

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

MUKULU CIZUNGU

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

REASONS FOR DECISION

T.D. 9/01

2001/07/31

PANEL: Roger Doyon, Chairperson

TRANSLATION

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I. INTRODUCTION

[1] The complainant, Mr. Mukulu Cizungu, is a black Canadian citizen originally from Zaire. He was hired by Human Resources Development Canada (HRDC) as an Information Services Agent. His employment began on January 5, 1998, and terminated on June 10, 1998.

[2] The complainant claims that he was the victim of discrimination by HRDC when it refused to extend his contract of employment due to his race, colour and national or ethnic origin, thus violating the provisions contained in section 7 of the *Canadian Human Rights Act*.

II. EVIDENCE

[3] Testimony provided by Mr. Michel Marchand provided information on the operations of a telephone call centre.

[4] HRDC operates call centres offering information services to the public on the Income Security and Employment Insurance programs.

[5] A regional call centre in Montreal (MRCC), serves the Quebec region, with two (2) points of service: one is located at 715 Peel Street in Montreal and offers the information on both programs, whereas the other point of service, in Shawinigan, only provides information on employment insurance.

[6] The MRCC has information service agents whose tasks include providing information over the phone to the public on the Income Security and Employment Insurance programs. Information services for the Income Security program usually target the elderly who receive or who wish to receive benefits under this program.

[7] These service agents are trained and specialized to offer information services on only one of the two (2) programs.

[8] The MRCC has a workforce of 186 employees, of whom 28% are full-time employees (37.5 hours/week) who work under indeterminate period contracts, 39.8% are part-time employees working under indeterminate period contracts, and 32.4% work part-time under a determinate contract for periods of approximately three months.

[9] The constraints of the task and the high volumes of calls during peak periods on Mondays and throughout the intensive period explain the requirement for a high ratio of part-time employees.

[10] The period referred to as "intensive" is the period during which the Old Age Pension beneficiaries may become eligible for the income supplement, or have their supplement modified due to changes in their annual income from the preceding year.

[11] The intensive period was from mid-January to mid-June relative to the events surrounding the complaint. Since the year 2000, this period runs from July to December.

[12] During the peak period, forms are sent to Old Age Pension beneficiaries to be completed to determine eligibility for the income supplement. For example, in 1998, 400,000 copies of this form were sent to beneficiaries. Consequently, the MRCC was flooded with phone calls from beneficiaries who need information or assistance to complete their forms.

[13] The MRCC has established client satisfaction criteria, and has set the service quality standard at 95%. To maintain this standard of service quality, the MRCC must significantly increase the number of its service agents during the peak period.

[14] Therefore, thirty additional unilingual French service agents were hired for the peak period in 1998. Due to a lack of space at 715 Peel Street, the additional staff were located at 620 René-Lévesque Blvd. for the entire peak period.

[15] The service agents were hired as part-time staff (25 hours/week) under a determinate period contract, and their employment normally terminated at the end of the peak period.

[16] However, in the spring of 1998, since the operating budgets allowed, and to maintain effective client service, it was decided to offer new employment contracts to 13 employees located at 620 René-Lévesque Blvd. and relocate them to the main office at 715 Peel Street.

[17] The contract in question was for part-time work (5 hours/week), for a determinate period from June 11, 1998 to September 4, 1998. In fact, moving the operations from 620 René-Lévesque Blvd. to 715 Peel Street led to the fact that work only started on June 25, 1998. New contracts of a comparable nature with the same conditions were offered to employees who were still working for periods running from September 4, 1998 to January 8, 1999. Then, for the peak period in 1999, the same process as in 1998 was implemented. Employees who had finished their contract of employment for 5 hours per week could apply for the contracts offering 25 hours per week.

[18] Personnel recruitment within a department is made through the Public Service Commission in accordance with the positions that the department intends to fill. Priority is given to public servants who have a priority status. Failing this, the Public Service Commission delegates to the department concerned the authority to hold a competition, establish a statement of qualifications, post the competition, establish deadlines, receive applications, establish a selection board and complete the eligibility list. At the final stage, the Public Service Commission appoints the successful candidate(s), and any candidate who feels that his/her rights have not been respected has the right to appeal to the Public Service Commission.

