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

And between:

Jonathon Wheatcroft

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian International Development Agency

Respondents

Decision

Member: Sophie Marchildon
Date: December 10, 2010
Citation: 2010 CHRT 32

[1] On October 21, 2010, the respondent Canadian International Development Agency ("CIDA") filed a motion to consolidate the cases of *Bronwyn Cruden v. Canada International Development Agency and Health Canada*; and *Jonathon Wheatcroft v. Canada International Development Agency*.

[2] The complainant Ms. Cruden filed two complaints with the Commission on November 8, 2008, on the ground of disability, alleging that Health Canada engaged in a discriminatory practice within the meaning of s. 5 of the *Canadian Human Rights Act* (the "*CHRA*") and that CIDA engaged in a discriminatory practice within the meaning of ss. 7 and 10 of the *CHRA*. On April 26, 2010, pursuant to paragraph 44(3) (a) of the *CHRA*, the Commission requested the Tribunal to inquire into both complaints. The complainant Mr. Wheatcroft filed a complaint with the Commission on February 9, 2009 on the ground of disability, alleging that CIDA had engaged in a discriminatory practice within the meaning of ss. 7 and 10 of the *CHRA*. On April 27, 2010, pursuant to paragraph 44(3) (a) of the *Canadian Human Rights Act*, the Commission requested the Tribunal to inquire into the complaint. The Commission will participate fully in both the *Cruden* and *Wheatcroft* hearings. On October 21, 2010, the respondent CIDA made a request to the Tribunal to join or consolidate the inquiries in the two cases. Both complainants oppose the consolidation of their cases.

[3] On October 21, 2010, Shirish P. Chotalia, Q.C., the Chairperson of the Canadian Human Rights Tribunal, determined that this request would be dealt with through written arguments. The undersigned was designated to decide the present request.

[4] The respondent's position in sum is as follows:

a) The Tribunal may institute a single inquiry into several complaints which involve substantially the same issues of fact and law.

b) The complaints have common factual and legal issues and the vast majority of the evidence will come from the respondent.

c) The single inquiry will avoid the possibility of inconsistent decisions, will be more efficient and will result in the respondent, the Commission and the Tribunal incurring lower costs than they would for two hearings.

d) It is in the best interests of the respondent's witnesses, as public servants to testify in one hearing instead of two, and it is also in the public's best interest to avoid multiplicity of proceedings.

e) While Ms. Cruden, who is pregnant, has valid reasons for wishing her complaint to be heard before she gives birth, the prejudice to the respondent in not consolidating the hearings outweighs any prejudice resulting from what would amount to a 90-day postponement of her hearing dates.

Analysis

[5] The two issues before me are as follows:

[6] First, as a Tribunal member of the Canadian Human Rights Tribunal, do I have the discretion to deal with the two cases together, and secondly, if so, is a joint hearing appropriate in these particular circumstances?

[7] Concerning the first issue, in considering whether or not I have the discretion to join the cases, it is helpful to examine the relevant provisions of the *CHRA*.

[8] Section 40(4) specifically addresses the ability of the Commission to deal with complaints filed by different complainants against the same respondent together, where the Commission is satisfied that the complaints involve substantially the same issues of fact and law. In such cases, it is also open to the Commission to request that the Chairperson of the Canadian Human Rights Tribunal institute a single inquiry into the complaints.

[9] In the present case, the Commission did not make use of s. 40(4) of the *CHRA* to deal with the complaints of Ms. Cruden and Mr. Wheatcroft together, or to request a single inquiry at the time the complaints were referred to the Tribunal, even though the referral dates of the complaints are one day apart: Ms. Cruden's complaint was referred on April 26, 2010 and Mr. Wheatcroft's complaint was referred on April 27, 2010. The Commission did however indicate in their written arguments that they were in agreement with CIDA's motion to consolidate both cases.

[10] In the Tribunal's ruling in *Lattey v. Canadian Pacific Railway*, 2002 CanLII 45928 (C.H.R.T.), I find the words of former Chairperson, Anne Mactavish, to be instructive:

> [12] In contrast to the specific guidance provided by the *Act* with respect to the Commission's ability to deal with cases together, the *Act* is silent as to the power of the Canadian Human Rights Tribunal to join or sever complaints before it. In my view, the issue of whether to hold a single hearing or multiple hearings is a procedural matter. In the absence of specific statutory direction, the Tribunal is master of its own procedure. [footnotes omitted]

[11] In view of the above, I am satisfied in regard to the first issue that I have the discretion to determine whether or not a single inquiry should be instituted into these complaints.

