Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 22
Date: November 13, 2015
File No(s).: T1471/1710

Between:

Jonathon Wheatcroft

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian International Development Agency

Respondent

Ruling

Member: George E. Ulyatt

[1] The Respondent has brought a motion to:

a) Summarily dismiss the Complaint because it has disclosed no genuine issue requiring a trial or hearing pursuant to the general authority granted under Rule 3(2)(d);

b) Alternatively, the Respondent submits:

- First, that the Tribunal admits into evidence in this proceeding all of the evidence adduced before the Tribunal in *Cruden*, including the transcripts of the evidence from the *Cruden* hearing, to avoid having to call the same witnesses to provide the same evidence a second time.
- Second, that the Tribunal order Mr. Wheatcroft to identify the specific argument he intends to advance that was not decided in *Cruden* and the Evidence that he intends to rely on.
- Third, that the Tribunal narrow the scope of Mr. Wheatcroft's hearing to address the novel issue(s) raised by Mr. Wheatcroft and not matters already decided in *Cruden*.

[2] The Respondent brings this Motion without the support of any evidence. The Respondent has chosen to rely on the complaint and the particulars from the Tribunal inquiry in the case of *Cruden v. Canadian International Development Agency and Health Canada* T1466/1210 (hereinafter referred to as "*Cruden*"), Tribunal decisions in the *Cruden* case bearing neutral citations 2010 CHRT 32 (motion to consolidate *Cruden with Wheatcroft*) and 2011 CHRT 13 (decision on liability), the Federal Court's judgment setting aside the decision on liability, *Canada (A.G.) v. Cruden* 2013 FC 520, and the Federal Court of Appeal's judgment, dismissing the appeal, 2014 FCA 131.

[3] It is submitted by the Respondent that the *Cruden* case and the one at hand have similarities, as they both dealt with the same alleged discriminatory practice by CIDA, whereby both individuals had applied for a posting to Afghanistan as part of CIDA's 2008 Field Posting Exam. Initially the Respondent sought to consolidate the present complaint with the *Cruden* complaint. Member Marchildon declined to consolidate the complaints (see 2010 CHRT 32). Thus, the *Cruden* matter proceeded before the Tribunal, the Federal Court, and ultimately the Federal Court of Appeal.

[4] The Tribunal in the *Cruden* matter, upon hearing substantial evidence, concluded that it would constitute undue hardship to require CIDA to post Ms. Cruden to Afghanistan

on account of her medical condition, being a Type 1 Diabetic, and went on at great length to outline Ms. Cruden's health conditions, proposed working conditions, and the limitations on medication delivery services to individuals in Afghanistan.

[5] The Respondent argues that the Tribunal, the Federal Court and the Federal Court of Appeal have dealt with the fact that no Type 1 Diabetic ought to be posted to a war zone, and further argues that there is "…no genuine issue to be determined by this Tribunal regardless of whether the Complainant can establish a *prima facie* case of discrimination, there was a *bona fide* occupation requirement to not post individuals with Type 1 Diabetes to Afghanistan because of risks inherent of the condition".

[6] The Respondent, in support of their position for summary judgment, relies on *Hryniak v. Mauldin* 2014 SCC 7, in which the Court stated, at para. 5:

> "…summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims."

[7] The Complainant takes issue with the position of the Respondent.

[8] The Complainant in his Brief, reviewed extensively his involvement with CIDA at different locations throughout the world, in different positions and the differences *vis-à-vis* himself and Ms. Cruden on health issues. The Complainant submits that the Respondent has misread the *Cruden* case and has ignored principles fundamental to human rights law and procedural fairness.

[9] The Complainant went at length to distinguish the circumstances of the present complaint from those of the *Cruden* matter. The Complainant essentially submitted that in order to make out a *bona fide* occupational requirement (BFOR) that would justify a *prima facie* discriminatory workplace standard, the Respondent must establish:

a) that it adopted the standard for a purpose rationally connected to the performance of the job;

b) that it did so in an honest and good faith belief and that it was necessary to the fulfilment of that legitimate work-related purpose;

c) that the standard is reasonably necessary to the accomplishment of that purpose such that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

These are the elements of the BFOR test that the Supreme Court of Canada formulated in British *Colombia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.,* [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 54.

