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: December 5, 2011
Citation: 2011 CHRT 21

[1] On November 24, Counsel on behalf of Ms. Bronwyn Cruden requested a conference call to seek further clarification in the implementation of an order in a September 23, 2011 decision; T1466/1210 *Bronwyn Cruden v. Canadian International Development Agency & Health Canada.*

[2] The undersigned requested submissions from all parties in writing, in a letter format to expedite the proceedings since there is urgency to the matter and, decided that it will also be addressed in a letter sent to all parties. I choose, upon review of the submissions, to address it in a ruling format instead of a letter.

[3] The urgency of the matter relies on the fact that postings for 2012 will be made in the next few weeks and Ms. Cruden is seeking clarification of the timeframe for the implementation of this order.

[4] The clarification request is made on Paragraph 176 that states that:

> On this basis, pursuant 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.

[5] At issue between the parties is the timing of the requirement that Ms. Cruden be posted to a friendly country within her top three choices where there are appropriate medical facilities and no medical restrictions.

[6] Ms. Cruden' position is that the effect of paragraph 176 is that CIDA is required to find a posting for her in the 2012 posting cycle. Given that the purpose of paragraph 176 is to ameliorate the negative effects of CIDA's failure to accommodate Ms. Cruden by providing her with a posting in 2009, delaying implementation of the order to 2013 posting will further compound the disadvantage that Ms. Cruden suffered from CIDA's failure to provide her with a posting in 2009.

[7] On November 15, 2011, Ms. Cruden provided CIDA with her top three choices for positions in the 2012 posting process that is currently underway. Ms. Cruden identified two positions: Vietnam and Philippines. CIDA acknowledged Ms. Cruden's interest in Vietnam (first choice after Afghanistan), but CIDA's position according to Ms. Cruden is that she should put together a career plan.

[8] Ms. Cruden argues there is no basis for the denial of the posting in 2012 in Vietnam. She has applied to the posting competition currently underway for postings that will take place in 2012. She meets all the essential qualifications and most of the asset qualifications for the position. The experience that CIDA has identified as an asset for the posting, such as experience in program-based approaches, can be provided to Ms. Cruden prior to the commencement of the posting in the fall of 2012.

[9] Other arguments were made by Ms. Cruden and were taken into consideration.

[10] The Canadian Human Rights Commission (Commission) filed submissions and contends that the complainant is not attempting to change the substance of its initial decision or to implement a different remedy than that which has already been provided. The complainant is seeking clarification of the timeline to implement the order in paragraph 176.

[11] The Commission contends that the Tribunal is not *functus officio* because it retained its jurisdiction until remedies are implemented as stated in paragraph 184.

[12] The Commission submitted caselaw to support the fact that the Tribunal can properly use its power under section 53(2) of the *CHRA* not only to award effective remedies, but also to retain a broad jurisdiction to return to specified matters to ensure that the ordered remedies are forthcoming. Where the Tribunal has retained jurisdiction to facilitate implementation, it remains open to, among other things, provide further direction that clarifies and supplements the original order.

[13] The Commission argues that the *CHRA* is remedial legislation that aims at identifying and eliminating discrimination. In light of this objective, it is important that human rights remedies be effective, consistent with the quasi-constitutional nature of the rights protected. Indeed as the Supreme Court of Canada has consistently held, the "main approach" of human rights legislation is not to punish the discriminator, "...but rather to provide relief for the victims of discrimination''.

[14] The Commission requests that the Tribunal clarify that its remedial order is to be implemented at the earliest possible opportunity presumably the 2012 posting rather than the 2013, unless CIDA provides compelling reasons why the earlier posting is not operationally possible.

[15] The Commission made other arguments and were taken into consideration.

[16] CIDA argues that the undersigned is *functus officio* ("having discharged one's duty"), and provided case law to support its position. CIDA contends also that the Tribunal cannot amend the decision. CIDA contends that the Tribunal did not retain its jurisdiction to remain seized on the implementation of this aspect of its order. This can be contrasted with paragraph 169 of the decision where the Tribunal specifically noted that it remained seized of the matter of overtime compensation.

[17] CIDA contains that in any event, the order is clear and carefully drafted to provide a certain amount of flexibility and discretion on the parties for its implementation is in good faith.

[18] The order made under section 53(2) (b) of the *CHRA* which provides that the Tribunal may order that the person make available to the victim of the discriminatory practice, *on the first reasonable occasion, the rights, opportunities or privileges that are being denied or were denied the victim as the result of the practice.*

[19] CIDA contends it is not reasonable to post Ms. Cruden in the 2012 cycle because, contrary to her assertions, she does not possess the essential qualifications. CIDA has committed itself to ensuring she attains these qualifications in short order.

[20] CIDA provided as a response:

> 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.

[21] CIDA also contends the postings are very competitive and sought after opportunities. As the complainant testified she has never held an operational/bilateral position. While a bilateral position does not necessarily qualify employees for a posting, the experience gained in these positions increases their chances for a posting. CIDA has already taken steps to identify which position within the GPB is of interest to the complainant and intends to work with her on a training plan which would give her exposure to all necessary delivery mechanism to prepare her for a posting.

[22] CIDA made other submissions that were taken into consideration.

Decision

Is the tribunal *Functus officio* in the present matter?

