Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Guylaine Bélanger

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

- and -

Union of Canadian Correctional Officers

Respondents

Decision

Member: Réjean Bélanger
Date: November 16, 2010
Citation: 2010 CHRT 30

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I. The Complaint

Discrimination on the basis of sex – Differential treatment – Discriminatory practice

[1] The Complainant, Guylaine Bélanger, is a correctional officer employed with the Correctional Service of Canada (CSC), one of the two Respondents in this case, and a member of the Union of Canadian Correctional Officers (UCCO-SACC-CSN), which is affiliated with the Confédération des Syndicats nationaux (CSN), the other Respondent.

[2] The Complainant alleges that on June 26, 2006, UCCO-SACC-CSN, on behalf of correctional officers, signed a collective agreement with Treasury Board and a "Global Agreement" with the CSC. She alleges that one of the provisions of the Global Agreement discriminated against female correctional officers like her who became correctional officers with the CSC after working in CSC administrative services.

[3] She alleges that the signing of the "Global Agreement" was preceded by a smear campaign waged by male CX correctional officers against women who, like her, held CR positions before they became CX correctional officers, which allegedly had the effect of differentiating adversely in relation to them in the course of employment.

[4] The Complainant alleges in her complaint that, in 1999, when she applied to be a correctional officer, the CSC was looking to hire female staff. No documents were produced to support that allegation.

[5] She complains that after the "Global Agreement" was signed, her years of service in CSC administrative services, which to that point had been recognized by the Public Service for purposes of vacation leave, were no longer recognized; only her years of service as a correctional officer were recognized.

[6] She alleges that the new rule discriminated on the basis of sex because it gave CX correctional officers, the majority of whom are male, favourable differential treatment and thus

discriminated against women like her, former clerical employees who had held a CR position before being classified as CX.

II. Analysis of the Facts

A. Facts of the case

(i) Complainant's work history

[7] At the time she filed her complaint on November 20, 2006, the Complainant was working as a CX correctional officer at the Regional Reception Centre (RCC) in Sainte-Anne-des-Plaines.

[8] She began her career in the Public Service of Canada on April 16, 1989, with the Correctional Service of Canada, for the Department of the Solicitor General of Canada. She worked as an office clerk in the female-dominated CR group.

[9] In December 1999, she changed careers: she joined the male-dominated CX correctional officer group and worked for the Correctional Service of Canada.

[10] When she first started working as a correctional officer in 1999, for purposes of allocating vacation leave, she was given credit for all of her years of service in the Public Service since 1989. That continued until the summer of 2006. She remained a member of the Public Service Alliance of Canada until that union was replaced by UCCO-SACC-CSN in 2001.

(ii) Adverse effects of the move from CR to CX

[11] In 2001, correctional officers classified as CX in Canada—more than 6,000—left the Public Service Alliance of Canada en masse and joined a new union affiliated with the Confédération des Syndicats Nationaux (CSN) called the Union of Canadian Correctional Officers (UCCO-SACC-CSN).

[12] UCCO-SACC-CSN submitted its draft collective agreement to Treasury Board on April 10, 2002.

[13] On June 26, 2006, UCCO-SACC-CSN signed its first collective agreement with Treasury Board. The same day, the union signed a document with the CSC called the "Global Agreement".

[14] The purpose of the provisions of the "Global Agreement" was to clarify certain clauses of the collective agreement covering CX correctional officers.

[15] Article 1-B-3 of the Global Agreement, the provision that gave rise to this complaint, reads:

> 1-B-3
>
> Vacation dates shall be chosen by any system agreed to at the local level prior to March 1st of each vacation year, or if agreement cannot be reached, the default process will be based on the years of service from the time an employee initially became a Correctional Officer.

[16] The Complainant contends that UCCO-SACC-CSN was pressured by male CX officers at the RRC to adopt Article I-B-3 of the "Global Agreement" and that the CSC turned a blind eye to the move.

[17] She alleges that when a vote was taken on a system based on seniority for granting vacation leave, the CX officers, most of whom are male, banded together to vote against former CR employees, the vast majority of whom are women, and that as a result, because they are a very small minority, the women were unable to express their point of view.

[18] In the fall of 2006, the UCCO-SACC-CSN members at the RRC, asked to choose a method of granting annual leave as provided for in Article 1-B-3 of the "Global Agreement", passed a resolution stating that until the next collective agreement was signed, only seniority as a

correctional officer would be recognized. It was agreed at that time that the new rule, because it was adopted late in 2006, would not be applied until the summer of 2007 and would remain in force until the collective agreement expired on May 31, 2010.

[19] For the Complainant and all other correctional officers who had been employed in the CR group, the consequences were such that, for the purpose of awarding vacation leave, they lost recognition of all of their years of service that had been recognized by the Public Service before they became correctional officers. They lost their ranking because only their years as a correctional officer counted.

[20] The Complainant also complains that the content of Article 1-B-3 of the "Global Agreement" was expected to vary from year to year and that because women are the minority, their vote carried very little weight.

Smear Campaign

[21] The Complainant complains that at various times between the date she became a correctional officer in 1999 and the vote accepting the draft collective agreement was taken in the spring of 2002, and in the run-up to meetings of members at which there was to be a vote, there was a "smear campaign" against women who became CXs after holding CR positions.