[10] In para. 62 of the *Meirion* decision, the Court elaborated upon the third element by holding that:

> "the standard…must accommodate factors relating to the unique capabilities and inherent worth and dignity of <u>every individual,</u> up to the point of undue hardship." [emphasis added]

[11] At paragraph 27 of his written submissions, the Complainant argued that the Supreme Court found that a blanket ban could only be justified in one of two ways:

> "1. 'No person with [the] condition could ever [be accommodated in the task] without creating an unacceptable level of risk'; and
>
> 2. Alternatively, the Respondent, it was argued, must prove that 'testing for exceptional individuals who can [be accommodated in the task] safely despite their disability is impossible short of undue hardship'".

[12] The foregoing submissions, all stress the point that one must examine the requirements of an individual, rather than applicants in general.

[13] The Commission, in objecting to the Motion for Summary Judgment, argues that:

a. Mr. Wheatcroft's condition is not the same as Ms. Cruden's, and the decision in Ms. Cruden's case was based upon a unique set of circumstances.

b. The decision in *Cruden* was based on factual findings which would be unfair to extrapolate to Mr. Wheatcroft.

c. The Respondent's Motion would be inconsistent with Tribunal Case Law.

d. The present motion for summary judgment is unique and the Respondent has not followed what would be a normal procedure which would include evidence that there is no genuine issue for trial.

I. Analysis

[14] The *Canadian Human Rights* Act at s. 50(1) (hereinafter referred to as "the *Act*") states that "the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations", and the CHRT Rules were enacted to ensure that "all parties to an inquiry have the full and ample opportunity to be heard." (Rule 1(1)(*a*))

[15] The Respondent argues that the case at hand can be dealt with summarily and expeditiously.

[16] This is an unusual motion in that there is no evidence before the Tribunal. The Respondent, the moving party, has not filed any evidence and basically relies upon the decisions rendered in the *Cruden* matter, at the various levels. The Respondent submits that the findings in *Cruden* and the particulars in the matter at hand are so similar, that even if the Complainant established a *prima facie* case, there would be no genuine issue for trial.

[17] The essence of the Respondent's argument appears to be that—even if a *prima facie* case can be made out—there is no genuine issue to be determined, as the prohibition on posting individuals with type 1 diabetes to Afghanistan has been found to be a BFOR. The Tribunal has reviewed all of the aforementioned *Cruden* decisions and judgments and would point out the following:

[18] The Federal Court judgment contains the following observations and conclusions at paragraphs 80-82:

> "[80] <u>This is not to say that there may not be a situation in the future where the application of the Afghanistan Guidelines would result in an employee being prevented from a posting in Afghanistan even though that employee's</u>

> disability could be accommodated without undue hardship, but this is not that case. Moreover, the Tribunal did not even identify *any* potential situation where an employee may be disentitled to a posting to Afghanistan by the application of the Afghanistan Guidelines but could still be accommodated in such a posting short of undue hardship to his or her employer. Unless one concrete example or at least general possibility is identified, it is baseless to assert, in the broadest sense, that the guidelines "differentiate adversely in relation to an employee," which is the requirement in paragraph 7(b) of the *CHRA*, or "[deprive] or [tend] to deprive an individual or class of individuals," which is the requirement in paragraph 10(a)" [underlined emphasis mine]
>
> "[81] HC acknowledged at the hearing before the Tribunal that the "absolute medical requirements" heading of the Afghanistan Guidelines was unfortunate as it did not capture the intention that it was a "guideline" and the Court was given to understand at the hearing of this application that it was under revision to reflect that fact. Any issue of compliance of the revised guideline with the *CHRA* will be addressed in the context of a specific fact situation that may arise in the future, i.e. where an employee claims they could be accommodated in an Afghanistan posting but is denied that opportunity through the application of the revised guideline."
>
> "[82] In summary, absent a finding of a discriminatory practice, Ms. Cruden's complaint had to be dismissed. It may be, as the Tribunal found, that the wording of the Afghanistan Guidelines requires revision; however, absent a finding of a discriminatory practice in the result achieved when the guidelines are applied to Ms. Cruden or some other reasonably identifiable future individual or class of individuals, the Tribunal had no jurisdiction to order the remedies it did. The application of the Afghanistan Guidelines did not discriminate against Ms. Cruden as she could not be accommodated in a posting to Afghanistan without undue hardship, there was no discriminatory practice as a result, and the complaint ought to have been dismissed."

