Rules which provides as follows:

Enforcement of order of tribunal

424 (1) Where under an Act of Parliament the Court is authorized to enforce an order of a tribunal and no other procedure is required by or under that Act, the order may be enforced under this Part.

Filing of order

(2) An order referred to in subsection (1) shall be filed together with a certificate from the tribunal, or an affidavit of a person authorized to file such an order, attesting to the authenticity of the order.

Exécution de l’ordonnance d’un office fédéral

424 (1) Lorsque la Cour est autorisée, en vertu d’une loi fédérale, à poursuivre l’exécution forcée de l’ordonnance d’un office fédéral et qu’aucune autre procédure n’est prévue aux termes de cette loi ou de ses textes d’application, l’exécution forcée de l’ordonnance est assujettie à la présente partie.

Dépôt de l’ordonnance

(2) L’ordonnance visée au paragraphe (1) est déposée avec un certificat de l’office fédéral ou un affidavit de la personne autorisée à la déposer, attestant l’authenticité de l’ordonnance.

[36] The Complainant commenced the within proceeding solely for the purpose of registering the damages award. He is now attempting to enforce payment of that award in this proceeding.

[37] The Respondent relies on section 30 of the *Crown Liability and Proceedings Act, supra* and the outstanding application for judicial review in cause number T-1286-18 to argue that payment of the damages award is premature.

[38] Section 30 of the *Crown Liability and Proceedings Act, supra* provides as follows:

Payment of judgment

30 (1) On receipt of a certificate of judgment against the Crown issued under the regulations or the Federal Courts Rules, the Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown.

Crown costs to be paid to Receiver General

(2) Any money or costs awarded to the Crown in any proceedings shall be paid to the Receiver General.

Paiement en exécution d'un jugement

30 (1) Sur réception d'un certificat de jugement rendu contre l'État et délivré en vertu des règlements ou des Règles des Cours fédérales, le ministre des Finances autorise le paiement, sur le Trésor, de toute somme d'argent accordée à une personne, par jugement contre l'État.

Versement au receveur général des dépens dus à l'État

(2) Les sommes d'argent ou les dépens adjugés à l'État dans toutes procédures sont versés au receveur général.

[39] The Respondent argues that the combined effect of this provision and Rule 474 means that any payment of the damage award is postponed until the disposition of the outstanding application for judicial review. Rule 474 provides as follows:

Certificate of judgment

474 (1) Where an order made against the Crown for the payment of money for costs or

Certification du jugement

474 (1) Dans le cas où une ordonnance rendue contre la Couronne lui enjoignant de

otherwise is executory and

payer une somme pour les dépens ou à tout autre titre est exécutoire, l'administrateur délivre un certificat de jugement attestant :

(a) where no appeal of the order has been instituted, the time allowed by law for an appeal from the order has expired, or

a) que le délai d'appel est expiré, lorsqu'elle n'a fait l'objet d'aucun appel;

(b) where there has been an appeal from the order, the order has been affirmed or varied on appeal,

b) qu'elle n'a pas été infirmée ou qu'elle a été modifiée, lorsqu'elle a fait l'objet d'un appel.

the Administrator shall issue a certificate of judgment accordingly.

Delivery of certificate

Remise du certificat

(2) A certificate issued under subsection (1) shall be transmitted by the Administrator to the office of the Deputy Attorney General of Canada.

(2) Le certificat visé au paragraphe (1) est transmis par l'administrateur au bureau du sous-procureur général du Canada.

[40] In my opinion, the Respondent's reliance on these provisions cannot succeed, at least at this time.

[41] There is no "appeal" outstanding against the damages award. I agree with the submissions of the Complainant that an application for judicial review is not an "appeal" within the meaning of the Rules. Rule 2 includes a definition of "appeal" as follows:

appeal means a proceeding

appel Instance visée à la règle

referred to in rule 335. (appel) 335. (appeal)

[42] Rule 335 is found in Part 6 of the Rules, entitled “Appeals”.

[43] Application is defined in Rule 2 as follows:

application means a	demande Instance visée à la
proceeding referred to in rule	règle 300. (application)
300. (demande)	

[44] Rule 300 is found in Part 5 of the Rules, entitled “Applications”.

[45] I agree with the Respondent that since the damages award is a decision of a “federal board, commission or tribunal” as defined in Rule 2, then it can only be reviewed by way of an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, *supra*.