[22] During that period, several male correctional officers took the opportunity to make disrespectful and insulting comments about the female officers; they were mostly criticized for being entitled to having their years of service in the CR group recognized.

[23] The male officers took the view that such favourable treatment of former female CR employees was unfair because during the years they spent in the Public Service, they had all their weekends and all their statutory holidays, worked days only, did not have to work in a dangerous environment like they did as correctional officers, spent their time serving coffee, etc.

B. Facts admitted to by the three parties

[24] The representatives of both UCCO-SACC-CSN and the CSC agree with the Complainant's statements regarding her work history, the change in union affiliation, and the signing and content of the collective agreement and the "Global Agreement".

[25] All of the parties agree on the impact of Article 1-B-3, namely, that it caused correctional officers, male and female alike, to lose recognition of their years of service in the Public Service before they became correctional officers, irrespective of their classification.

[26] All of the parties agree that the CSC and UCCO-SACC-CSN had an anti-harassment policy and that the Complainant did not avail herself of that policy for the reason given by the Complainant herself and by her representative, as will be explained later.

C. Facts disagreed with

(i) The CSC was looking for female employees

[27] One of the CSC witnesses, after checking the selection standards that were in effect on September 14, 1998, testified that the Complainant was mistaken when she stated that at the time she was hired in 1999, the CSC was looking for female staff. The document in question, which was still in effect in 1999, was produced in evidence by this same witness. It makes no reference to the sex of applicants. It must be remembered that the Complainant did not produce any documents to support her claim. Further, the statistics produced in evidence show that several men were hired during that period.

(ii) Origin of Article 1-B-3: standardizing the procedure for granting leave

[28] Regarding the "smear campaign", the union denies that its leaders could have initiated it or even been involved in it in any way. It states that it was not told about the campaign and adds

that there is an anti-harassment policy in place. It points out, however, that it was unable to apply the policy to the Complainant because it did not receive a complaint from her.

[29] One of the employer's witnesses, an employee in the Human Resources Office, testified before the Tribunal that at no time prior to the vote on the draft collective agreement and the "Global Agreement" was the CSC informed of such a smear campaign. The witness added that the CSC also has an anti-harassment policy, but because it did not receive a complaint from the Complainant, it was unable to react in a timely manner.

[30] The union does not admit that there was a smear campaign but suggests that the Complainant exaggerated by placing herself at the heart of the debate and claiming that the campaign waged at the RRC against her and the former secretaries, who had all been CRs in the Public Service, gave rise to Article 1-B-3.

[31] According to the union witnesses involved in preparing, negotiating and signing the draft collective agreement and the "Global Agreement", the request to establish procedures for granting leave simply came from all of the members at the 54 institutions across the country, who were of the opinion that the employer's system that was in place when the Alliance was their union was arbitrary and who therefore wanted to establish clear and consistent rules for all correctional officers in Canada.

[32] In the absence of a Canada-wide procedure, before the new collective agreement came into effect and the "Global Agreement" was signed in 2006, each institution set its own rules, which could vary infinitely, with the result that the members voiced their dissatisfaction. Holding a random draw and granting vacation in alphabetical order or in order of years of service were among the methods used.

[33] The union evidence supported by the testimony of several witnesses very closely involved in the consultations held in anticipation of a new draft agreement with Treasury Board

and the CSC clearly showed that Article 1-B-3 of the “Global Agreement” was the product of national consultations and filled a need expressed by members across Canada.

[34] It therefore seemed to negotiators and the membership that Article 1-B-3 was one of the methods most likely to win the support of the majority of members; in their view, the article laid the groundwork for a general rule, namely, that leave would be granted taking into account years of experience as a correctional officer, but the door would be left open for members at institutions who might prefer a different formula. According to the witnesses who appeared, the discussions that took place during the consultations did not focus on the issue of women who previously held CR positions.

[35] Further, the members at each institution were given the option of requesting each year that the agreement be revisited and of proposing a different formula.

[36] According to the union witnesses, some of the 54 correctional institutions in Canada did in fact use that option to adopt a different formula. At Kingston, members chose seniority in the Public Service. At Donnacona and Archambault (according to one of the witnesses for the Complainant in the case of Archambault), the members went with a grandfather clause.

(iii) The CSC shares the union’s point of view

[37] An employee from the CSC’s Human Resources Management Branch who was involved in negotiating the collective agreement and the “Global Agreement” stated in her testimony that Article 1-B-3, as submitted by the UCCO-SACC-CSN representatives, seemed reasonable to the employer’s negotiators and moreover that they did not see it as having any adverse impact.

[38] he employee also stated that she knew nothing about the Complainant’s situation or the situation of other people at the RRC who might have had seniority as a CR and was never made aware of any problems in that regard.

(iv) Concerted efforts of male officers against female officers

[39] The Complainant's witnesses recounted several incidents that occurred in the workplace. The incidents entailed male CX officers making disrespectful and insulting comments about women who became CXs after working in CR positions. These incidents occurred many times, primarily in advance of meetings during which the members were to vote. They were so frequent that they came to be described as a "smear campaign".

[40] These same witnesses did not report any irregularity in the meetings of the members, nor did they observe facts similar to those presented in the previous paragraph.

[41] The union witnesses, meanwhile, stated that they did not witness firsthand any incidents where male correctional officers made rude comments to female CXs who were formerly CRs, either outside or during meetings of the members.

