

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161108

Docket: A-538-15

Citation: 2016 FCA 271

**CORAM: TRUDEL J.A.
SCOTT J.A.
GLEASON J.A.**

BETWEEN:

CHRIS HUGHES

Appellant

and

**ATTORNEY GENERAL OF CANADA
and
CANADIAN HUMAN RIGHTS COMMISSION**

Respondents

Heard at Ottawa, Ontario, on November 8, 2016.
Judgment delivered from the Bench at Ottawa, Ontario, on November 8, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on November 8, 2016).

GLEASON J.A.

[1] Mr. Hughes appeals from the order of the Federal Court in *Canada (Attorney General) v. Hughes*, 2015 FC 1302, 260 A.C.W.S. (3d) 560 [*Hughes FC*], which allowed the Attorney General's application for judicial review of the decision of the Canadian Human Rights Tribunal in *Hughes v. Transport Canada*, 2014 CHRT 19.

[2] In that decision, the Tribunal determined that Transport Canada discriminated against Mr. Hughes on the basis of disability in a staffing process when the hiring panel decided to screen Mr. Hughes out of the process. More specifically, the Tribunal held that Transport Canada had committed indirect or unintentional discrimination when it declined to find that the performance appraisals and other documents tendered by Mr. Hughes provided sufficient proof of his meeting the hiring criterion of being detail-oriented.

[3] Rather than accepting these documents as establishing this criterion, the chair of the hiring panel wanted personal references to validate that Mr. Hughes possessed the required ability to pay attention to detail. However, Mr. Hughes told the chair of the panel that it would be difficult for him to obtain references from his former employers because he had been involved in litigation with them due to his having been a whistle-blower and the subject of discrimination. He also indicated that he suffered from a mental health disability that was occasioned by the difficulties he had experienced with his former employers.

[4] The other member of the staffing panel who testified before the Tribunal indicated that she had reviewed the documents that Mr. Hughes had tendered in support of his possessing the necessary ability to pay attention to details, but was not satisfied that they demonstrated that Mr. Hughes met the detail-oriented criterion. The Tribunal found her to not be credible in respect of these points.

[5] The Tribunal held that the documents tendered by Mr. Hughes provided as much confirmation – if not more – of his ability to pay attention to detail as was established by the

verbal references obtained for the other candidates. This, coupled with the selection panel's knowledge of Mr. Hughes disability, led the Tribunal to conclude that Mr. Hughes had made out a *prima facie* case of discrimination. The Tribunal went on to conclude that Transport Canada had not discharged its burden of disproving discrimination and so upheld this portion of Mr. Hughes' complaint.

[6] In setting the Tribunal's decision aside, the Federal Court stated that it was conducting a reasonableness review, but, in fact, it re-weighed the evidence that was before the Tribunal. The Court did not agree with the Tribunal that it was problematic for the hiring panel to penalize Mr. Hughes for his lack of references as there had been no change in the hiring panel's references policy after Mr. Hughes' disclosed his disability and thus there was no evidence of discriminatory conduct (*Hughes FC* at para. 54). The Court also found that because Mr. Hughes' documentation in lieu of references did not "self-evidently" illustrate that he met the attention-to-detail criterion, it was inappropriate for the Tribunal to substitute its own conclusion for that of the hiring panel on this point (*Hughes FC* at para. 53).

[7] In this appeal, we are required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. Here, while the Federal Court selected the appropriate standard – namely reasonableness – it did not apply that standard correctly.

[8] In re-weighing and effectively re-deciding the case, the Federal Court was much too interventionist. There was more than ample evidence before the Tribunal to support its key conclusions; interference with them under the reasonableness standard is therefore not warranted.

[9] More specifically, the evidence demonstrated that the decision on Mr. Hughes' candidacy was not made until after Mr. Hughes told the chair of the selection panel of his disability and the reasons for his failure to obtain references. The evidence also showed that it was the chair who was instrumental in giving Mr. Hughes a failing grade on the detail-oriented criterion and that this assessment was not made until after the chair was aware of Mr. Hughes' disability. Moreover, there was evidence that a document favorable to Mr. Hughes' case had been altered by the employer and that the chair of the hiring panel disregarded the advice of the human resources representative on the hiring panel and continued to refuse to consider the written documentation that Mr. Hughes supplied in support of his candidacy even after the reasons why he was unable to obtain adequate verbal references were made known to the chair. Finally, there was a basis in fact for the Tribunal to have concluded that the written documents supplied by Mr. Hughes were as adequate as the verbal references the successful candidates were able to provide.

[10] In light of this, the Tribunal's finding that Mr. Hughes had made out a *prima facie* case of discrimination is reasonable. Likewise, its determination that the employer had failed to provide an adequate explanation for its failure to consider the written documents provided by Mr. Hughes cannot be challenged as it is grounded in large part in the factual findings and

credibility determinations made by the Tribunal. Its decision is therefore reasonable and the Federal Court erred in concluding otherwise.

[11] It follows that this appeal will be allowed with costs, the order of the Federal Court set aside, and, making the determination that the Federal Court ought to have made, the judicial review application of the respondent, the Attorney General of Canada, is dismissed, with costs. Based on the parties' agreement, costs in the Federal Court are fixed at \$1,500.00 and in this Court at \$1,500.00, in both cases all-inclusive of disbursements and taxes.

“Mary J.L. Gleason”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-538-15

STYLE OF CAUSE: CHRIS HUGHES v. ATTORNEY
GENERAL OF CANADA and
CANADIAN HUMAN RIGHTS
COMMISSION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: NOVEMBER 8, 2016

REASONS FOR JUDGMENT OF THE COURT BY: TRUDEL J.A.
SCOTT J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY: GLEASON J.A.

APPEARANCES:

David Yazbeck FOR THE APPELLANT

Ward Bansley FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. FOR THE APPELLANT
Barristers & Solicitors
Ottawa, Ontario

William F. Pentney FOR THE RESPONDENTS
Deputy Attorney General of Canada