Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 35
Date: October 26, 2020
File No(s).: T2393/5219

[ENGLISH TRANSLATION]

Between:

Lise Shannen Jovel Abreu

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Fortuna

Respondent

Decision

Member: Marie Langlois

Table of Contents

I. Decision

[1] The Tribunal allows the complaint of discrimination on the basis of the sex, specifically pregnancy, and disability of Lise Shannen Jovel Abreu (the Complainant) as a result of her dismissal from Transport Fortuna (the Respondent or the Employer). The Tribunal finds with respect to the other grounds raised, i.e. race and national or ethnic origin, that the evidence does not establish that the Complainant suffered adverse differential treatment as a result of these grounds. The reasons for this decision are as follows.

II. Overview

[2] The Respondent is a small company specialized in the refrigerated transportation of fruits and vegetables, and supplies. The company was incorporated in 2016 and started operating in 2017, with four tractor-trailers making deliveries between Canada and the United States.

[3] The Complainant was hired as an administrative assistant on February 26, 2018. The Complainant and her boss, the company's owner, Oumit Satarov, signed the employment agreement. The agreement includes provisions for the termination of employment as a result of illness-related absences. They stipulate that the Employer can terminate the employment if the employee is on sick leave for a certain number of days, be they consecutive or not. The number of days is not specified, this part of the agreement clause having been left blank in the copy filed with the Tribunal. The Complainant submits that she did not discuss the provisions of the agreement as she was simply asked to sign it, without any other formalities.

[4] On March 1, 2018, the Complainant was away from work for a medical appointment. She learned that she was pregnant and that her pregnancy was high risk. She was away again for medical reasons related to her pregnancy on March 13, 23 and 28, and on April 5, 2018. On April 6, 2018, at 6:57 a.m., she informed her employer by text message that she would again be off for the day for medical reasons. The Employer dismissed her instantly, in a text message sent at 7:33 a.m. on the same day.

[5] She had in the meantime, on March 14, 2018, informed her Employer of her pregnancy.

[6] The Complainant also reports that her four colleagues, including her boss Mr. Satarov, were of Russian or Slavic descent. She states that she did not understand their conversations that took place in Russian, and that the person who replaced her is also of Russian or Slavic descent. However, she communicated with her colleagues and Mr. Satarov in English or French.

[7] The Complainant believes that she was dismissed on the grounds of her pregnancy and her illness as well as her race and national or ethnic origin. She filed a complaint with the Canadian Human Rights Commission, which is now before the Tribunal.

[8] The Respondent, on the other hand, submits that the dismissal was connected to errors and omissions made by the Complainant in her work that had major repercussions for the company. It argues that the dismissal had nothing to do with the Complainant's pregnancy or illness-related absences.

[9] Regarding the issue of race and national or ethnic origin, the Respondent submits that all the office staff speak English or French, that the drivers come from a variety of ethnic communities and that the Complainant was not discriminated against on the basis of her race or national or ethnic origin.

III. Issues

[10] The issues are the following:

A. Does the Complainant have one or more characteristics protected under the *Canadian Human Rights Act*[1] (the Act)?

B. If so, did she experience an adverse impact with respect to her employment?

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[1] R.S.C. 1985, c. H-6.

C. In the affirmative, were the protected characteristic or characteristics a factor in the Employer's decision to dismiss the Complainant?

D. If this is the case, did the Employer justify its decision under section 15 of the Act or was it able to limit its liability under section 65 of the Act?

E. If not, what are the applicable remedies?

IV. Legal Framework

[11] Paragraph 7(a) of the Act provides that refusing to continue to employ any individual is a discriminatory practice if the decision is based on one or more of the prohibited grounds of discrimination set out in section 3 of the Act.