[42] Several union witnesses attended the members' meetings at the Regional Reception Centre (RRC), Leclerc, La Macaza, Joliette or Donnacona. All stated that at each institution, meetings pertaining to approval of the draft negotiations and adoption of the collective agreement and the "Global Agreement" and meetings that dealt with the choice of a method for establishing a procedure for granting leave at each of these establishments were conducted in an orderly and democratic manner.

[43] They stated that the discussions were sometimes heated, but were always respectful and never went too far. There were two opposing camps. On one side were correctional officers who objected to seniority which employees might have accumulated in the Public Service before becoming a correctional officer being recognized in the collective agreement or by other means. On the other were correctional officers who sought recognition of their Public Service seniority prior to becoming a correctional officer.

[44] Never did the issue of sex enter into the debate. Sex therefore could not have had any impact on the outcome of the various votes.

(v) Impact of Article 1-B-3 for officers with seniority other than as CXs

[45] The union argues that it is incorrect to say, as the Complainant did, that Article 1-B-3 adversely affected female CRs primarily.

[46] Contrary to the Complainant's allegations that 1-B-3 adversely affected primarily former clerical staff, the majority of them women who had held CR positions, the witnesses for the union and the employer showed that female correctional officers who worked in CR positions were not the only group of employees adversely affected by Article 1-B-3. Other groups of employees were also affected.

[47] They contended that there was a negative impact on all correctional officers, male and female alike, who had years of service in the Public Service before they became correctional officers.

[48] The following is a partial list of categories of workers, mostly male, who had experience in the Public Service in a group other than CR before becoming a correctional officer:

1) Firefighters (mostly men)

2) National Defence (mostly men)

3) Ex-military (mostly men)

4) Technical maintenance (mostly men)

5) National ports (mostly men)

6) Trades (mostly men)

7) Nursing (only one case discussed: man)

[49] The following is a list of employment categories which were mentioned at the hearing but the discussion of which did not indicate which sex was in the majority:

1) Cook

2) Laundry

3) Personal items

[50] The information provided during the hearing was insufficient to establish the sex of workers who had years of service in the Public Service before becoming a correctional officer at the various correctional institutions in Canada.

[51] For all of these employees, regardless of sex, who came from different fields and had experience elsewhere in the Public Service before becoming a CX with the CSC, those years of service were no longer recognized. The union argued that it is therefore clear that 1-B-3 had an adverse impact not only on women who had held CR positions, but also on men who had held CR positions and a host of workers, men and women alike, who had held positions in other groups.

[52] The impact was no more disastrous for women than for men; in fact, the effects were the same for correctional officers of both sexes.

D. Analysis of the case by the parties

(i) The Complainant limited her study to the RRC

[53] Ms. Bélanger's complaint is based on her personal experience at the Regional Reception Centre (RRC) in Sainte-Anne-des-Plaines. It takes into consideration female correctional officers

at that institution and the few men who, like her, lost the years of service they had accumulated in the federal public service.

[54] It appears that at that institution, more than anywhere else, male correctional officers were more hostile toward and disrespectful of female CRs.

[55] The Complainant's perception is based solely on her personal experience at the Regional Reception Centre. According to the numbers provided by the employer and not contested by the union, the number of people at the RRC adversely affected by Article 1-B-3 was:

- in 2007, two men and six women;
- in 2008, nine men and 11 women.

[56] The Complainant's representative stated that in order to assess the impact of the application of Article 1-B-3 and determine the number of employees adversely affected, we have to go back to the day the members voted in favour of the "Global Agreement", that is, June 26, 2006, and that the fluctuation in the number of members in subsequent years should not be taken into account. He justified his position by stating that at the time the vote was taken, women were in the majority.

[57] As shown in the following paragraphs, the Complainant and the union did not use the same population or the same date in analyzing the situation.

(ii) The union based its analysis on the 54 correctional institutions in Canada

[58] The union contends that the Complainant considered the effect of Article 1-B-3 in the context of the Regional Reception Centre in Sainte-Anne-des-Plaines only and wants Article 1-B-3 to be repealed even though it was adopted by and applies to members at all correctional institutions in Canada.

[59] The union also contends that the Complainant based her assessment of the impact of the article on 2006 only, yet the collective agreement spans several years. In its view, she should have assessed the impact over a period covering each year of the collective agreement.

[60] The union contends that the Complainant claimed discrimination solely on grounds that a majority of women at the RRC were affected by 1-B-3. In the union's opinion, a simple majority is not enough. Other factors have to be considered, as will be demonstrated later in the review of applicable case law.

[61] According to UCCO-SACC-CSN, it would be a serious mistake to consider the Complainant's complaint based solely on an analysis of the impact of Article 1-B-3 in a single institution. The union states that any examination of the situation must take the RRC into account, of course, but must also look at what happened at the other 53 federal correctional institutions in Canada. There were 54 institutions in 2006. Article 1-B-3 appears to have been adopted in the interest of the more than 6,000 correctional officers employed at federal correctional institutions across the country.

