

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Bronwyn Cruden

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian International Development Agency

- and -

Health Canada

Respondents

Ruling

Member: Sophie Marchildon

Date: March 1, 2012

Citation: 2012 CHRT 5

[1] On September 23, 2011, the Tribunal rendered its decision in *Bronwyn Cruden v. Canadian International Development Agency & Health Canada*, 2011 CHRT 13 [*Cruden*].

[2] On November 24, 2011, counsel on behalf of Ms. Bronwyn Cruden (the Complainant) requested clarification with regards to the implementation of the remedy ordered by the Tribunal at paragraph 176 of its decision in *Cruden*. Specifically, the order provides:

[P]ursuant to paragraph 53(2)(b) of the *CHRA*, I order CIDA to deploy the complainant in the GPB Branch at the PM06 level and to work with the complainant to post her in a friendly country within her top three choices where there are appropriate medical facilities and no medical restrictions she will face.

(*Cruden* at para. 176)

[3] In an order made pursuant to subsection 53(2)(b) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the Act], the person found to have engaged in the discriminatory practice, in this case the Canadian International Development Agency (CIDA or the Respondent), is to make available to the victim of discrimination, **on the first reasonable occasion**, the opportunities that were denied to the victim as a result of the discriminatory practice. The issue currently requiring clarification is the timing of the requirement that the Complainant be posted to a friendly country, namely, what the first reasonable occasion to do so is.

[4] On December 5, 2011, the Tribunal determined that it was not *functus officio* and retained jurisdiction with regards to the implementation of the order in issue (*Bronwyn Cruden v. Canadian International Development Agency & Health Canada*, 2011 CHRT 21). However, the Tribunal requested further submissions from the parties to determine the matter.

[5] After having reviewed the additional submissions provided by the parties, the Tribunal required further explanation regarding the information contained therein. Due to the technical and factual nature of the parties' dispute, the Tribunal convened a hearing to receive viva voce evidence from the parties. The hearing was held on January 16, 2012.

Law & Analysis

[6] The aim of the Act is remedial and is "...not aimed at determining fault or punishing conduct" (*Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at para. 13 [*Robichaud*]). Rather, the primary focus of the legislation is to "...identify and eliminate discrimination" (*Robichaud* at para. 13). To eliminate discrimination, "remedies must be effective, consistent with the "almost constitutional" nature of the rights protected" (*Robichaud* at para. 13). As part of being an "effective" remedy, the Act mandates that a remedy ordered under section 53(2)(b) be implemented "...on the first reasonable occasion". What is reasonable will depend on the circumstances of each particular case; however, the use of the word "first" in this subsection indicates that the implementation of the remedy should not be delayed unless it would be unreasonable to do so.

[7] The Complainant applied for two postings in Vietnam for the 2012 posting cycle: a PM-06: Head of Cooperation (ASI-1257) and a PM-5: Senior International Development Officer (ASI-17678). She was screened out of both competitions for lack of essential experience.

[8] According to the Respondent, the Complainant possesses only 1 of the 4 essential qualifications for the ASI-1257 posting. She lacks experience managing programs or key issues in the international development field; she lacks experience liaising with stakeholders and lacks experience in formulating and delivering strategic advice and recommendations to senior managers. With regards to the ASI-17978 posting, the Respondent claims she does not have experience collaborating with foreign government representative or international organizations. The Respondent adds that the Complainant's application to these postings were reviewed by a panel who determined that she was not qualified to continue to the second stage of the process. With regards to the argument that the Complainant could gain the required experience before a 2012 posting, CIDA claims there is not enough time to allow for a combination of formal training and hands-on experience. On this point, the Respondent states that the Tribunal should be mindful that CIDA is in the best position to assess the requirements of the posting as well as

the Complainant's qualifications. Relying on the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Respondent asserts that the Tribunal should apply a deferential standard to CIDA's assessment that the Complainant should not be posted within the 2012 cycle.

[9] According to the Complainant, she meets the essential qualifications for the 2012 postings, as she was previously screened into the pool for postings in 2010 with the same essential requirements. Alternatively, the Complainant's application and resume establish that she has the essential experience required for both positions. The area where the Complainant has less experience relates to those requirements that can only be gained in the field; however, this lack of experience in the field is the "harm" that the order is designed to remedy and, therefore, cannot be used as the basis for delaying the decision to post the Complainant to 2013. The Complainant adds that there is no evidence to suggest that the appropriate skill set and knowledge required for a successful posting cannot be developed and learned in the six months prior to the commencement of the postings.

[10] I do not find *Dunsmuir* to be useful in determining this matter. That decision examines "reasonableness" as a standard of review applicable to administrative decisions on judicial review. Here, we are not reviewing CIDA's decision, but rather attempting to find a fair and proper way to implement the remedy ordered by the Tribunal and eliminate the discrimination suffered by the Complainant.

[11] After having examined all of the submissions of the parties on this matter, including the oral arguments and testimonies presented to the Tribunal at the hearing, I accept that posting the Complainant in Vietnam for the 2012 cycle would not be reasonable given the current circumstances. CIDA's witness at the hearing, Lise Filiatrault, Regional Director General for Americas at CIDA, provided credible information as to exactly what kind of experience is necessary for an individual to succeed in the two postings in Vietnam and why the Complainant lacked the necessary experience. The Head of Cooperation is the most senior person in the country and supervises a team and provides guidance to senior development officers, and

replaces the head of missions or ambassadors when required. The Complainant does not possess the required three years extensive experience in financial, material and human resources management of a project in the field. For the Senior Development Officer position, the Complainant does not have a year's experience in collaborating with foreign government representatives or international organizations.