[12] Before addressing the issues, I must note that the Complainant has the burden of showing that the practice to which she was subjected was, on its face, discriminatory (*prima facie* case). A *prima facie* case 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".[2]

[13] The case law recognizes the difficulty of proving allegations of discrimination by direct evidence given that discrimination is not a practice which one would expect to see displayed directly or overtly. The Tribunal's role, therefore, is to consider all the circumstances and to determine on a balance of probabilities whether there is discrimination or whether there is, as described in *Basi*,[3] the "subtle scent of discrimination". In short, the Tribunal can draw an inference of *prima facie* discrimination when the evidence before it renders such an inference more probable than the other possible inferences or hypotheses.[4]

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[2] *Ont. Human Rights Comm. V. Simpsons-Sears*, [1985] 2 SCR 536 at para 28 [*Simpsons-Sears*]).
[3] *Basi v.Canadian National Railway*, 1988 CanLII 108 (CHRT).
[4] Béatrice Vizkelety, *Proving Discrimination in Canada*, Toronto, Carswell, 1987 at p 142. See also *Khiamal v.Canada (Human Rights Commission)*, 2009 FC 495 at para 60.

[14] To discharge her burden, therefore, the Complainant must establish on a balance of probabilities[5] that she has one or more of the characteristics protected under the Act, that she experienced an adverse impact with respect to her employment, and that the protected characteristic or characteristics[6] were a factor in the adverse impact.[7]

[15] In making her case, the Complainant does not have to show that the Respondent intended to discriminate against her since, as the Supreme Court of Canada observed in *Bombardier*, some discriminatory conduct involves multiple factors or is unconscious.[8] Consequently, intent to discriminate is not a determinative factor; rather, what counts is the outcome, the adverse effect.[9]

[16] Furthermore, it is not essential that the connection between the prohibited ground of discrimination and the contested decision be an exclusive one, or that there be a causal relationship, since the prohibited ground in question need only to have contributed to a particular decision or action. In short, the evidence must establish that the prohibited ground of prohibition was a factor in the impugned decision.[10]

[17] In addition, it is sufficient if the Complainant's sex (which includes pregnancy), disability, race, or national or ethnic origin was one factor in the Employer's decision to terminate her employment.[11]

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[5] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v.Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 67 [*Bombardier*].

[6] Called "prohibited grounds of discrimination" in the *Canadian Human Rights Act*.

[7] *Moore v.British Columbia (Education)*, 2012 SCC 61 at para 33.

[8] *Bombardier,* above, note 5 at paras 40, 41.

[9] *Simpsons-Sears*, above, note 2 at paras 12, 14.

[10] *Bombardier*, above, note 5 at paras 45–52.

[11] *AB v.Eazy Express Inc*, 2014 CHRT 35 (CanLII) at para 16.

[18] Once this has been established, the Employer can justify its decision by demonstrating, also on a balance of probabilities, that the decision was based on a *bona fide* occupational requirement under section 15 of the Act, or it can limit its liability by applying section 65 of the Act. In that case, the burden of proof shifts to the Employer.[12]

V. Analysis

A. Does the Complainant have one or more characteristics protected under the *Canadian Human Rights Act*?

[19] The Complainant argues that her disability and her pregnancy are prohibited grounds of discrimination under the Act.

[20] The Act sets out various prohibited grounds of discrimination, including disability and sex (subsection 3(1)). Where the ground of discrimination is pregnancy, the discrimination shall be deemed to be on the ground of sex (subsection 3(2)).

[21] The Complainant was pregnant. She took time off work because of pregnancy-related complications, medical appointments and paramedical examinations. Medical certificates in the file confirm this.

[22] There is therefore no doubt that the Complainant has the characteristics she claims as prohibited grounds of discrimination, namely, disability and sex, given that her condition and her pregnancy confirm this. The answer to question A therefore has to be yes.

B. Did she experience an adverse impact with respect to her employment?

[23] The Complainant was dismissed on April 6, 2018, after informing her boss, Oumit Satarov, that she had to take more time off work for medical reasons.

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[12] *Peel Law Association v.Pieters*, 2013 ONCA 396 (CanLII) at para 67.

[24] The Tribunal is of the opinion that the Employer's decision to dismiss the Complainant entailed an adverse impact with respect to her employment under paragraph 7(a) of the Act.

[25] Consequently, as a result of the Complainant's dismissal, the answer to question B must therefore be yes.

[26] As discussed previously, paragraph 7(a) of the Act provides that the refusal to continue to employ any individual is a discriminatory practice if the decision to do so is based on a prohibited ground of discrimination. This aspect will be examined under question C.