[19] Earlier, at paragraph 65 the Court stated:

> "…The Tribunal found that if it was not for its refusal to post Ms. Cruden to Afghanistan, CIDA would have experienced undue hardship because there were myriad pitfalls in posting a Type 1 diabetic with her profile and medical needs into a war zone."

[20] Upon review of the Federal Court's decision, the Federal Court of Appeal at paragraph 29 stated:

> "[29] The Federal Court Judge noted in paragraph 81 of his decision, there may be another situation where the application of the *Afghanistan Guidelines* could result in a particular employee being denied a posting in

> Afghanistan even though the needs of such person could be accommodated without imposing an undue hardship on the employer. However, this is not the case in this matter and the Tribunal did not identify any such particular situation. The Federal Court Judge also noted that Health Canada was planning to revise the *Afghanistan Guidelines.*"

[21] In reviewing the foregoing, both the Federal Court and the Federal Court of Appeal clearly indicate the possibility of other complaints based on the Afghanistan Guidelines. The Courts do not appear to take issue with the Tribunal finding in *Cruden* that Ms. Cruden had established a *prima facie* case; rather, the only matter the Courts took issue with was the Tribunal's finding that a separate procedural duty to accommodate could subsist where an employer had established that it satisfied all three parts of the *Meiorin* BFOR test.

[22] The *Cruden* case recognizes that each claim has to be assessed on an individual basis, and the result in *Cruden* does not automatically prevent another Complainant with Type 1 Diabetes from coming forth with a Complaint about matters that may be similar to the *Cruden* matter

[23] In order for Summary Judgment to succeed, it would require the Tribunal to dismiss the Complaint for not disclosing a discriminatory practice or if this was in a civil matter, for not disclosing a cause of action, which would be akin to a civil procedure. However, the present matter is not a civil matter but one that is governed by the *Act*.

[24] The Federal Court in *Canada (Human Rights Commission) v. Canada (Attorney General)* 2012 FC 445 (sub. nom. FNCFCS v. Canada) discussed in detail (at paragraphs 125 – 157) the authority of the Tribunal to consider motions to dismiss in advance of a full hearing on the merits. The Court found that the power to dismiss should be exercised cautiously and would only be in the clearest of cases (see paragraph 140).

[25] The Court in *FNCFCS v. Canada* found that the Tribunal has flexibility and may choose to deal with matters in advance, and stated as follows:

> [148] The examples referred to above are not intended to provide an exhaustive list of all of the circumstances where the Tribunal might choose to deal with issues in advance of a full hearing on the merits of a complaint. In every case, the Tribunal will have to consider the facts and issues raised

> by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow.
>
> [149] However, the process adopted by the Tribunal will have to be fair, and will always have to afford each of the parties "a full and ample opportunity to appear[,]…present evidence and make representations" in relation to the matter in dispute.
>
> [emphasis added]

The Respondent has not established that the Complainant's allegations, even if taken as proven, would fail to make out a discriminatory practice. Mr. Wheatcroft should be given the opportunity to present his case in an attempt to establish that there is a *prima facie* case of discrimination. It would be at that juncture that the Respondent could argue that the Complainant has not established a *prima facie* case and could move for a non-suit and dismissal of the complaint. The jurisdiction and the law governing non-suits is canvassed in *Filgueira v. Garfield Container Transport Inc*., 2006 FC 785. However, after hearing evidence, if Mr. Wheatcroft has established a *prima facie* case, it is then incumbent upon the Respondent to establish a BFOR. At present, the Respondent's Motion is lacking any evidence, which is the Respondent's choice, but this choice cannot deprive the Complainant of the benefit of s. 50(1) of the *Act*.

[26] It would only be in the clearest of cases that a complaint would be dismissed in advance of a full hearing on the merits. Expediency, invoked by the Respondent, cannot prevail over procedural fairness, natural justice, and s. 50(1). At present, there is no evidence before the Tribunal and the arguments based on the *Cruden* decisions have not satisfied me that this matter should not proceed.