[19] Before a candidate's name can be referred to a department, that candidate must successfully complete a written exam that is administered by the Public Service Commission, except if the candidate's academic qualifications allow an exemption, which was the case for Mr. Cizungu.

[20] In the fall of 1997, HRDC held a competition to recruit unilingual French service agents, at the CR-5 level.

[21] Mr. Cizungu applied (exhibit I-2) and, on November 18, 1997, he was invited to an oral interview before a selection board that was composed of 3 members. Ms. Diane Vallé, Director of Client Services for the MRCC, chaired the selection board. She was assisted by Messrs. Camille Basineau and Luc Béliveau.

[22] Using an evaluation grid (Exhibit I-7), the interview evaluated the candidate's abilities, including oral communication and the essential elements of providing information using vocabulary, listening skills, clarity and accuracy of communication as well as analysis and interpretation of information. In addition, the selection board assessed personal suitability, including judgement and reliability.

[23] The selection board noted, as stated by Ms. Vallée, that Mr. Cizungu had good logic skills, good vocabulary and showed a keen interest for the position. On the other hand, he lacked clarity and frequently repeated the same ideas. Globally, the complainant scored 194/300 and ranked 18th on a list of 33 candidates chosen to fill the position (Exhibit C-4). Currently, six (6) of these candidates are still employed part-time by HRDC on contract for an indeterminate period.

[24] On December 8, 1997, HRDC informed Mr. Cizungu that he had qualified for the eligibility list (Exhibit C-3). On January 5, 1998, he received an offer for part-time work as an information services agent for a determinate period from January 5, 1998 to March 31, 1998, for 25 hours/week, five (5) hours per day, from Monday to Friday inclusively. He accepted this offer of employment (Exhibit C-5).

[25] The complainant began a training period that initially was to last one month but was shortened by one week due to the ice storm that occurred in January 1998. Training was given at 715 Peel Street, with the objective of initiating the service agents to the procedures and legislation governing the Income Security program. Operations were then transferred to 620 René-Lévesque Blvd., and the personnel began working on January 26, 1998.

[26] At that location, the work team included the Director of Services, Mr. Luc Lévesque, who supervised operations, and occasionally provided technical support. He was assisted by a consultant, Ms. Lise Blais, and, after March 31, 1998, Ms. Héléne Leclerc. Their roles consisted of ensuring quality of service provided to clients by the information services agents, checking the quality of their work and informing them of any new guidelines that applied to them, and evaluating their knowledge.

[27] Two (2) expert agents, Messrs. Michel Robitaille and Jacques Cadieux, assisted the information services agents in their tasks. Finally, 22 information services agents answered telephone calls from clients. They were equipped with a desk, a telephone, and a computer. Their work consisted in providing information to clients regarding the income security program benefits. They had to be able to understand and interpret clients' needs and explain, if necessary, the eligibility criteria for income security benefits, establish their eligibility taking into account their financial situation, and prepare an estimate of the amount of benefits they would receive

(Exhibit I-8). Finally, they had to be able to enter the data on the computer system and make any necessary corrections to client files.

[28] During the period from January 5, 1998 to March 31, 1998, Mr. Cizungu states that he had not received any evaluation, blame, or reproach from his superiors regarding the quality of his work. In February 1998, Mr. Lévesque provided him the call statistics indicating the number of calls that he received daily and their duration, as well as the time periods when he was connected to the telephone. Mr. Cizungu is unaware whether his superiors listened in on his conversations at any time during his employment.

[29] Mr. Cizungu also states that he received a copy of these call statistics only once. For their part, Mr. Lévesque, as well as Ms. Antonietta DiMarco and Mrs. Christine Kozak, who provided testimony at the request of the Commission, stated that these statistics were regularly provided to the information services agents. The information services agents were also informed that their phone calls were regularly monitored.

[30] The complainant has stated, and Mr. Lévesque has acknowledged, that these statistics are not a determining factor in assessing his performance. They were used for showing each information services agent how effective his work was or to help make any necessary improvements.