[12] While the Complainant was previously screened into a pool for PM-05 postings in 2010, Lise Filiatrault testified that CIDA no longer utilizes this availability bank of candidates. The organization has a 3 year decentralization plan. According to Ms. Filiatrault, decentralization means that more responsibilities are transferred to the field in an attempt to improve the chances for success of a project in that CIDA representatives are closer to their partners in the field. I accept the Respondent's evidence regarding decentralization, which explains why the 2012 PM-05 and PM-06 positions are classified differently than those in 2010, including the higher experience requirements necessary to qualify for a posting.

[13] To post the Complainant prematurely, without the required experience, could jeopardize CIDA's project in Vietnam and would not give the Complainant the necessary tools to allow her to succeed in her posting. The mandatory training offered by CIDA that was discussed at the hearing is the training offered to successful candidates that have already qualified to go on a posting and does not compensate for the gaps in the experience the candidate requires to qualify for a posting. That being said, the Respondent has identified that it can provide the Complainant with a customized learning plan in order for her to gain the necessary training and experience she needs to be successful in a field posting. According to the Respondent, this learning plan could include placing the complainant in a PM-05 position while securing a PM-06 position; allowing her to shadow someone that has the necessary experience; visits in the field; and, providing her with courses, training, and coaching. In this regard, in its November 30, 2011 submissions, the Respondent states:

CIDA intends, upon Ms. Cruden's return from maternity leave in February, 2012, to find her a suitable (operational) position within its GPB Branch. This will serve

as a precursor to a field assignment to a friendly country commencing in 2013 wherein CIDA will work with Ms Cruden in 2012 to ensure that she has the appropriate skill sets and knowledge to allow her to succeed in her field posting assignment. To this end a defined learning plan will be elaborated with Ms. Cruden and put into place focusing on elements such as international project/program management, working with various bilateral programming modalities (such as Program-based approaches, budget support) experience.

[14] However, aside from making this statement, there is no indication that a defined learning plan has been developed. There is no indication that the Respondent has worked with the Complainant to identify satisfactory postings; what additional training and/or experience is required for her to succeed in a posting; how the Respondent proposes she gain the required training and/or experience to succeed in a posting; and, when, as a result, will be the first reasonable opportunity to post her abroad.

[15] Even though the Complainant identified her preferred posting choices to CIDA early on in the posting process, a defined learning plan was not established at that time. Nor was a learning plan in place by the time the Tribunal conducted its hearing in this matter on January 16, 2012. At the hearing, CIDA's witness was not able to identify any concrete steps CIDA has taken in considering how it will implement the Tribunal's order because she was not involved in the implementation of the order. According to the Respondent, it sent a letter to the Complainant and her counsel inviting her to communicate with them about the way to implement the order and the Complainant did not respond. The Respondent contends communications were interrupted between the parties when the Complainant made its request for clarification to the Tribunal in November 2011. I find this explanation is not credible. In early November, the Complainant was told by the Respondent that CIDA was not going to post her in 2012, but that she could apply to the posting process anyways. She then applied for the two Vietnam postings and was screened out. At any moment after the Complainant made her posting choices, CIDA could have planned a meeting with her to start the discussions on how to implement the Tribunal's order. The Complainant was available for such discussions.

[16] Pursuant to section 53(2)(b) of the *Act*, the obligation is on the Respondent to make available to the Complainant the opportunities that were denied to her as a result of the discriminatory practice. To determine when the first reasonable occasion to post the Complainant is, the Respondent must first seriously consider how it will implement the order. While the Tribunal's order was meant as a guideline in order to allow the parties to work out between themselves the details of the implementation of the order, this may have resulted in the Complainant losing the opportunity to be posted to the positions in Vietnam. Therefore, the Tribunal finds that clarification of its order is required to facilitate its implementation and to ensure that the remedy ordered by the Tribunal is forthcoming to the complainant. In this regard, the Tribunal directs as follows:

- (1) Within seven days of the issuance of this ruling, CIDA must place Ms. Cruden in a PM-06 position in the GPB branch.
- (2) Within 15 days of the issuance of this ruling, CIDA is to identify to Ms. Cruden 2013 postings in foreign countries that are or will be available where there are appropriate medical facilities and no medical restrictions that she will face.
- (3) Within 21 days of Ms. Cruden indicating to CIDA in writing her top three choices for posting among those identified by CIDA (whether it be three choices for posting in different countries; in the same country; or, two choices in one country and one in another), CIDA is to prepare a customized learning plan, in consultation with Ms. Cruden, outlining any training and/or experience Ms. Cruden needs to complete and/or acquire in order for her to succeed in one of the field postings chosen for 2013.
- (4) The customized learning plan must specify how CIDA will provide the required training and/or experience to Ms. Cruden and must also include a schedule, with dates, as to when the training and/or experience will be provided to Ms. Cruden before the posting date.
- (5) Once Ms. Cruden has completed the required training and/or experience identified by the learning plan; CIDA is to post Ms. Cruden to the field assignment for which the learning plan was developed.

[17] The Tribunal shall continue to remain seized of this matter in order to be available in the event any further clarification is required and until the parties confirm that the terms of the Tribunal's order have been implemented.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
March 1, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1466/1210

Style of Cause: Bronwyn Cruden v. Canadian International Development Agency
& Health Canada

Ruling of the Tribunal Dated: March 1, 2012

Date and Place of Hearing: January 16, 2012
Ottawa, Ontario

Appearances:

Alison Dewar, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Alex Kaufman and Max Binnie, for the Respondents