[62] The union states that at all of the institutions examined, women were not the group most affected by the article; for example, it alleges that the number of officers adversely affected by Article 1-B-3 at the following institutions was:

> La Macaza: in 2007, 13 men and 5 women; in 2009, 17 men and seven women;
>
> Leclerc: in 2006, according to Exhibit I-3, tab (29), 15 men and five women may have been adversely affected by the article (even though it did not come into force until 2007); in 2007, 11 men and seven women; and in 2008, 12 men and seven women.

[63] It appears that at these two institutions, more men than women were adversely affected when CX seniority was adopted.

[64] Even at the Regional Reception Centre (RRC), where the Complainant worked in 2007, two men and six women were apparently adversely affected by the article. In 2008, nine men and 11 women were adversely affected. The numbers clearly show that the majority which existed in 2006 had mostly vanished.

[65] The union contends that the majority of men nationwide did not vote for CX seniority; for example, at Donnacona, where men are at a 74% majority, the vote was in favour of a grandfather clause.

[66] A grandfather clause recognizes, for vacation purposes, years worked in the Public Service before becoming a correctional officer.

[67] The union challenges the Complainant's claim that the situation would be different if the majority of members were women. For example, CX seniority was adopted at Joliette, where most of the correctional officers are women. In 2007, five men and 27 women voted for CX seniority and one man and six women voted against.

[68] The union contends that the votes were not driven by sex; as stated previously, the evidence showed that at each institution examined in the course of the hearing, sex was not an issue in the discussions that took place in the following locations: Leclerc, La Macaza, Joliette, Donnacona and even the Regional Reception Centre (RRC).

(iii) CSC spoke for all correctional institutions in Canada

[69] An employee from CSC's Human Resources Management Branch stated in her testimony that the needs or situation at all correctional institutions, not individual institutions, were taken into consideration during the negotiations.

[70] She added that she was never asked about and was never informed of any specific situation concerning the RRC that would have warranted including a specific clause in the collective agreement or the “Global Agreement”.

[71] She stated that at no time before the collective agreement or the “Global Agreement” was signed did she hear about a situation involving the Complainant and the smear campaign.

[72] The employer’s negotiators were satisfied by the UCCO-SACC-CSN negotiators that their request to negotiate the procedure for granting leave had only one purpose, and that was to standardize the procedure across the country.

[73] She stated that the employer’s negotiators usually assessed the impact of union demands in terms of cost and feasibility. She admitted, however, that she did not do an impact study of Article 1-B-3.

[74] Overall, the union’s demand regarding the procedure for granting leave seemed reasonable to them.

[75] Regarding the notion of “seniority” that is so dear to unions, she pointed out that the notion does not apply in the federal public service. Seniority was also not incorporated into the collective agreement with the union signed in June 2006.

[76] The witness did not dwell on the distinction between “seniority” and “years of service”, but did say that in the federal public service, the more common term is “years of service”. Further, the Public Service recognizes the “merit” principle.

(iv) The parties’ analyses do not carry the same weight

[77] This overview of the positions taken by the Complainant, the union and the employer shows that the parties’ points of reference are different and do not have the same scope.

[78] We should note for the moment that the Complainant's analysis was limited to one institution, the Regional Reception Centre in Sainte-Anne-des-Plaines, where she worked, and that the UCCO-SACC-CSN and CSC analyses looked at all 54 correctional institutions in Canada.

[79] We should also note that the Complainant's representative stated that in order to evaluate the impact of Article 1-B-3, we have to go back to the day the members voted in favour of the "Global Agreement", that is, June 26, 2006, and that the subsequent years should not be taken into account. The Complainant added that because the majority of women at her institution were adversely affected, there was discrimination on grounds of sex.

[80] The union, meanwhile, argues that in order to assess the impact of the article, we must consider the effects produced in each year of the "Global Agreement" and the collective agreement. Both agreements were signed on June 26, 2006, and will remain in effect until May 31, 2010. In fact, it was not until the summer of 2007 that the new seniority rules applicable to vacation were enforced. Consequently, in the eyes of the union, the 2006 date used by the Complainant cannot be justified. The union further argues that it is not enough to show that the majority of women were adversely affected; it must also be shown that there was more harm to women than to men, which the Complainant's evidence failed to do in this case.

III. Applicable Law

A. Establishment of a *prima facie* case

[81] Paragraph 7(*b*) of the *Canadian Human Rights Act* states that it is a discriminatory practice in the course of employment to differentiate adversely in relation to an employee on any of the prohibited grounds of discrimination listed in section 3; in the case at hand, sex was the alleged ground of discrimination.

[82] Paragraph 10(*b*) of the *Canadian Human Rights Act* states that it is a discriminatory practice for an employer, employee organization or employer organization to enter into an

agreement that deprives or tends to deprive an individual or class of individuals of any employment opportunities on any of the prohibited grounds of discrimination listed in section 3; in the case at hand, sex was the alleged ground of discrimination.

[83] In any human rights case brought before the Tribunal, the complainant has a duty to present the Tribunal with facts showing the existence of *prima facie* evidence of discrimination. The complainant cannot simply offer an opinion or convey an impression of discrimination.

[84] In this case, because she alleged discrimination on grounds of sex, the Complainant must provide the Tribunal with complete and sufficient testimonial and/or documentary evidence to support the allegations made in her complaint, as the Supreme Court determined in *Ont. Human Rights Comm. v. Simpson-Sears*, [1985] 2 S.C.R. 536, at paragraph 28:

> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the Respondent-employer.