[12] Turning to the second issue, I must now consider if it is appropriate to join the two cases together.

[13] I carefully reviewed all the materials put before me and considered the case law presented by all parties.

[14] The ruling in *Lattey* is also instructive in its identification of the factors to consider in determining whether or not the cases should be heard together, namely:

> 1. The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;
>
> 2. The potential prejudice to the respondent [in this case—the complainants—who oppose the consolidation] that could result from a single hearing, including the lengthening of the hearing for each respondent as issues unique to the other respondent are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one respondent or the other; and
>
> 3. Whether there are common issues of fact or law.

[15] Even if the *Lattey* principles are instructive, I note that former Chairperson Mactavish did not stipulate in her ruling that her enumeration of relevant factors was an exhaustive list. Moreover, factual distinctions between the *Lattey* matter and the matter before me cannot be overlooked. The former Chairperson in *Latttey* was not confronted, as I am, with two separate complainants who are at very different stages of the proceedings before the Tribunal, and who oppose the joint hearing of their cases.

[16] As I feel it is an additional relevant factor in my analysis, I will elaborate on the issue of each case's stage in the Tribunal proceedings, and related considerations: Ms Cruden has already filed all her materials at the Tribunal; she is ready to proceed with her case and hearing dates are to commence as early as January 17, 2011. She is hoping to finish the hearing before she gives birth to her child since she is due in February 2011. In the *Wheatcroft* case, the respondent has yet to file its Statement of Particulars, which are only due on December 20, 2010. Even though the most important prejudice would be suffered by Mrs. Cruden if the cases are joined, Mr. Wheatcroft who opposes the joining of the cases will not have to suffer any prejudice if the cases are heard separately.

[17] If the motion is allowed and, the solution put forward by the respondent is authorized, this will inevitably split the hearing in two because of Ms. Cruden's delivery date; it will postpone the hearing of part of her case until she has given birth or delay her hearing thereby creating additional hardships for her. Given the foregoing, I do not see how the request from the respondent adequately addresses the efficiency of the hearing. This issue must be considered in light of the public interest in having complaints of discrimination dealt with expeditiously (*Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.*, (1997) F.C.J. No. 207 (F.C.T.D.); see also *CHRA* s. 48.9(1)). This brings me to the timeliness of the respondent's request. While the cases were referred for inquiry in April of 2010, the request to join the two cases together was not made until late October. The respondent did not satisfy me as to why their request was made at this stage of the proceedings and not earlier. Proceeding the way the respondent is asking to, adds complexity to the hearing process and does not sufficiently address the prejudice caused to the complainants, who oppose the request.

[18] I acknowledge the fact that there might be some overlapping evidence to be adduced in the two cases on behalf of the respondent, and that most of the respondent's witnesses' testimony in chief in the first case will be repeated in the subsequent case. However, this repetition could potentially be minimized with a future request to file with the Tribunal in the second hearing transcripts of testimony in chief given during the first hearing. (Of course, such a request would have to be considered on its merits by the presiding member of the second hearing, presumably after receiving submissions from all parties).

[19] As an additional observation, while I acknowledge that it is not desirable for the Tribunal to render inconsistent or contradictory decisions dealing with the same issue, I would note that an order joining the *Cruden* and *Wheatcroft* proceedings may not be the only available means of preventing such inconsistency. Indeed, the need to prevent inconsistent results formed part of the Supreme Court's discussion of the doctrine of abuse of process in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

[20] Ultimately, the inefficiencies that may result from the cases being heard separately are outweighed by the prejudice Ms. Cruden would incur if her complaints are not dealt with in accordance with the established schedule.

[21] My ruling might have been different if the two cases where at the same stage of pre-hearing disclosure and hearing readiness. I emphasize the importance of a case by case approach.

[22] The exercise of the Tribunal's discretion is subject to the rules of natural justice, and the regime of the CHRA. It has not been shown how the result sought by the respondent better accords with natural justice, nor how it better advances the legislative objectives of the inquiry process, in particular, expeditiousness, and the granting to all parties of a full and ample opportunity to participate (*CHRA* s. 50(1)).

[23] For all of the above reasons the respondent’s request to consolidate the cases is denied.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
December 10, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1466/1210 and T1471/1710

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

Ruling of the Tribunal Dated: December 10, 2010

Appearances:

Andrew Raven, for the Complainant, Bronwyn Cruden

Jonathon Wheatcroft, for himself
Peter Engelmann, for the Complainant, Jonathon Wheatcroft

Brian Smith, for the Canadian Human Rights Commission

Alex Kaufman, for the Respondents