[23] Paragraph 169 of the decision where the Tribunal specifically noted that it remained seized of the matter of overtime compensation does not exclude the effect of paragraph 184 that mention the following:

> I retain jurisdiction and remain seized of the matter until the parties confirm that the terms of this order, and of any further orders, have been implemented.

[24] The intent of this paragraph was to retain jurisdiction on all remedies ordered. The mention in paragraph 169 was to ensure submission would be made to submit additional evidence to assist the Tribunal in reaching its decision on that aspect of the case because insufficient evidence was before the Tribunal to make a precise order on the amounts granted to the complainant.

[25] Pursuant to the principle of *functus officio* courts cannot, as a general rule, reopen their final decisions except where there has been a slip in drawing it up or there was an error in expressing the manifest intention of the court (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at para. 19 [*Chandler*]). The Supreme Court in *Chandler* found that the *functus officio* principle applies to administrative tribunals as well, although "...its application must be more flexible and less formalistic..." (*Chandler* at para. 21). According to the Supreme Court in *Chandler*, a decision of the Tribunal can be reopened if there are indications in the *CHRA* that the Tribunal may do so in order to discharge its functions (see *Chandler* at para. 22). In addition, the Tribunal can reopen a decision if it failed to dispose of an issue that was fairly raised by the proceedings and of which the Tribunal is empowered by the *CHRA* to dispose (see *Chandler* at para. 23). However, the Tribunal cannot revisit a decision because it has changed its mind, made an error within its jurisdiction or because there has been a change of circumstance (see *Chandler* at para. 20). Furthermore, the fact that one remedy is selected over another

alternative remedy does not entitle the Tribunal to reopen proceedings to make another selection (see *Chandler* at para. 23).

[26] In *Grover v. Canada (National Research Council)* (1994), 80 F.T.R. 256 (F.C.) [*Grover*], the Federal Court held that although the *CHRA* does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

> The integration into the workplace of an employee who has been subjected to discrimination at the hands of his or her employer to a position which he or she would have occupied had the discriminatory practice not taken place is a remedy which is inherently difficult to implement and therefore, may require some supervision. [...] Often it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the reintegration into the workplace, rather than to have an unworkable order forced upon them by the Tribunal.
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> [...]
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> It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. [...] It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal.
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> (*Grover* at paras. 32-33)

[27] In *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 [*Moore*], the Federal Court found that the reasoning in *Grover* supports the conclusion that the Tribunal has broad discretion to return to a matter and whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case (see *Moore* at para. 49). In both *Grover* and *Moore*,

the Court found that the Tribunal had specifically retained jurisdiction to deal with the issues in question in those cases.

[28] Based on all of the above I find the Tribunal is not *functus officio* and remains seized of the present question and the implementation of all remedies ordered.

[29] Thus being said, the intent of paragraph 176 was to place, as close to as possible, the complainant Ms. Cruden, in the position had the discrimination practice not occurred. Its purpose was to also provide parties guidelines in order to allow the parties to work out between themselves the details of the reintegration into the workplace, rather than to have an unworkable order forced upon them by the Tribunal.

[30] Paragraph 176 does leave discretion to CIDA on how to implement the order in consultation with the complainant. The intent was not for the employer to post the complainant where she has no sufficient qualifications for the work requirements. On the other hand, it does not leave discretion to CIDA never to post the complainant to a 'friendly country' on that basis. The employer needs to help the complainant achieve the intent of the remedy to obtain a field posting. Moreover, this applies even if the postings are very competitive and sought after opportunities. The fact that postings are competitive should not prevent CIDA to post the complainant pursuant to section 53 (2) (*b*): ***on the first reasonable occasion****, the rights, opportunities or privileges that are being denied or were denied the victim as the result of the practice.*

[31] Thus being said is 2012 the first reasonable occasion or not to post the complainant? Submissions on the issue at hand are contradictory. Ms Cruden contends she does possess the qualifications for a 2012 posting to Vietnam while CIDA finds it premature to do so.

[32] I recall the complainant testifying she needed the field experience and to be deployed to the GPB Branch to acquire the experience for her career plan, experience she did not have. The

decision is also instructive on the evidence heard as to why she was not posted and but for her disability she would have obtained a posting to Afghanistan.

[33] Without in any way doubting the good faith of the respondent CIDA, having read their submissions and taking notice they already started implementing the order in part, I would request further submissions from both parties on the only issue of qualifications and experience of the complainant for a 2012 posting.

[34] Since 2012 appears to be *the first reasonable occasion* to post the complainant if she has the qualifications and experience to do the job why is it unreasonable or reasonable that Ms. Cruden be posted to Vietnam after a few months working in the GPB Branch?

[35] To help the Tribunal understand the question it would be helpful to obtain a copy of the posting and qualifications and experience required for the 2012 Vietnam posting. I request further submissions from both parties to help me understand the issue at hand.

[36] I find CIDA in this case, would be in a better position to provide the information first.

[37] I request the respondent CIDA's submissions by Friday December 9, 2011 and the complainant Ms. Cruden and the Commission, to file their submissions by December 14, 2011.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
December 5, 2011

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: December 5, 2011

Appearances:

Alison Dewar, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Alex Kaufman and Max Binnie, for the Respondents