[31] On March 20, 1998, HRDC offered Mr. Cizungu a new contract of employment with the same conditions as the previous contract (Exhibit C-5), from March 31, 1998 until June 10, 1998, which he accepted (Exhibit C-7).

[32] In the spring of 1998, the complainant learned that new contracts for part-time employment (25 hours/month) for a determinate period (June 11, 1998 to September 4, 1998) would be offered to the information services agents working at the 620 René Lévesque Blvd. location, and that they would be transferred to the MRCC at 715 Peel Street.

[33] He was interested in obtaining a new contract of employment, convinced that he was able to provide satisfactory performance, especially since he had never received any verbal remarks or written evaluation of his work performance.

[34] However, under cross examination, the complainant admitted that the consultant had pointed out to him that he had made errors that she had corrected (Volume 2, page 215).

[35] Mr. Cizungu states that, on May 25, 1998, Mr. Lévesque asked him to leave his desk to follow him into a conference room, where Mr. Lévesque informed him that he had two pieces of news, both good and bad. The good news was that he would have to work five (5) hours of overtime per week until his contract expired. The bad news was that he had decided not to offer him a new contract of employment for the period from June 11, 1998 to September 4, 1998, due to the fact that Mr. Cizungu had a problem with his accent. The complainant claims that he was very surprised because it was the first time that anyone had spoken to him about a problem regarding his accent (Exhibit C-1). However, in his complaint, Mr. Cizungu specified that Mr.

Lévesque, did not give him any explanation regarding his decision at the meeting that was held on May 25, 1998.

[36] On May 27, 1998, the complainant met Mr. Raymond Martineau, the liaison agent for the offices at 715 Peel Street and those at 620 René-Lévesque Blvd., and he informed him of the decision that had been taken concerning him. Mr. Martineau told Mr. Cizungu that he had the right to know the criteria for evaluating his work. On May 28, 1998, Mr. Lévesque gave each employee a copy of the evaluation criteria (Exhibit C-9).

[37] At the weekly staff meeting that was held on May 29, 1998, Mr. Cizungu asked Mr. Lévesque to reveal the names of the individuals who have been selected for the eligibility list for a new contract. Mr. Lévesque only provided the names of the three (3) individuals who had not been selected: Mr. Solon Kennedy, of Haitian origin, Mr. Ali Gaham, of Algerian origin, and the complainant. However, Ms. Karine Tius, who is of Haitian origin, had her contract renewed.

[38] Mr. Cizungu continued to work until the end of his contract in June 1998.

[39] Mr. Lévesque was also called to provide his version of the facts. In mid-May 1998, he was informed that he was to draw up an eligibility list with 13 information services agents who would be transferred to the MRCC. He decided to perform an evaluation of the 16 services agents under his supervision who were still in their positions, because certain others had already left for other jobs.

[40] M. Lévesque explained his decision as follows (Volume 3, pages 474-475):

<At that time, it certainly became more important to perform evaluations for each candidate to find out whether they were sufficiently autonomous to work with the group at 715 Peel, where support was not the same because there was only one consultant, maybe two, well two at the time perhaps, for some 80 employees. Therefore, it was a completely different situation, since it was necessary for the employees to be autonomous at that level. So it became important to perform evaluations to make sure that the best agents were sent over, or that contracts were offered to the most capable agents.

Q. Were the employees at 715 more experienced?

R. Yes. At 715, the employees had been there for a long time and were fully familiar with the legislation and procedures. Of course, there is support at the technical level; at the legal level, there is a consultant, but over time, the questions have become more complex. When we do... we get more specific requests from our clients like, for example, it could be an international request, for example, where it takes perhaps more knowledge or experience to interpret or verify a client's eligibility, but at that point we call the consultant, and he will provide us the support, except that with that consultant, he provides verification for the entire office.

So if we do a percentage comparison, there are two consultants for almost 80 employees at 715, while at 620, there were three consultants for 22 employees. So of course, as soon as there was a hand raised, there was an agent, a coach, who could help out. Whereas it was not realistic to do that at 620 (sic) because in any event, the agents are already more knowledgeable and know the work; it is just when things get really complicated that the consultant is called in. >

[41] He asked the consultant, Ms. Hélène Leclerc, and the two consultant agents, Messrs. Robitaille and Cadieux, to perform personnel evaluations. They performed the evaluations using the following criteria: familiarity with legislation and procedures, ability to solve problems, autonomy and punctuality, performance and respecting the client.