[85] Consequently, in order to make a decision at this first stage, the Tribunal must limit its analysis to the testimonial and documentary evidence produced by the Complainant. The Tribunal must ignore the evidence submitted by the Respondent in response. See *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at paragraph 22:

> [22] The approach taken by the Tribunal and upheld by the Trial Judge in determining whether a *prima facie* case of discrimination had been made out is not supported by the authorities. The appellant's *prima facie* case was that he sought a position of chief engineer on board the M.V. "Princess of Acadia", that he was qualified for the position, that someone else was hired for the position and that his race played a part in the Respondent's decision to hire the other candidates. By these allegations, the appellant might have established a *prima facie* of discrimination as explained in *O'Malley, supra*, that is, a case "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the Respondent-employer." Instead of determining whether these allegations, if believed, justified a verdict in favour of the appellant, the Tribunal

> also took into account the Respondent's answer before concluding that a *prima facie* case had not been established. As is clear from *Etobicoke*, *supra*, and *O'Malley*, this latter element does not figure into a determination of whether a *prima facie* case of discrimination has been established.

[86] Further, the Complainant's allegations must be sufficiently credible to support a conclusion that a *prima facie* case exists (*Dhanjal v. CHRC*, (1997) CanLII 5751 (F.C.), at paragraph 6).

[87] Finally, if the Tribunal determines that there is no *prima facie* evidence relating to a key element of the allegations or that the evidence produced is incomplete or insufficient, it must dismiss the complaint. See *C.H.R.C. v. C.N.*, (2000) 38 C.H.R.R.D/107 (F.C.). What it really comes down to is determining whether every key element of the discriminatory act is supported by evidence.

B. Defences

[88] However, if the Tribunal determines that a *prima facie* case has been made out, the burden of proof shifts. The onus is then on the Respondents to show that the Complainant's allegation of discrimination is without merit because there was no discrimination or the practice which gave rise to the complaint was not discriminatory or was justified. In the latter case, the Respondents can provide "reasonable" or "satisfactory" explanations for the otherwise discriminatory practice. (See *Lincoln v. Bay Ferries Ltd*, 2004 FCA 204 (CanLII), 2004 FCA 204, paragraph 23; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 (CanLII), paragraphs 26 and 27).

[89] However, an employer's practice will not be considered discriminatory if the employer is able to show that its refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to employment is based on a *bona fide* occupational requirement (paragraph 15(1)(*a*) of the *Act*). In order for a practice to be considered to be a *bona fide* occupational requirement, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who

would have to accommodate those needs, considering health, safety and cost (subsection 15(2) of the *Act*).

[90] The Respondent must also establish that the justification is not merely a pretext to cover up a discriminatory practice. This was determined by the Federal Court in *Canada (A.G.) v. Lambie,* (1996) 29 C.H.R.R.D./483.

C. Evidence

[91] The standard of proof for determining whether there is discrimination is the standard required in civil matters, that is, the balance of probabilities. The requirements of that standard are less stringent than those applicable in criminal court. The Tribunal wrote the following in *Dawson v. Canada Post Corporation*, 2008 TCDP 41, at paragraph 73 :

> [73] This said, as stated in *Wall v. Kitigan Zibi Education Council*, (1997) C.H.R.D. 6, the standard of proof in discrimination cases remains the ordinary civil standard of the balance of probabilities and that in cases of circumstantial evidence, the test is the following: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses (B.Vizkelety, *Proving Discrimination* in Canada, Carswell, 1987, p. 142).

[92] The case law has long recognized the difficulty faced by complainants seeking to establish proof of their allegations of discrimination.

[93] In the case at hand, the Complainant must show that she was the subject of adverse differentiation in the course of employment because of her sex and/or that the adoption of Article 1-B-3 of the “Global Agreement” deprives or tends to deprive her of employment opportunities.

IV. Analysis

A. Did the smear campaign cause Ms. Bélanger to be the subject of adverse differentiation in the course of employment? (s. 7 of the *Act*)

(i) The Complainant was unable to make out a *prima facie* case

Smear campaign

[94] The Complainant alleges that the smear campaign waged by several male CX correctional officers at the RRC against female correctional officers with CR experience recognized by the Public Service differentiated adversely in relation to her in the course of employment. She claims that the campaign reached its peak at the start of the 2001 raiding campaign.

[95] Despite the proximity in time between the smear campaign and the raiding campaign, the evidence heard did not show that the two campaigns were connected.

[96] The Complainant and her witnesses showed that there was indeed a smear campaign and that she was humiliated as a result of the campaign.

[97] The Complainant alleges that the smear campaign differentiated adversely in relation to her in the course of employment. However, she did not offer any explanation or give any example that might explain how the campaign affected her.

[98] We can conclude from the evidence produced that the smear campaign was a personal undertaking by male CX correctional officers who found the situation frustrating.

[99] The evidence did not show that UCCO-SACC-CSN or the CSC was behind the smear campaign, encouraged it or simply turned a blind eye to it.

[100] The UCCO-SACC-CSN and CSC representatives, meanwhile, state that there may have been a smear campaign, but if there was, they had no knowledge of it. They deny that their representatives or agents could have been involved in the campaign in any way. Consequently, they are exempted from the presumption set out in section 65 of the *Act*.