C. In the affirmative, was the Complainant's dismissal connected to this or these characteristics?

[27] The Complainant was dismissed on April 6, 2018. The Tribunal believes that the pregnancy and illness-related absences were the causes or part of the reasons for the dismissal, for the reasons set out below.

[28] On February 26, 2018, the Employer hired the Complainant to work as an administrative assistant. Among other things, the Complainant was responsible for meeting truckers before they were hired and for finalizing their files. She had to check truck drivers' criminal backgrounds before drivers could drive to the United States. She also had to arrange for drivers to undergo a drugs test before they were assigned a trip. These verifications are extremely important for the Employer because its safety rating, awarded by the American Federal Motor Carrier Safety Administration (FMCSA), depends on it. Without a safety rating, a carrier cannot cross the border between Canada and the United States. An excellent safety rating attracts clients while a lower safety rating can deter them. The safety rating also plays an important role in the cost of the carrier's insurance. A safety rating can be lowered or even withdrawn if, for example, a carrier hires a driver with a criminal record, if a driver does a trip despite a positive drug test or even if the test result was not received before that trip.

[29] Indeed, on June 30, 2017, before the Complainant was hired, an investigation report regarding the Respondent was issued by the United States Department of Transportation

(USDOT). The report notes multiple drug and alcohol–related violations. It mentions, among other things, that the Respondent had employed a driver who violated the Drug and Alcohol Testing Rules by refusing to get retested for drugs and alcohol after a first test turned out to be positive. Another driver made a trip even though the Respondent had not yet received the results of his drug and alcohol tests. The Respondent did not keep test results, which violates the Rules. The report also noted a number of other violations, with respect to drivers' qualifications and log books containing falsified reports. In light of this investigation report, the United States Department of Transportation imposed remedial measures and lowered the Respondent's safety rating. It gave the Respondent a conditional safety rating and imposed a US$7,520 fine.

Absences

[30] A few days before she started her job, on February 20, 2018, the Complainant went to see a doctor. She was prescribed a urine culture and an analysis of the results. She was also scheduled to see a gynecologist on March 1, 2018.

[31] As mentioned above, the Complainant started her job on February 26, 2018. Three days later, on March 1, she was away from work for her medical appointment. She was told she was pregnant.

[32] During the night of March 13, 2018, the Complainant went to a hospital emergency room because she was bleeding.

[33] At 4:04 a.m. that night, the Complainant sent Mr. Satarov a text message reading as follows:

> [TRANSLATION]
>
> Hi Oumite, sorry for writing so late!
>
> I've just come out of hospital where I was told to see my family doctor today if possible. So I won't be able to come in today. I'll explain properly on Wednesday!
>
> Really sorry for any inconvenience!!

[Translated as it appears in the French version]

[34] Sometime on March 13, 2018, the Complainant underwent an obstetric ultrasound. The report showed that the Complainant was about seven weeks pregnant. According to this test, the pregnancy was normal. The Complainant was therefore away from work for the day of March 13, 2018.

[35] On March 14, 2018, the Complainant told Mr. Satarov that she was pregnant. According to Mr. Satarov's testimony, he congratulated her and gave her $150 as a gift.

[36] The Complainant disputes this affirmation and states that she never received any gift whatsoever from him.

[37] When cross-examined on this matter, Mr. Satarov noted that the amount was in cash and that it had come from petty cash. In the absence of any corroboration or written explanation, the Tribunal remains puzzled about this issue.

[38] On March 23, 2018, the Complainant was away from work again, for six hours, for some medical exams. She therefore worked 34 of the 40 hours assigned to her for the March 18 to 24 period.

[39] On March 23, a gynecological cytology report revealed the presence of benign reactive inflammatory cellular changes. The obstetrician-gynecologist wrote in her May 2, 2018, report that the Complainant had experienced bleeding in the first trimester of her pregnancy and that she suspected a fetal malformation. She noted that the Complainant had been seen at her office on March 23 and May 2, 2018.

[40] In the meantime, the Complainant was away for part of the day on March 28, 2018, to undergo a new obstetric ultrasound. This ultrasound was normal, despite the patient's bleeding.

[41] On April 5, 2018, the Complainant took time off work for medical reasons and notified Mr. Satarov by text message. A medical report confirms that the Complainant went to a clinic because of flu-like symptoms.