[27] The Respondent asks in the alternative that at the hearing, he be granted permission to rely on the Transcripts of Evidence provided by his witnesses in the *Cruden* matter. The Respondent seeks to file the Transcripts of the oral evidence of the following individuals:

- Bob Johnston, former Director General of the Afghanistan Taskforce at CIDA;
- Michael Collins, former Director of Corporate Services, Afghanistan Taskforce, CIDA;
- Marion Parry, former Manager, Corporate Mobility at CIDA;
- Colonel Jacques Ricard, former Chief of Land Staff, Medical Advisor, Department of National Defence;
- Major Robin Thurlow, formerly of the Directorate of Health Services Operations, Department of National Defence;
- Dr. Eva Callary, former Medical Officer-in-Charge, Occupational Health Clinic, Health Canada;
- Dr. Peggy Baxter, Doctor, Occupational Health Clinic, Health Canada;
- Dr. John Dupré, Endocrinologist, Respondent's Expert;

This request is made without prejudice to the Respondent's right to call witnesses to address the specifics of this case. Also, in the Overview portion of the Respondent's motion materials, the Respondent asks for the Complainant to identify the specific arguments the Complainant intends to rely on which were not decided in *Cruden*. Finally, the Respondent asks that the Tribunal narrrow the scope of Mr. Wheatcroft's hearing such that it will only address novel issues raised by Mr. Wheatcroft, and will not address matters already decided in *Cruden*.

[28] The Respondent relies on a decision of the Human Rights Tribunal of Ontario in *CAW – Canada v Presteve Foods Ltd.* 2013 HRTO 20 (hereinafter "*CAW*") where the adjudicator ordered that a transcript from criminal proceedings be accepted as sworn testimony and be available for all parties to rely upon at the hearing. The Tribunal recognized the need to hear oral evidence on the specific allegations upon which it was being asked to make findings of credibility. The Tribunal then observed, at para. 104, that:

> "…there were other matters addressed in the transcript from the preliminary inquiry, both in examination-in-chief and on cross-examination, where it seemed that there may be little utility in going over orally at the hearing before this Tribunal what is already set out in full in the transcript from the preliminary inquiry in the criminal proceeding."

[29] The Complainant, in principle, does not object to the introduction of transcripts of the evidence of the witnesses in the *Cruden* matter as it relates to the evidence in chief. The Complainant asks that the witnesses be called for cross-examination without limitation, and to elicit any other relevant evidence.

[30] The Commission does not disagree with the use of transcripts as evidence, subject to the Complainant and the Commission being permitted to cross-examine the Respondent's witnesses. Furthermore, the Commission also submits that it may wish to use part of its cross-examinations from the *Cruden* hearing, but in addition, it may also wish to further cross-Examine the witnesses in respect of questions that arise in the matter at hand.

[31] The Complainant also referred the Tribunal to the *CAW* case with respect to the use of transcripts from prior proceedings. The *CAW* decision states, at para. 105:

> " [105] In this regard, and without restricting the ability of any party to question any witness or elicit any relevant evidence, I proposed that all parties be allowed to rely upon the evidence as set out in the transcript from the preliminary inquiry without needing to have that evidence repeated before me in oral testimony." [Emphasis mine]

[32] However, the Tribunal in the *CAW* case went on to state, at paras. 106-107:

> "[106] I invited submissions from the parties in response to my proposal. While not generally averse to what I proposed, all parties expressed concern that they not be restricted by the transcript in relation to matters upon which they may want to examine or cross-examine witnesses. CAW-Canada submitted that the issues in a human rights proceeding are very different than in a criminal proceeding, and that further evidence may need to be elicited from the witnesses than is set out in the transcript. I agree. My intention was not to restrict the eliciting of relevant evidence from witnesses, but rather to make the sworn testimony in the transcript from the criminal proceeding admissible as testimonial evidence before me and available to be relied upon by all parties.