[101] The complaint of discrimination which the Complainant filed with the Canadian Human Rights Commission was against UCCO-SACC-CSN and the CSC. UCCO-SACC-CSN and the CSC are therefore the only Respondents.

[102] The individuals considered responsible for the campaign were simply not named as Respondents.

[103] Consequently, although she alleges that she was the subject of adverse differentiation in the course employment as a result of the harassment campaign, the Complainant was unable to establish proof of discrimination. Nor can she blame UCCO-SACC-CSN and/or the CSC for the campaign, because none of their employees, agents, officers or directors, as the case may be, initiated or consented to the campaign in the course of their employment. In addition, both organizations put in place an anti-harassment policy that sent a clear message to all staff that harassment would not be tolerated. The union and the employer took those measures to prevent such incidents from recurring. They therefore cannot be held accountable for discrimination on grounds of sex.

Harassment

[104] The facts presented by the Applicant alleging that there was a smear campaign which caused her to be the subject of adverse differentiation in the course employment are the same as the facts on which her allegation of harassment is based.

[105] The Complainant was aware of the CSC's and UCCO-SACC-CSN's harassment policies, but she decided it would serve no purpose to avail herself of them and file a harassment

complaint with both parties at the time of or subsequent to the “smear campaign”. She stated that she did not think the policies were effective. The Complainant’s representative acknowledged that the comments said to have been made during the campaign were not tolerated by the CSC, but attributed the absence of a complaint to the fact that no specific woman was targeted and they hoped the harassment campaign would end.

[106] Consequently, because they did not receive a formal complaint, UCCO-SACC-CSN and the CSC could not support the Complainant in any way and therefore cannot be accused of negligence or an omission of any kind. Without a complaint, they did not get an opportunity to mitigate or avoid the effects of the campaign, as provided for in section 65 of the *Act*.

Impact on the decision-making process

[107] Despite the fact there was a smear campaign, the Complainant was unable to prove that at

(a) preliminary and/or information meetings about bargaining,
(b) the meeting during which the collective agreement and the Global Agreement were ratified, and
(c) the meeting during which CX seniority was adopted,

the men voted against the women.

[108] She failed to show that at those meetings the democratic process was not respected or was skewed against female correctional officers who had previously held CR positions, or that sex was at the heart of the debate.

[109] While it is likely that the smear campaign that preceded the various votes by the membership may have had an effect *prima facie* on the democratic process, the evidence produced before the Tribunal does not permit an assessment of the impact on the adoption of Article 1-B-3 or the decision by the members at the RRC to adopt CX seniority as the method for

granting vacation leave. We believe the democratic and respectful conduct of the meetings avoided or significantly mitigated the adverse effects of the smear campaign.

[110] We cannot conclude from the evidence heard that in the other 53 correctional institutions in Canada there was a smear campaign like the one at the RRC, that the "sex" factor had any bearing on the adoption of Article 1-B-3 or that the men voted against the women.

(ii) Was the Complainant the subject of adverse differentiation in relation to another group?

[111] The Complainant alleges that Article 1-B-3 had an adverse impact especially on women at the RRC where she worked. As we saw earlier, that assertion is more or less true. We need only examine the statistics produced by the Complainant herself (Exhibit P-1, tab 9) and admitted to by the CSC and UCCO-SACC-CSN to realize this.

[112] The statistics show that the number of men and women adversely affected by the application of 1-B-3 at the RRC in the first year the new procedure for granting vacation leave was used (2007) was almost the same in 2008. To determine the effects of Article 1-B-3, we have to consider not only women who were previously employed in the CR group, but also other men and women at the RRC who were employed in a different group before they became CXs. Exhibit P-1, tab 9, indicates that 10 employees (nine women and one man) were previously employed in the CR group and that nine employees (eight men and one woman) were previously employed in another group.

[113] However, the fact that there were slightly more women than men at the RRC who were affected by 1-B-3 does not constitute sufficient grounds to allege discrimination on the basis of sex. To support that assertion, we believe it is appropriate to reproduce several excerpts from the Federal Court of Appeal decision in *Thibaudeau v. Her Majesty the Queen*, (1994) 2 D.F. 189*:*

> Page 9 …
>
> Indeed, in my view it is not because more women than men are adversely affected, but rather because some women, no matter how small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on grounds of sex.
>
> …
>
> Accordingly, it seems to me that one cannot logically say that an otherwise neutral rule discriminates on the basis of sex simply because it affects more members of one sex than of the other. …The focus, surely, is not on numbers but on the nature of the effect; on quality rather than quantity. If legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex.

Note: This decision was quashed by the Supreme Court of Canada in *Thibaudeau v. Canada,* [1995] 2 S.C.R. 627. The decision was apparently amended, but for reasons other than those alleged above.

[114] The evidence produced by the Complainant was not sufficient to show that there was *prima facie* evidence of discrimination within the meaning of paragraph 7(*b*) of the *Act*.

[115] The number of women affected adversely by 1-B-3 was similar to the number of men. The effects of the application of Article 1-B-3 were identical for officers of both sexes.

[116] The Complainant therefore failed to show that the adverse effects were greater for women at the RRC than for male employees at the RRC who had been employed in a different

group before becoming CXs. Everyone lost recognition of his or her years of service in the Public Service prior to becoming a correctional officer.

[117] The evidence produced showed that the situation was the same at all institutions in Canada.