[42] Ms. Leclerc arrived on April 1, 1998 at the 620 René-Lévesque Blvd. location as a consultant. She verified the work of the information services agents. Each agent had an identifier on the computer, which allowed verification of their daily work. This verification also included the specific individual requests for her assistance, and the monitoring of the agents' phone calls.

[43] During the 2nd week of May, 1998, she monitored the phone calls handled by the complainant from 2 to 3 times per day, for 4 to 5 days. She found that that the duration of the calls received by Mr. Cizungu was much too long compared to the duration of calls for the other information services agents.

[44] She also noted that: (Volume 4, page 586)

< People often asked him to repeat the information he had provided. The problem was that he always used the same words; he would not modify or reformulate his answer. Therefore, people often asked him to repeat what he said. >

[45] Towards mid-May 1998, at the request of Mr. Lévesque, she prepared a summary of the written evaluations for all the information services agents (Exhibit C-9). In this evaluation, she found that the complainant had a good knowledge of the legislation and procedures, and that he was autonomous. However, he had marked difficulties with written communications. >

[46] In cross examination, she stated that Mr. Cizungu had difficulty in formulating sentences and that he repeated his words, which led to difficulties in communication.

[47] Mr. Cadieux was a consultant agent for the information services agents at 620 René-Lévesque Blvd. At the request of Mr. Lévesque, he performed a personnel evaluation based on his interventions during the course of work. In the case of Mr. Cizungu, he did not note any problems with knowledge of legislation and procedures. Upon interventions with the complainant, he found that the duration of calls were too long because he kept repeating the information that he would give the client, always using the same words and the same sentences. He recommended to Mr. Cizungu that he use different terms or sentences when repeating information for a second or third time. Despite this suggestion, Mr. Cadieux did not note any improvement. Upon evaluation of the complainant's performance, this was the main problem

found. He also stated that he had never experienced any difficulties in understanding the language used by Mr. Cizungu.

[48] For his part, Mr. Lévesque analyzed personnel performance using the statistical data. Through the Centrex Company, each morning he received a fax containing the statistics for the previous day. This data showed for each information services agent the number of calls received, the average call duration and the connect time.

[49] Using Excel software, he created a computer file enabling him to create graphs showing individual performance for each information services agent, as well as for the entire group.

[50] In the case of Mr. Cizungu, the graphs showed that the duration of calls was much too long compared to the average duration for the group, and that the quantity of calls processed was lower than the group average (Exhibit I-10). This lack had been found throughout the duration of Mr. Cizungu's employment.

[51] Mr. Lévesque, Ms. Leclerc and Mr. Cadieux met to discuss their observations and provide their opinions. By unanimous decision, they established the eligibility list for the 13 positions for information services agents that needed to be filled, and Mr. Cizungu ranked 14th. Therefore, he was not offered a new contract.

[52] Ms. Claire Gélinas-Chebat, who provided testimony, is a professor in the Linguistic Department at the University of Quebec in Montreal. She is a specialist in speech therapy/audiology and has a doctorate in phonetics. The parties acknowledged that Ms. Chebat was qualified as an expert witness in speech therapy and audiology as well as in phonetics.

[53] At the request of HRDC and using the information that was provided to her, she prepared an assessment (Exhibit I-12) aimed at determining the reasons for Mr. Cizungu's performance that was deemed unsatisfactory by his employer.

[54] Ms. Chebat was informed that (Exhibit I-12, page 2):

< the function consists of informing and serving the public, primarily senior citizens, to assess eligibility for the income security program or for benefits paid under the various income security programs. The employer's statistics, regarding the performance graphs, show that the variables for < connect time >, the < number of calls > and < the average duration per call > are lower than the averages for the group, regularly and significantly. >

[55] Using this information and her knowledge, and upon analyzing the factors for success and failure in a communications process, without however having met the complainant, she came to the following conclusion (Exhibit I-12, page 11):

< Senior citizens generally have greater difficulty in hearing and understanding, but Mr. Cizungu should have been able to find the means to communicate his message. We have a reasonable doubt that Mr. Cizungu was not able to make

himself easily understood within the context of his employment. >

III. ANALYSIS

[56] Two (2) questions arise from the body of evidence. Did HRDC have any legal obligation to offer a new contract of employment to Mr. Cizungu upon the expiry of his contract of employment on June 10, 1998? Did HRDC commit a discriminatory act toward Mr. Cizungu, based on his race, colour, or national or ethnic origin upon refusing to renew his contract of employment?

