HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Amanda Hussey

Applicant

-and-

Big Brothers Big Sisters of Peterborough Incorporated and Darlene Evans

Respondents

DECISION

Adjudicator:	Jay Sengupta
Date:	January 4, 2013
File Number:	2011-09371-I
Citation:	2013 HRTO 16
Indexed as:	**Hussey v. Big Brothers Big Sisters of Peterborough Incorporated**

APPEARANCES

Amanda Hussey, Applicant	)	Andrew Cross and Shamoon Poonawala, Representatives
Big Brothers Big Sisters of Peterborough Incorporated and Darlene Evans, Respondents	)	Jeffrey Ayotte, Counsel

INTRODUCTION

[1] This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment because of record of offences. A hearing was held on October 9, 2012 in Toronto, during which I heard evidence from the applicant and the personal respondent. For the reasons that follow, this Application is dismissed.

THE LAW

[2] The relevant sections of the Code are as follows:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 10(1) In Part I and in this Part,
>
> ……
>
> "record of offences" means a conviction for,
>
> (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
>
> (b) an offence in respect of any provincial enactment; ("casier judiciaire")

THE FACTS

[3] The applicant applied for a job with the respondent organization as a caseworker in mid-2010. She was interviewed by Darlene Evans, the executive director of the respondent organization and a personal respondent in this matter. During the course of the interview, one of the standard questions she was asked was the following:

> BBBS requires that all agency staff provide a clean criminal reference check and vulnerable sector screening clearance before commencing employment. Are you able to comply with this requirement?

[4] There is no dispute between the parties that the applicant was asked during the interview whether she could provide this information and no dispute that the applicant answered the question in the affirmative.

[5] The applicant began working at the respondent organization on June 28, 2010. Within the first two weeks of her employment, the issue of the police clearance was raised with her on two separate occasions by respondent Evans.

[6] The first of the two instances was at the end of the applicant's first week of employment. Respondent Evans asked the applicant whether she had obtained the criminal record check and was told that the applicant was in the process of obtaining it from the local police station.

[7] The second occasion was on the Friday of the second week of the applicant's employment. On Friday morning, respondent Evans reminded the applicant that she was still waiting to receive the applicant's criminal record check.

[8] That afternoon, the applicant came to respondent Evans' office. Respondent Evans describes the applicant as being tearful. She says the applicant told her that she did not have the criminal record check and explained that she had a conviction in her past, and that at the time of the offence, she had been much younger and under the influence of a boyfriend or partner.

[9] Respondent Evans indicated that she told the applicant that the situation was unfortunate but that her employment could not continue. She says she explained that the policy was clear that the clearance was a requirement for employment at the agency. She says the meeting was a brief one lasting approximately 10 minutes.

[10] The applicant provides a different version of the material facts. She indicates that prior to seeking employment, she had applied for a pardon as she was eligible to receive one. She does not dispute that she was asked if she could provide a clear criminal record and she does not dispute that she answered in the affirmative.

[11] She says she was very upset when she was terminated as she provided what she refers to as a "parliamentary letter" to show that she was eligible for the pardon and just waiting for the pardon to be processed.

[12] The letter she refers to is one from a constituency assistant to Dean Del Mastro, the local Member of Parliament, who indicates that the M.P.'s office has been working with the applicant to obtain the pardon and suggests that because they have spoken to the relevant department, the letter from the constituency assistant should constitute an "implied Pardon status" until she receives "the paperwork" in a few weeks.

[13] Respondent Evans disputes that the letter was given to her on the afternoon of July 14, 2010. Even if it had been, she took the view that a letter from a constituency assistant indicating that a pardon was forthcoming at some future date would not have been enough to satisfy the agency's requirement that a clean criminal record check was a precondition for employment. She also testified that she viewed the applicant's assurances that she could provide the clean criminal record check as meaning that any necessary pardons were already in place. Finding out that was not the case meant, in her view, that she had been lied to by the applicant on several occasions both prior to and during the employment period.

[14] The applicant has provided the Tribunal with a document confirming that a pardon was eventually granted on July 15, 2010. She testified that during the meeting that resulted in her termination, respondent Evans told her that she felt that the prior conviction defined the applicant as a person, that people don't change and that once a person was a criminal, they were always a criminal.

[15] Respondent Evans denies making any such statements. She points out that she has worked for 24 years in the field of social work, has two Master's degrees, one in social work and the other in business administration, is currently a PhD candidate and part-time professor at Ryerson University in the faculty of Child and Youth Care, and her experience is quite the opposite: that people are very capable of change.

[16] The applicant testified that she sent a further email in January of the following year seeking reemployment. She indicates that she received no response to the email from respondent Evans and argues that this constitutes a further act of discrimination or a reprisal.

[17] Respondent Evans indicates that she received the email and did not respond for two reasons. The first reason was that there were no openings for staff at the time the email was sent and the second was that the applicant had lied to her on three separate occasions while employed by the agency and, for that reason, she would not have considered her for re-employment even if a position had been available. She testified that she does not always respond to all inquiries for employment and there is no policy in place at the organization that requires that she respond to all email inquiries for employment.

DECISION

[18] The Tribunal considered the definition of "record of offences" in *de Pelham v. Mytrak Health Systems*, 2008 HRTO 172. In that case, the Tribunal concluded that the language of the statute was clear and unambiguous, and that while "it is true that the *Code* is an important public policy statute and must be given a large, liberal and purposive interpretation, … this does not mean the Tribunal can depart from the express provisions of the legislation".

[19] The definition of "record of offences", plainly read, can only be said to apply to the applicant after she received her pardon on July 15, 2010, the day following the termination of her employment.

[20] I agree with the respondents that the pardon was granted on July 15, 2010 and that letters from constituency assistants, or even the parliamentarians for whom they work, are insufficient as they are not empowered to grant pardons.

[21] Given the above, the only allegation that relates to discrimination in respect of employment on the ground of "record of offences" under the *Code* is the applicant's communication with the respondents in January 2011, during which she inquired about re-employment, and the lack of response to that inquiry by the respondents.

[22] In that regard, I find that the applicant has not established on a balance of probabilities that the reason for the lack of response to the email is discriminatory. It is insufficient for the applicant to simply point out that she is a person who has a characteristic that can be described by a ground under the *Code* (record of offences) and that her email did not receive a reply.

[23] There is no evidence that the applicant received differential treatment in respect of employment on the ground of "record of offences" under the Code when she inquired about re-employment with the respondent in January 2011, and the respondent's lack of response to her inquiry. I am persuaded by the evidence of respondent Evans that there is no policy within the agency of responding to any and all inquiries regarding employment and that the applicant's email inquiry was not treated differently from others received, particularly when there are no open or available positions.

[24] As a result, the Application is dismissed.

Dated at Toronto, this 4th day of January, 2013.
"Signed by"

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Jay Sengupta
Vice-chair