> [107] The respondents expressed concern that credibility will be a major issue in this proceeding, and they did not want to be restricted from cross-examining witnesses simply because a particular line of cross-examination had been pursued in the criminal proceeding and was recorded in the transcript. As I have stated, I appreciate that there will be significant issues of credibility to be determined before me and I wish to afford all parties an adequate opportunity to test the credibility of opposing witnesses. At the same time, I am empowered under the Rules to provide not only for the fair and just but also for the expeditious resolution of this matter, and I have specific power to limit the evidence on any issue. I will exercise this power judiciously at the hearing and in a manner that will not deprive any party of a fair, just and expeditious resolution of this matter. But if a line of questioning already has been pursued with a witness in the criminal proceeding and if it is my determination that the hearing process is not benefiting from repeating this line of questioning before me, I will exercise the powers available to me under the Rules." [Emphasis mine]

[33] The present circumstances are significantly different from the *CAW* case, in that the transcripts in question are from proceedings where Mr. Wheatcroft was not a participant. There is, however, utility in admitting the evidence from the *Cruden* matter which is not specific to Ms. Cruden, provided the witnesses are made available for cross-examination, subject to certain restrictions.

[34] The adjudicator in the *CAW* case was cognizant of the need to ensure that the opposing parties (in the case before me, being Mr. Wheatcroft and the CHRC), be afforded a full opportunity to cross-examine or elicit evidence, and that they should not be restricted in this regard. I am in agreement with those principles.

[35] Finally, while the CHRT's statutory framework and rules differ from those governing the *CAW* matter, like the adjudicator in the *CAW* matter, I am still empowered to set

certain limits on the cross-examination. (See *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, para. 37; *C.E.P.U. v. Bell Canada*, 2004 CHRT 26, para. 20; *Kirchmeir v. Edmonton (City) Police Service* 2000 ABCA 324, para. 21) I will therefore adopt the spirit of the underlined portions of paragraph 106 of the *CAW* decision cited above, as the approach that I will follow in the current case.

[36] The Respondent has argued, in the alternative, that the Complainant should identify new arguments that were not identified or considered in the *Cruden* matter. The problem with the position of the Respondent is that the Complainant was not a party to the *Cruden* proceedings and was not privy to the exchange of documents and reports, nor has the Complainant had an opportunity to review the transcripts of the *Cruden* proceedings. It would be unfair to the Complainant to require him to identify new arguments or limit the scope of his complaint at this juncture.

II. Order

[37] The Respondent's Motion for Summary Judgment is dismissed.

[38] The Respondent shall forthwith, and in any event no later than December 4, 2015, make available to the Complainant copies of the testimony transcripts from the *Cruden* hearing held before Member Marchildon.

[39] The aforementioned transcripts shall be accepted as sworn testimony before the Tribunal, and will be available for all parties to rely upon at the hearing.

[40] The Parties shall be able to call further evidence to address the specifics in the present case.

[41] The Complainant Mr. Wheatcroft shall be able to lead his own evidence subject to relevance, as provided for by s. 50(1) of the *Act*. If Mr. Wheatcroft is advancing arguments not before the Tribunal in the *Cruden* proceedings, he shall particularize same, after reviewing the transcripts and exhibits in *Cruden*, and prior to hearing dates being set in the current matter.

[42] The Complainant, at this time, is not required to advise what specific arguments he intends to advance that were not decided in *Cruden*, nor will the scope of his complaint be limited. This matter and the evidence he intends to advance may be addressed later, after the transcripts have been provided and disclosure is complete.

[43] The Respondent shall, by summons if necessary, make available for cross-examination by the Complainant and the Commission, all witnesses whose transcript evidence in *Cruden* is being relied upon by the Respondent in the current case, subject to my earlier comments as set forth in paragraph 31.

[44] Where a party relies on the cross-examination of a witness from the *Cruden* transcript, the party is not restricted from cross-examining that same witness in the current hearing.

III. Closing Comments

[45] I trust the foregoing has covered all matters outstanding. Should there be any questions or difficulty in meeting the disclosure deadline, a further Case Conference should be immediately requested. I would ask that the Complainant, Mr. Wheatcroft, and the Commission advise the Tribunal when they have had an opportunity to review the transcripts and are in a position to move forward with setting hearing dates.

[46] As a final comment, I would like to thank all counsel for their briefs and their thorough oral submissions.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
November 13, 2015