A. Legal obligation to offer a new contract to Mr. Mukulu Cizungu.

[57] The Canadian Public Service Employment Act (R.S., Chapter P-33) defines an <employee> as follows (article 2 (1)):

< a person employed in that part of the Public Service to which the Commission has the exclusive right and authority to appoint persons.>

[58] Article 25 of this law stipulates that < An employee who is appointed for a specified period ceases to be an employee at the expiration of that period. >

[59] At the end of his period of employment, on March 10, 1998, Mr. Cizungu lost his status as an employee, and HRDC no longer had any obligation toward him.

[60] However, under the provisions of section 23 of this Act, if the employer justifies additional needs for a certain period of time and has the necessary financial resources, it may, upon assessment, issue a new contract for a determinate period, or hold a competition.

[61] Upon expiry of Mr. Cizungu's contract, on March 31, 1998, HRDC had additional needs for personnel and the necessary financial resources. It opted for an evaluation based on merit, and offered Mr. Cizungu a new contract of employment for a determinate period, from March 31, 1998 to June 10, 1998.

[62] At the end of this second period of employment, Mr. Cizungu again lost his status as an employee, and HRDC did not have any obligation to continue to employ him because the contractual relation had terminated.

[63] On the other hand, additional needs continued to exist, as well as the necessary financial resources. However, the nature of the needs had changed. Information services agents were required for the period from June 11, 1998 to September 4, 1998 at a rate of 5 hours/week instead of 25 hours/week as had been the case for the complainant.

[64] In addition, the Public Service Staff Relations Act (R.S., Chapter P-35) defines an employee in the following terms (article 2 (1)):

< Person employed in the Public Service, even if that person ceases to work as a result of a strike or by reason of the termination of employment of that person contrary to this Act or any other Act of Parliament, other than:

a) ...

b) ...

c) ...

d) ... a person not ordinarily required to work more than one third of the normal period for persons doing similar work. >

[65] The additional need for information services agents was for 5 hours/week, or less than one third of the number of hours of work (25 hours) that at the time was worked by the information services agents.

[67] Consequently, HRDC did not have the legal obligation to maintain the employment of the complainant, which resolves the first question.

B. Discriminatory act committed by HRDC against Mr. Mukulu Cizungu

[68] In May 1998, HRDC identified a requirement to hire 13 information services agents for part-time services (5 hours/week) for a determinate period, that is, from June 10, 1998 to September 4, 1998. It was decided to establish an eligibility list using the information services agents working at 620 René-Lévesque Blvd. To accomplish this, a merit evaluation was performed based on work efficiency and effectiveness.

[68] When the employer chooses to perform an evaluation based on merit, it is obliged to do so equitably, in a fair manner, and especially, without discrimination. Mr. Cizungu believes that, during the evaluation of his work, he was discriminated against, therefore, it is incumbent upon him to prove the allegation, which is not an easy task.

[69] In the *Basi* case, (9, *CHRR*, *D 5029*), the following statements were made, in paragraphs 38481 and 38482:

38481 - < To accomplish that end [discrimination 41] the complainant would have a herculean task were it necessary for him to prove, by direct evidence, that discrimination was the motivating factor. Discrimination is not a practise which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised. >

38482 - < Discrimination on the grounds of race or color are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer

discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises."

Kennedy v. Mohawk College (1973) Ontario Board of Inquiry (Professor Borons).

[70] In the complaint that he submitted to the Canadian Human Rights Commission (the Commission) (Exhibit C-1), on February 18, 1999, nearly eight (8) months after the end of his employment, Mr. Cizungu stated that Luc Lévesque had not given him any reason why he refused to offer him a new contract for the period from June 10, 1998 to September 4, 1998.