[118] Consequently, the Complainant failed to show with *prima facie* evidence that she was the subject of adverse differentiation in the course of employment in relation to men in a situation similar to hers.

Adverse differentiation in the course of employment

[119] As stated earlier, the evidence produced did not show that the smear campaign caused the Complainant to be the subject of adverse differentiation in the course of employment.

[120] We stated earlier that we came to the conclusion that (1) the evidence showed that no employee, agent, officer or director of UCCO-SACC-CSN or the CSC was responsible in any way in the course of his or her employment for the smear campaign the Complainant had to endure; (2) both the union and the employer took all necessary measures to prevent this type of abuse by adopting anti-harassment rules of conduct; and (3) because the Complainant did not file a complaint against the campaign, neither UCCO-SACC-CSN nor the CSC could endeavour to avoid or mitigate its effects.

[121] The Complainant therefore failed to produce *prima facie* evidence showing that the two Respondents differentiated adversely in relation to her in the course of employment and that she was discriminated against by the two Respondents on grounds of sex.

B. Did the adoption of Article 1-B-3 deprive or tend to deprive Ms. Bélanger of employment opportunities within the meaning of section 10 of the *Act*?

(i) The Complainant failed to establish a *prima facie* case

[122] Because the phrase "employment opportunities" is an important element of paragraph 10(*b*) of the *Act*, we believe it is appropriate to use the meaning ascribed in the following decision, an excerpt of which is provided below. Paragraphs 97 and 98 of *Walden et al. v. Social Development Canada*, December 13, 2007, CHRT read:

> [97] The French version of s. 10 refers to practices that deny or tend to deny "les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus". When the French and English versions of s. 10 are read together, one is led to the conclusion that the term "employment opportunities" refers to conditions which enable employment and the advancement of individuals in their employment.
>
> [98] This interpretation is reflected in the Tribunal's jurisprudence wherein the term "employment opportunities" has been used to refer to opportunities to transfer to another job (*Gauthier v. Canadian Armed Forces*, [1989] C.H.R.D. No. 3 T.D. 3/89; opportunities to do certain kinds of work that would enhance earnings and career potential (*O'Connell v. Canadian Broadcasting Corp*, [1988] C.H.R.D. No. T.D. 9/88); training opportunities (*Green v. Canada (Public Service Commission)*, [1998] C.H.R.D. No. T.D. 6/98, reviewed on other grounds in: *Canada (Attorney General) v. Green*, [2000] 4 F.C. 629 (T.D.)); and continued and uninterrupted employment (*Hay v. Cameco*, [1991] C.H.R.D. No. 5 No. T.D. 5/91).

Note: An application for judicial review of this CHRT decision in *Walden* was dismissed by the Federal Court (neutral citation 2010 FC 490). The Federal Court's decision has been appealed to the Federal Court of Appeal (Docket A-219-10).

[123] The Complainant showed that the application of 1-B-3 had only one adverse effect, and that was to cause her to lose recognition of her seniority in the Public Service for purposes of granting vacation leave. She failed to show that she was the subject of any other adverse differentiation. She did not allege any adverse effect 1-B-3 might have had on her opportunities

for promotion, the chances of being laid off or transferred, or any other working condition. She did not satisfy the Tribunal that 1-B-3 discriminated against her on grounds of sex.

[124] Consequently, her evidence failed to establish a *prima facie* case of discrimination under paragraph 10(*b*) of the *Act* because it did not show that the adoption of 1-B-3 deprived or tended to deprive her of employment opportunities in any way.

[125] If we were to conclude that the Complainant lost an "employment opportunity", which the evidence did not show, we would have to determine whether the Respondents are exempted from the presumption set out in section 65 of the *Act*, which reads:

> **65.** (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.
>
> (2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[126] Under subsection 65(1), the Respondents, the CSC and UCCO-SACC-CSN, as employer of the persons who took part in the smear campaign, would be considered responsible for the actions of their members or employees.

[127] However, under subsection (2), the Respondents would be exempted from that presumption if they were able to show that they "exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof." The evidence heard indicated that the smear campaign, which the Complainant described as harassment, was carried out unbeknownst to the Respondents; the Respondents had taken the necessary measures to prevent harassment by adopting anti-harassment guidelines of which the

Complainant was aware. However, for reasons explained earlier, the Complainant chose not to avail herself of those guidelines. Consequently, the Respondents were unable to endeavour to mitigate or avoid the effects of the campaign and are exempted from the presumption set out in section 65.

Vested or individual rights

[128] Since the Complainant alleges that, as a result of the application of 1-B-3, termination of the recognition of her years of service that had previously been recognized by the Public Service for purposes of granting vacation leave was a breach of her vested rights, we believe it is important to clarify the following points: (1) Are we in fact dealing with vested rights? and (2) How does respect for "vested rights" come into play in human rights?

[129] It must be recalled at the outset that before 1-B-3 was adopted, all of her years of service were recognized by the Public Service for purposes of granting vacation leave. It should be noted, however, that that recognition was not provided for in the collective agreement between Treasury Board and the Public Service Alliance of Canada, which at the time represented CSC administrative staff before it was replaced by UCCO-SACC-CSN. At most, these were individual rights acquired over a number of years, not collective rights.

[130] The case law recognizes the right to modify the vested rights of parties, in particular seniority rights. See *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962**:**

> Though it is possible in some cases to **interpret** a collective agreement so as to give seniority rights to certain workers, one cannot simply **ignore** the terms of such an agreement in order to give employees vested rights in the matter. Seniority rights are subject to the collective bargaining process like any other employee right. In the context of labour relations it would be singular, to say the least, for these rights to be absolutely and irremediably raised to the level of vested rights. When a collective agreement exists, individual rights are for all practical purposes superseded. As Laskin C.J. said at p. 725 of *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, in which the Court adopted a rule stated in *Syndicat catholique des employés de magasins du Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206:

> The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

[131] The common law applicable to individual and collective contracts continues to apply even in human rights cases provided, as stated in *Etobicoke, supra*, the parties are not able to waive statutory human rights by contract.

[132] Based on this analysis, we conclude, first, that the Complainant cannot claim to have lost "vested rights" related to the granting of vacation leave because she did not have such rights before 1-B-3 was adopted and, second, that in any event, it would have been possible to modify them by inserting a clause in the collective agreement. It should be remembered that the purpose of the "Global Agreement" was to clarify some of the provisions of the collective agreement covering CX correctional officers. Third, neither UCCO-SACC-CSN nor the CSC breached any provision of the *Canadian Human Rights Act*.

[133] The Complainant failed to show that there were vested seniority rights. She was unable to give a single example which showed that she was the subject of adverse differentiation in the course of employment within the meaning of section 7 of the *Act* or that she was deprived of or likely to be deprived of employment opportunities within the meaning of section 10. As a result, she was unable to prove that UCCO-SACC-CSN and/or the CSC, in the context of the harassment campaign or the adoption of Article 1-B-3, engaged in a practice that discriminated against the Complainant on grounds of sex, differentiated adversely in relation to her in the course of employment, or deprived or tended to deprive her of employment opportunities.

(ii) Was the explanation provided by UCCO-SACC-CSN and the CSC merely a pretext?

[134] Even if the Complainant had been successful in establishing a *prima facie* case, we would be of the opinion that the explanation provided by UCCO-SACC-CSN and endorsed by the CSC

was not a pretext. The reasons given by the UCCO-SACC-CSN and CSC witnesses seemed to us to be perfectly valid and reasonable.

[135] Our impression is that both the union and the employer acted in good faith. We make this point even knowing full well that good faith is not a determinative factor in assessing the reasonableness of an explanation.

[136] The fact that every institution is allowed under Article 1-B-3 to choose a formula other than CX seniority is not, in our view, inconsistent with the stated desire of union leaders to standardize the process of granting leave. At most it represents the right of members to adopt each year at a meeting of the membership a different formula that better meets the needs of each institution at a given time.

[137] Granting that right to the members at each institution conveys a desire to standardize the process of granting leave. In that sense, the rules are the same across Canada. We believe that standardization of the process was a *bona fide* justification, not a pretext.

V. Decision

[138] The smear campaign on the basis of sex of which the Complainant claims to be a victim cannot be attributed to the two Respondents, namely, the Correctional Service of Canada (CSC) and the Union of Canadian Correctional Officers (UCCO-SACC-CSN), for the following reasons. The evidence showed that no employee, agent, officer or director of either Respondent initiated or supported the campaign in the course of his or her employment; that the campaign was conducted without their consent; that they took all necessary measures to prevent such abuse, specifically by adopting an anti-harassment policy; and finally that they were unable to avoid or mitigate the effects of the campaign for the simple reason that the Complainant did not exercise her right to file a complaint.

[139] Further, the evidence produced by the Complainant did not show that the smear campaign, a discriminatory practice in which UCCO-SACC-CSN and the CSC were accused of

engaging, differentiated adversely in relation to her in the course of employment within the meaning of paragraph 7(*b*) of the *Act* or deprived or tended to deprive her of employment opportunities within the meaning of section 10 of the *Act*. Consequently, neither Respondent can be held accountable for the campaign.

[140] The adoption of Article 1-B-3 of the "Global Agreement" by UCCO-SACC-CSN and the CSC cannot be construed as discrimination on grounds of sex. It did not differentiate adversely in relation to the Complainant in the course of employment within the meaning of paragraph 7(*b*) of the *Act*, nor did it deprive or tend to deprive her of employment opportunities within the meaning of paragraph 10(*b*) of the *Act*. In fact, we are of the opinion, based on the evidence produced, that the adoption of 1-B-3 was justified and reasonable.

[141] The Respondents are exempted from the presumption set out in section 65 of the *Act*, as amply explained elsewhere in this decision.

[142] For all these reasons, the complaint is dismissed.

Signed by

Réjean Bélanger
Tribunal Member

Ottawa, Ontario
November 16, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1419/4509 and T1420/4609

Style of Cause: Guylaine Bélanger v. Correctional Service of Canada & and Union of Canadian Correctional Officers

Decision of the Tribunal Dated: November 10, 2010

Date and Place of Hearing: April 19, 21 and 22, 2010 et les 17 et 18 mai 2010

Montreal, Quebec

Appearances:

Pierre Chapleau, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Nadine Perron and Nadia Hudon, for the Respondent, Correctional Service of Canada

Gérard Notebaert and Ioana Egarhos, for the Respondent, Union of Canadian Correctional Officers