Tribunal's Remedial Order against Transport Canada Reminds Employers to Follow Sound Hiring Practices

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Facts

In 2005, Mr. Hughes applied for the position of Intelligence Analyst at Transport Canada. When he was asked to provide references during the process, Mr. Hughes informed the selection board that it would be difficult for him to provide references due to litigation he had been involved in with respect to previous employers, and that he suffered from a mental health disability that had arisen from difficulties he experienced with the same previous employers. Despite receiving advice that it should rely on supplemental documentation such as performance reviews instead, the selection board insisted on communicating with external references to establish that Mr. Hughes possessed the criterion of being "detail-oriented", which the Intelligence Analyst position required.

The Liability Decision

The Canadian Human Rights Tribunal (The Tribunal) in *Hughes v. Transport Canada*, 2014 CHRT 19, determined that Transport Canada discriminated against Mr. Hughes when it declined to find that the performance reviews and other supplementary documents submitted by Mr. Hughes established that he met the hiring criterion of detail-oriented. The Tribunal determined that based on the evidence, Mr. Hughes should have met the detail-oriented criterion and that he was therefore qualified for the position; that the selection board ought to have taken a more liberal approach in this case due to the abundance of supplemental documentation Mr. Hughes had provided and his particular circumstances; and that the successful candidates' answers to the detail-oriented questions in their interviews were no better than those of Mr. Hughes. The Tribunal also found it notable that there was evidence that a document favourable to Mr. Hughes' candidacy had been altered without explanation from the selection board. As such, the Tribunal determined that Mr. Hughes had established a *prima facie* case of discrimination.

The Tribunal then found that the selection board's explanation of its decision to screen out Mr. Hughes' application was not credible, and that it had been inappropriate to insist on external references in light of the fulsome supplemental documentation Mr. Hughes had provided, and determined that Transport Canada was liable for discrimination.

The Federal Court set aside this decision on reasonability grounds in *Canada (Attorney General) v. Hughes,* 2015 FC 1302, but the Federal Court of Appeal later restored the decision in *Hughes v. Canada (Attorney General)*, 2016 FCA 271.

The Remedies Decision

In *Hughes v. Transport Canada*, 2018 CHRT 15, the Tribunal released its decision in respect of remedies (the Remedies Decision). The Tribunal ordered that Transport Canada instate Mr. Hughes in the Intelligence Analyst position, and that Transport Canada pay to Mr. Hughes compensation for lost wages and benefits from the time he should have been appointed to the position up until the point when the causal link between Transport Canada's discrimination and Mr. Hughes' loss of wages was severed: May 2006 to May 2011. The Tribunal also awarded to Mr. Hughes $15,000 for pain and suffering, and $5,000 as compensation for Transport Canada's reckless engagement in a discriminatory practice.

With respect to the finding of recklessness, the Tribunal relied on the fact that the chair of the selection board did not give due consideration to the supplemental documents Mr. Hughes had provided and continued to insist on communication with external references despite having received advice to the contrary, and that another member of the selection board had "brushed aside" Mr. Hughes supplemental documents.

According to this news article, Transport Canada recently paid out the amount of $518,000 to the complainant in compliance with the Remedies decision.

On Judicial Review

Both parties applied for judicial review of the Remedies Decision, and the Federal Court released its decision on July 31, 2019.

In *Hughes v. Canada (Attorney General)*, 2019 FC 1026, the Federal Court determined that the Remedies Decision ought to be set aside in part – namely, insofar as the Tribunal erred in its causation analysis by setting the cut-off date for compensation for lost wages and benefits as May 2011. Whereas the Tribunal had cited a number of intervening factors which severed the causal relationship between the discrimination and Mr. Hughes' lost wages – including Mr. Hughes' other temporary employment, health issues unrelated to Mr. Hughes' mental disability, and the fact that there was an approximate five-year tenure of Intelligence Analysts – the Federal Court determined that the Tribunal erred in relying on the presumption that Mr. Hughes would have left the Intelligence Analyst position after five years, as this premise was based on the personal circumstances of other individuals and not on evidence directly related to Mr. Hughes. As a result, the Federal Court set aside the Remedies Decision in part on this point alone and remitted it to the Tribunal for redetermination.

However, the Federal Court affirmed the Tribunal's awards of instatement and compensation for lost wages, as well as the award for reckless engagement in a discriminatory practice. The Federal Court affirmed that instatement and lost wages compensation are different heads of damages that address different components and therefore do not constitute double recovery. Instatement is forward-looking, seeking to remedy the opportunity lost, whereas a lost wages award seeks to compensate past losses, which would not have occurred but for the discrimination.

Takeaways

The *Hughes v. Transport Canada* jurisprudence serves as an important reminder to employers with respect to discrimination in hiring. First, employers should ensure that selection processes are well-established and systematic for all candidates. Any departure from the regular process should only be made for clearly non-discriminatory purposes and should be adequately documented. In light of the Tribunal's award of damages for recklessness in the case, it is important that if a candidate raises a characteristic protected by human rights legislation, employers should heed any reasonable advice sought from HR or legal advisors. More generally, employers should seek legal advice if a candidate discloses a mental illness during the hiring process.

By

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