[71] At the hearing, more than three (3) years after termination of his employment, Mr. Cizungu stated that the reason invoked by Mr. Lévesque was his African accent. For his part, Mr. Lévesque does not recall having given this reason, and states instead that the complainant had difficulties with oral communication.

[72] I had the opportunity to hear the complainant for a few hours during his testimony and I had no difficulty in understanding him. His diction was quite acceptable and his slight accent in no way hindered understanding his language. This is also why it appeared to me to be pertinent to know whether he had taken any courses in diction after he lost his job. Mr. Cizungu responded in the negative.

[73] Moreover, Mrs. Leclerc as well as Mr. Robitaille maintained that the complainant's communications problem was not due to his accent.

[74] I therefore conclude that the complainant's accent was not a determining factor in the evaluation of his performance performed by his superiors.

[75] Evidence has shown that the evaluation criteria adopted by the employer have been the same for all personnel (Exhibit I-9).

[76] The Commission's counsel maintains that, in Mr. Cizungu's performance evaluation, the employer gave too much weight to the call statistics that included the number of calls, the average call duration and the connect time. In his opinion, these statistics do not have any scientific value and contradict the MRCC's primary objective, which is to pay constant attention to client satisfaction.

[77] I do not share this opinion. First, these statistics had been developed for all information services agents. Although Mr. Cizungu claims that he was seldom informed of these statistics, the preponderant proof, and testimony provided by Mr. Lévesque as well as Ms. DiMarco and Ms. Kozak, who were subpoenaed by the Commission, reveal that these statistics were regularly provided to staff.

[78] Secondly, evidence has unequivocally shown that the performance evaluation for Mr. Cizungu did not rely solely on the call statistics. The consultant, Ms. Leclerc, listened to phone conversations of all staff, including the complainant. Monitoring the phone calls allowed her to find that Mr. Cizungu frequently repeated the information that he provided because the clients could not understand him. Instead of repeating the information by modifying either the words, or the phrasing of sentences to facilitate comprehension, he repeated the same statements without making any changes.

[79] This method created a difficulty in communication, which was also what the consultant agent, Mr. Robitaille, had discovered.

[80] Ms. Leclerc requested an analysis of the call statistics to confirm what she had found during the telephone monitoring exercise. Also, in the written summary of her performance evaluation of the complainant, she indicated that there was a marked difficulty with oral communication.

[81] Third, I do not believe that the statistics are an obstacle to achieving client satisfaction. They provide elements for performance analysis of each information services agent in relation to the entire group, for discovery of any shortcomings and for taking the appropriate action. For example, if an information services agent is not fully familiar with the legislation and the procedures, the statistics will be of little use in helping to detect this. On the other hand, the monitoring of phone conversations and discussions with the consultant agent will help in discovering it.

[82] The evidence submitted has not led me to find that in terminating his employment HRDC has committed a discriminatory act based on Mr. Cizungu's national or ethnic origin.

[83] It is true that only the complainant, originally from Zaire, Mr. Solon Kennedy, of Haitian origin, and Mr. Ali Gaham, of Algerian origin, were not maintained in their jobs. However, Karine Tius, of Haitian origin, was offered a new contract by HRDC.

[84] Evidence has also shown that HRDC employs personnel of various national and ethnic origins and races. At the MRCC, visible minority employees account for 7.6% of all staff (Exhibit I-3).

IV. DECISION

[85] Based on the elements of evidence required as established in the Basi case to conclude that discrimination is a factor, I have concluded that the evidence in this case does not show that in terminating his employment HRDC committed a discriminatory act based on Mr. Cizungu's race, colour, or national or ethnic origin.

[86] In my opinion, Mr. Cizungu's performance evaluation was not performed in a discriminatory manner. In addition, Mr. Cizungu's difficulty in oral communication with clients was sufficient to justify HRDC not renewing his employment contract.

V. CONCLUSION

[87] Therefore, the complaint is dismissed.

Roger Doyon, Chairperson

July 31, 2001

OTTAWA, Ontario

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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Human Resources Development Canada

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