[46] However, I do not accept the Respondent’s contention that, in these circumstances, the word “appeal” must be read as including an application for judicial review or that the two terms bear the same meaning.

[47] It follows that I agree with the Complainant that there is no appeal and that section 30 of the *Crown Liability and Proceedings Act*, *supra* does not assist the Respondent, in the absence of a judicial stay.

[48] The Complainant submits that he does not have to make such a request since he has a judgment against the Respondent.

[49] I disagree.

[50] In my opinion, the Rules require a party in the position of the Complainant to take such a step and I see no reason why he should ignore it.

[51] However, the matter does not end here.

[52] The Respondent is a Department of the Government of Canada. It is part of the executive that, pursuant to section 9 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, is vested in the Crown in right of Canada.

[53] A party cannot take steps to enforce payment of a judgment by the Crown; that is, the execution process described in Part 12 of the Rules is not available to a judgment creditor when the debt is owed by the Crown. I refer to section 29 of the *Crown Liability and Proceedings Act*, *supra* which provides as follows:

No execution against Crown

29 No execution shall issue on a judgment against the Crown.

Absence d'exécution forcée contre l'État

29 Les jugements rendus contre l'État ne sont pas susceptibles d'exécution forcée.

[54] As a practical matter, then, the Complainant can do nothing to make the Respondent advance part of the monetary award in his favour.

[55] In my opinion, the submissions about the government policy respecting *ex gratia* payments are irrelevant.

[56] The correspondence from and on behalf of the Complainant, requesting an advance on payment of monies assessed in the damages award, does not concern an *ex gratia* payment which is a voluntary payment, made without a finding of a liability to pay. I refer to the decision in *Edwards v. Skyways Ltd.*, [1964] 1 All E.R. 494 at 500 (U.K.Q.B.).

[57] In the present case, the liability decision has been made. The decision of the Federal Court of Appeal is final, since the record does not show an application for leave to appeal to the Supreme Court of Canada.

[58] It is within the competence of the Respondent to make a partial payment to the Complainant. No such payment has been made and the Respondent exercised his right to seek judicial review of the damages award.

[59] Although the pending application for judicial review does not in my opinion operate to stay payment of the damages award, there is no legal avenue by which the Complainant can enforce payment.

V. COSTS

[60] In his notice of motion, the Complainant seeks costs in the event he is successful. At the hearing of the motion, he argued that no costs should be awarded to the Respondent in the event that his motion were dismissed.

[61] The Respondent seeks costs of attendance at the Case Management Conference on December 12, 2018 and also for the costs of attendance in Victoria upon the hearing of the motion; it does not seek recovery of disbursements.

[62] Pursuant to Rule 400(1), costs lie in the full discretion of the Court.

[63] The Complainant met partial success with his arguments about the applicability of section 30 of the *Crown Liability and Proceedings Act, supra* but this success does not assist him in obtaining a means of enforcing the damages award. Further, he has not yet complied with Rule 474.

[64] However, I am not persuaded that costs should be awarded against him in favour of the Respondent.

[65] The Respondent did not provide any authority to support an award of costs in respect of a Case Management Conference. I note the Case Management Conference in question was requested by the Respondent.

[66] In light of the known circumstances of the Complainant, as outlined in the extracts of the liability decision of the Tribunal, in the decision of the Federal Court of Appeal and in the affidavits filed in respect of this motion, in the exercise of my discretion, I make no Order as to costs.

[67] I commend to both parties the factors outlined in Rule 400 for the award of costs. The list of factors is not exclusive and the pursuit of unnecessary steps, including motions taken out of an abundance of caution, may be considered in an ultimate award of costs.

[68] In the result, the motion is dismissed, no Order as to costs.

ORDER

THIS COURT ORDERS that the Motion is dismissed. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1315-18

STYLE OF CAUSE: CHRIS HUGHES v CANADIAN HUMAN RIGHTS
COMMISSION v TRANSPORT CANADA

PLACE OF HEARING: VICTORIA, BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 20, 2019

ORDER AND REASONS: HENEGHAN J.

DATED: JANUARY 15, 2019

APPEARANCES:

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FOR THE COMPLAINANT
(ON HIS OWN BEHALF)

Elizabeth (Lisa) McDonald

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT