

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Bronwyn Cruden

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Health Canada

Respondent

Ruling

Member: Sophie Marchildon

Date: July 6, 2012

Citation: 2012 CHRT 15

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

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

...pursuant to paragraph 53(2)(b) of the *CHRA*, I order CIDA to deploy the complainant in the GPB Branch at the PM06 level and to work with the complainant to post her in a friendly country within her top three choices where there are appropriate medical facilities and no medical restrictions she will face. (*Cruden* at para. 176)

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

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

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

[6] On March 1, 2012 the Tribunal issued a ruling, 2012 CHRT 5, and found that the first reasonable occasion for the Complainant to be posted was in 2013 and, that clarification of its order was required to facilitate its implementation and to ensure that the remedy ordered by the Tribunal is forthcoming to the Complainant. In this regard, the Tribunal directed as follows:

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

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

[8] The Tribunal received a letter from the Respondent dated April 25 2012 seeking to amend a portion of the order that states as follows:

Within 15 days of the issuance of this ruling, CIDA is to identify to Ms. Cruden 2013 postings in foreign countries that are or will be available where there are appropriate medical facilities and no medical restrictions that she will face.

[9] The Tribunal received submissions from all parties on their positions on the proposed amendment. The Respondent's reply was filed June 1, 2012.

[10] In support of his proposed amendment, The Respondent contends:

We propose that the wording of part 2 be amended to reflect the fact that CIDA will not be able to offer Ms. Cruden a 2013 posting until October 2012. This is due to the fact that the 2012 process is ongoing and positions available for 2013 will not be identified until the 2012 process is complete. CIDA anticipates knowing which positions will be available for 2013 posting cycle in October of 2012 and is willing to commit to identifying the possible positions to Ms. Cruden as soon as the information is available.

Of course, if the information becomes available before October 2012, CIDA will identify the postings to Ms. Cruden before.

[11] The respondent contends that pursuant to part 1 of the March 1 order, Ms. Cruden is currently occupying a PM-06 position in the GPB Branch at CIDA. Pursuant to Part 4 of March 1 order, Ms. Cruden and CIDA have worked together to create a customized Learning Plan. CIDA is committed to honoring part 5 of the March 1 order, once Ms. Cruden's training is completed.

[12] According to the field postings, the Respondent submits that they typically have a duration of 2 years with an option to extend by 1 year. The follow-up with in-place field staff to assess their interest in pursuing an extension (or not) and management's concurrence therein is undertaken in the summer. If there is agreement that an employee will extend, then the position is clearly not included in the offering of field postings. If an incumbent opts not to extend and/or management does not concur with extension, then the position becomes part of the annual Field Posting Exercise (FPE) for that additional year. Typically, the Respondent knows this is in the months of September/October, in advance of launching the formal FPE process in October.

[13] And provides assurances such as the following:

- (1) the available options will be provided to Ms. Cruden at the earliest opportunity, and in any event, before the launch of the formal posting processes;
- (2) varying the schedule in this manner will not affect Ms. Cruden's learning plan, which is designed to provide her with skills that will be required, regardless of what country options become available; and
- (3) Ms. Cruden will have time to acquire country-specific skills in the period between September/October of 2012, and the summer of 2013 since the training plan the Respondent has developed with the Complainant aims to develop the skills, and provide the experience and knowledge required, to conduct development work in the field generally, and not in a particular country.

I. The Commission's position

[14] The Commission accepts that the Tribunal has authority to vary the deadline in the circumstances of this case. In the Commission's view, this step could be taken as a further exercise of the jurisdiction it retained to oversee implementation of remedies, and /or as a matter of affording procedural fairness to CIDA, which to my knowledge was previously unaware that a 15 day deadline might be attached to any requirement to advise of available posting opportunities.

[15] With respect to the substance of CIDA's request, the Commission agrees with CIDA that Ms. Cruden should be informed of the posting options for 2013 as soon as the information is available. The Commission also notes that CIDA, has said it is not possible to comply with the deadline in the Ruling, or to disclose available opportunities before September or October of 2012

[16] The Commission also notes that CIDA has said it is not possible to comply with the deadline in the Ruling, or to disclose available opportunities before September or October of 2012.

[17] In the circumstances, and based on the assurances described above by the Respondent, the Commission consents to CIDA's request to vary the Ruling.

II. The Complainant's position (reproduced in its entirety)

[18] Ms. Cruden is concerned that, if the Tribunal grants CIDA'S request without putting a number of safeguards in place, this will have a negative impact on her.

A. The Learning Plan

[19] Ms. Cruden's Learning Plan is a critical aspect of the preparation for a posting and in order to illustrate Ms. Cruden's concerns, it is important to understand how the Learning Plan was developed, its implementation and the impact of CIDA's proposed new timeline on posting selection. We have enclosed a copy of the Learning Plan.

B. Learning Plan Development

[20] When Ms. Cruden returned to work in February 2012 she was tasked with developing her Learning Plan.

[21] Ms. Cruden was unsure where to begin. She completed the first column in the plan - the learning objectives - by identifying those experiences that CIDA had identified in the Asia posting exercise of 2012 that she was lacking.

[22] This Learning Plan was developed with the operational requirements of an Asia posting as its focus. While Ms. Cruden's Learning Plan should cover the operational requirements of other postings, they do not necessarily reflect the requirements of postings outside of Asia. For example, in South American countries, the working language is Spanish, a language Ms. Cruden does not speak, and this is not contained within her Learning Plan at present.

[23] Furthermore, the activities chosen for Experience in formulating and delivering strategic advice and recommendations for senior managers, at Row 5, were determined as a result of discussions with Ms. Cruden's director. Ms. Cruden's director thought that she should use the

opportunity for learning to attend the International Program for Development Evaluation Training (IPDET), and requested that she work that into her Learning Plan.

[24] Ms. Cruden's director recognized that this learning objective would build on her extensive experience in the development of the Benchmarking Memorandum to Cabinet and the Results and Risk Management Accountability Framework approved by the Treasury Board Secretariat among others, and suggested this learning objective would allow her the opportunity to gain evaluation training and experience. This learning objective is designed to allow for a thorough understanding of evaluation work, which will strengthen Ms. Cruden's ability to manage programs.

[25] Lastly, it is important to note that in Column 4 of the Learning Plan, "op" denotes those objectives derived from Asia postings, whereas "perf" denotes those objectives that were added by Ms. Cruden's director in order to assist her with her development. For example, it was recommended by the second in command to the Asia Regional Director General that Ms. Cruden take the "Preparing Treasury Board Submissions" drafting course (Row 6) as it may prove useful in the future to assist the Asia directorate achieve its objectives.

C. Implementation of the Learning Plan

[26] A review of Ms. Cruden's Learning Plan reveals that many of the key competencies are still to be determined (TBD). The following explains in more detail the impact of the failure to determine these key competencies on Ms. Cruden's ability to succeed.

Rows 1 and 2 - Experience in liaising with local, national or international stakeholders/collaborating with government representatives or IOs (two separate learning objectives).

Row 3 - These objectives will not be achieved until Ms. Cruden is assigned an active project. The first three projects she has been assigned are two closing projects, which do not require liaison with stakeholders, and the Program Support Facility, which is a project that Ms. Cruden has previously managed.

[27] CIDA's assessment of Ms. Cruden's prior experience in the field (the seven weeks in Kabul and Kandahar in 2007 and 2008) was that it was not sufficient for a spent posting in 2012. The plan was that she would be provided with an opportunity to gain the requisite knowledge and field experience during the period she is working at headquarters before she obtains a posting in 2013. At this time, there is no timeline to obtain the additional two weeks of field experience deemed necessary to attain the required field experience.

Row 4 - This row contains all of the experience required for project management. The first two projects assigned to Ms. Cruden were both closing projects and the third is one that she has previously managed on the Afghanistan Program. As such, the CIDA deemed essential for posting to be successful has yet to be planned or implemented.

[28] Furthermore, CIDA has yet to assign Ms. Cruden with an appropriate mentor to guide her development. Instead she has been advised to direct any questions to the Chief of Operations for Indonesia, whom according to the Complainant, only has a few years of operational experience. While Ms. Cruden has no Issue with the Chief of Operation's efforts to assist her, she was been told by the Chief of Operations that, to date, she has to seek answers to all of Ms. Cruden's questions from others, which means that they have not always been answered.

[29] As a result Ms. Cruden spends a great deal of time trying to figure out what she needs to know and then has to go through a circuitous route to obtain answers. The assignment of an appropriate mentor who has a wealth of experience in program management and who could actively guide her through the program management process is critical if Ms. Cruden is to meet the objectives in her Learning Plan. For example, Lawrence Peck of the Afghanistan Program would be ideal given his wealth of experience in the program management in CIDA.

Row 5 - Shadowing the Program Evaluation is not experience within the control of the Geographic Programs Branch, but with the Policy Branch at CIDA. Time is not only required for negotiations between branches, but Ms. Cruden's participation needs to be included in the Terms of Reference of the eventual contracting of the evaluator. Although the evaluation is planned for September, to date, there has been no discussion between branches on this objective

D. Timeline Impact on Posting Selection

[30] The original ruling ensured that Ms. Cruden was not forced to compete with others for the eventual posting. Should you revise the ruling as requested by CIDA, Ms. Cruden will be providing her list of postings to CIDA when others are competing for the postings of their choosing. As such, CIDA will be able to choose which posting to provide Ms. Cruden after assessing who is competing for the same postings. Moreover, it will be unfair to all staff to compete for a posting that may not be available for competition.

[31] Furthermore, the Learning Plan in place is supposed to be completed by April 2013. If the extension is granted, Ms. Cruden will be provided with a list of postings at a time when only six months of her Learning Plan will have been completed, and some of the key experiences identified in the plan will not have been achieved.

[32] As well, should Ms. Cruden's posting be in a country outside of the Asia program, due to the fact that the options are limited given budgetary restrictions, it will provide her with only six to nine months for language training.

[33] Given the above, Ms. Cruden is proposing a revision to CIDA's request for an extension as follows:

1. CIDA will provide Ms. Cruden the list of postings in 2013, two weeks prior to advertising the postings to CIDA employees.
2. Ms. Cruden will provide CIDA with her choice of three positions within one week of receipt of the list in item 1. CIDA will choose the final posting. After communication of this decision to Ms. Cruden, they will then post the list of countries to all employees as per normal process.
3. Completion of the Learning Plan should not be a factor in proceeding with the posting in 2013.
4. Should Ms. Cruden not be able to provide CIDA with three positions as stipulated in the order, she will identify one or two postings, with the understanding that this would enable CIDA, should it decide not to provide Ms. Cruden with one of countries identified, to defer the posting to 2014. This will account for the fact that there will

likely be fewer positions in 2013 than any previous year given the budget reductions, and as such, likely fewer suitable positions that Ms. Cruden can request in family-friendly countries.

Examples of how the budget has affected the number of postings are as follows:

- This year, postings to Mozambique, Rwanda and South Africa were cancelled (confirmed by the attached minutes from staff meeting).
- CIDA has closed programs in eight countries (three in Asia and five in Africa, see enclosed news article).

[34] Positions in Asia that Ms. Cruden will be eligible to apply for will be greatly reduced in 2013. There are three fewer countries available, plus she is not able to take on a position in Bangladesh as the Head of Mission is her sister. This would mean that Ms. Cruden could not replace her supervisor, the Head of Aid, during her absence as she would have to report directly to her sister.

[35] Furthermore, given that two positions were filled in Vietnam in 2012, the only position she could apply for in Vietnam in 2013 would likely be an EX-1 position. The only way that this would be possible, as an EX-1 position is not contemplated in the order, is if Ms. Cruden actually met the competencies, or if the PM-06 going on posting in 2012 in Vietnam, who has been acting as an EX-1 for a number of years, would consider taking on the EX-1 role enabling Ms. Cruden to take over the PM-06 role.

[36] Vietnam was Ms. Cruden's second choice of postings after Afghanistan. As a result, if she cannot find suitable positions in other regions, Ms. Cruden would prefer have CIDA postpone her posting to 2014 rather than provide a country in the list of three that she would not feel comfortable living for three years. The current ruling does not provide for a way forward should Ms. Cruden not be able to provide three positions.

III. The Respondent's reply to the Complainant's submissions

[37] The Respondent already advised that the Complainant would be alerted about the available positions in advance of the launch of the formal process. The Respondent expects to provide this information in October 2012, which is expected to be more than two weeks before the launch of the formal process.

[38] The Complainant's concerns have been relayed to the Respondent, which remains available to discuss and work through any of her concerns.

[39] The Respondent reiterates that the Complainant's Learning Plan will not be affected by the requested amendment.

[40] Finally the Respondent responds to the request made by the Complainant to be allowed to postpone her posting until 2014 if she is not satisfied with the choice of available postings. The Respondent contends that this request contradicts the intent of the Order, as recognized in the Ruling dated March 1, 2012, which was to make available, at the first reasonable opportunity, the opportunities that were denied to the Complainant. The Respondent further contends that the original order specifically provided that the Respondent would retain some discretion as to which country the Complainant would be posted. According to the Respondent this last request from the Complainant is inappropriate as it entails a significant and prejudicial amendment of the Order, and it prolongs the fulfillment of the terms of the Order. The Respondent asks the Tribunal not to consider this last request or at the very least not in the context of the Respondent's amendment request.

[41] The Respondent suggests that if the Complainant is dissatisfied with the opportunities that will be made available to her, she could always bring a motion at that time and the Tribunal's ruling would not be made in an evidentiary vacuum.

IV. Analysis

[42] In *Cruden*, and in its March 1, 2012 ruling in this matter, the Tribunal retained jurisdiction to oversee the implementation of the remedies ordered in this case. Pursuant to that jurisdiction, the Respondent makes a request that the Tribunal vary the timeline for implementation of the order outlined in its March 1, 2012 ruling. The Commission consents to the Respondent's request and the Complainant, in the event the timeline for the implementation of the order is extended, requests appropriate safeguards be put in place to ensure that the order is implemented. I accept the Respondent's contention that 2013 postings cannot be identified until the 2012 process is complete and that the Respondent will only have this information in or around October of 2012. Therefore, the Tribunal's March 1, 2012 will be amended accordingly, pursuant to the terms below.

[43] That being said, in response to the Respondent's current request, the Complainant raised concerns regarding the development and implementation of the Learning Plan. In this regard, it is instructive to understand why a clarification of the *Cruden* Order was required and, to understand the reasons that led to the March 1, 2012 ruling regarding the issue of the first reasonable occasion to post the Complainant. A portion of those reasons is reproduced below:

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

[15] Even though the Complainant identified her preferred posting choices to CIDA early on in the posting process, a defined learning plan was not established at that time. Nor was a learning plan in place by the time the Tribunal conducted its hearing in this matter on January 16, 2012. At the hearing, CIDA's witness was not able to identify any concrete steps CIDA has taken in considering how it will implement the Tribunal's order because she was not involved in the implementation of the order. According to the Respondent, it sent a letter to the Complainant and her counsel inviting her to communicate with them about the way to implement the order and the Complainant did not respond. The

Respondent contends communications were interrupted between the parties when the Complainant made its request for clarification to the Tribunal in November 2011. I find this explanation is not credible. In early November, the Complainant was told by the Respondent that CIDA was not going to post her in 2012, but that she could apply to the posting process anyways. She then applied for the two Vietnam postings and was screened out. At any moment after the Complainant made her posting choices, CIDA could have planned a meeting with her to start the discussions on how to implement the Tribunal's order. The Complainant was available for such discussions.

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

(*Cruden* at paras. 14-16)

[44] In light of these reasons, I added requirements to the Order to assist the parties in taking steps towards developing and implementing an effective Learning Plan and to ensure the Complainant would be trained in time for a 2013 posting. Having considered the parties' most recent submissions, there still seems to be issues between the parties regarding the development and implementation of the Learning Plan. While the Respondent states that it has worked with the Complainant to develop a Learning Plan and that going forward it will work with the Complainant to address her concerns regarding the Learning Plan, the Complainant submits that she was left on her own to design her Learning Plan. The Respondent states that varying the timeline for implementing the Order will not affect Ms. Cruden's Learning Plan and that Ms. Cruden will have time to acquire country-specific skills in the period between September/October of 2012 and the summer of 2013. While the order below covers these issues, I believe a further conference call following the issuance of this ruling would be beneficial to ensure that the parties understand their obligations under the order going forward and to provide

any further clarification that may be needed. A further conference call will also be an opportunity to discuss the issues raised by the parties regarding the implementation of the order beyond the 2013 posting cycle.

V. Order

[45] Pursuant to the reasons above, the Tribunal orders as follows:

1. At least 2 weeks prior to advertising 2013 postings to other CIDA employees, CIDA is to provide Ms. Cruden with a list of the 2013 postings in foreign countries that are or will be available where there are appropriate medical facilities and no medical restrictions that she will face.
2. Within one week following receipt of the list in item 1 above, Ms. Cruden will provide CIDA with her top three choices for posting among those postings identified by CIDA.
3. Among the three posting choices identified by Ms. Cruden, CIDA will choose the final posting and communicate that choice to Ms. Cruden prior to advertising any postings to other CIDA employees.
4. Following CIDA's choice of Ms. Cruden's posting location for 2013, CIDA is to finalize a customized Learning Plan, in consultation with Ms. Cruden, outlining any training and/or experience Ms. Cruden needs to complete and/or acquire in order for her to succeed in the 2013 posting.
5. The customized Learning Plan must specify how CIDA will provide the required training and/or experience to Ms. Cruden and must also include a schedule, with dates, as to when the training and/or experience will be provided to Ms. Cruden before the 2013 posting date.
6. Once Ms. Cruden has completed the required training and/or experience identified by the Learning Plan; CIDA is to post Ms. Cruden to the 2013 field assignment for which the Learning Plan was developed.

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

[47] The parties are asked to provide the Registry by August 7, 2012 their availabilities for a conference call to take place during the weeks of August 13, 2012 or August 20, 2012.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
July 6, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1466/1210

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

Ruling of the Tribunal Dated: July 6, 2012

Appearances:

Alison Dewar, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Alex Kaufman, for the Respondent