[42] At 6:57 a.m., on April 6, 2018, the Complainant sent Mr. Satarov the following text message:

> [TRANSLATION]
>
> Hi Oumite, I still have the flu. I won't be able to come to work today sorry!
>
> However, regarding Anton Lablanz, I was supposed to call him today to get him to make his written statement. He can do it on the second page of the MINTZ authorization. We can then send . . .[13]

[Translated as it appears in the French version]

[43] On the same day, at 7:33 a.m., Mr. Satarov sent the following reply in a text message:

> [TRANSLATION]
>
> Listen I'll take care of everything! Shannen, I really understand, but I can't expand like this! Please send someone to pick up your last cheque! Everything's ready.

[Translated as it appears in the French version]

[44] At the hearing, the Complainant explained that she had clearly understood that she was being dismissed because of her pregnancy-related absences. In turn, Mr. Satarov attempted to explain at the hearing that the message was actually referring to the quality of the Complainant's work and the mistakes she had made.

[45] He also testified that he had not required that the medical reports be given to him because he trusted the Complainant. He stated that he had a great deal of empathy for women experiencing pregnancy complications and that he would never have wanted to discriminate against the Complainant.

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[13] The rest of the message was not filed with the Tribunal on time; the Tribunal will therefore rely only on the truncated version.

Quality of Work

[46] The Complainant testified that Mr. Satarov was in such a hurry to send his drivers on the road that he did not wait for the results of drug and alcohol tests or criminal background checks before assigning trips to drivers.

[47] Mr. Satarov testified on the contrary that he would not send drivers whose files had not been finalized or were not compliant on the road. He would not put his company at risk since a drug test or criminal background check violation could have disastrous consequences for his company. He mentioned the 2017 USDOT report that saw his safety rating drop.

[48] Criminal background checks are done through the Mintz website. According to a document taken from that site, the response time for a criminal record check in Canada is 24 hours. Also before the Tribunal is an email sent by Mr. Etchart, an account manager at Mintz Global, to the Complainant on October 18, 2019, according to which a criminal background check in Canada takes 8 business hours.

[49] The Respondent uses the CannAmm website to request drug and alcohol tests and to receive the results. The Respondent filed a list of [TRANSLATION] “those responsible for drug testing with CannAmm”. It submits that the Complainant was the only person who could request those tests. The Tribunal questions Mr. Satarov’s statement as the document in question, which is undated, lists Mr. Satarov and five other people as [TRANSLATION] “active” contacts, as well as the names of seven other people, including that of the Complainant, who are not checked as being “active”.

[50] As mentioned above, Mr. Satarov claimed the Complainant was dismissed because of a series of mistakes she made.

[51] Mr. Satarov testified that over the week of March 12, 2018, he hired six new drivers and did a road test with a driver who was to start on March 16. He checked with the Complainant whether the file of the driver in question had been finalized. The Complainant allegedly replied that the file was complete, but Mr. Satarov noticed that the Complainant had not made arrangements for the drug test, such that Mr. Satarov had to cancel the trip

and lost the client. He testified that he had been unhappy about this and that he had met with the Complainant about the matter in her office to ask her not to repeat the mistake. According to his statements, he gave her the 2017 investigation report a second time at that point.

[52] During the week of March 19, 2018, the same situation occurred with another driver. Mr. Satarov again had to cancel a trip. He submitted that he met with the Complainant again to tell her about the mistake. He claimed that he had been [TRANSLATION] "really frustrated", but that he had given the Complainant a second chance.

[53] The Complainant disputed these claims in her testimony and stated that she had never received this investigation report and that Mr. Satarov had never given her negative feedback about the cancelled trips. Under cross-examination, she stated that Mr. Satarov may have met with her once.

[54] Indeed, an invoice sent to the Respondent by Mintz for the period ending April 30, 2018, indicates that the Complainant had requested background checks for four drivers. According to this document, Mr. Satarov also requested a criminal background check for one of these drivers, which, in the Tribunal's opinion, reveals a contradiction with Mr. Satarov's testimony that only the Complainant requested this type of check.

[55] At 9:46 p.m. on March 27, 2018, Mr. Satarov sent an email to a number of people, namely, his brother Ishan Satarov, who is a dispatcher, the Complainant and another person who also works for the Respondent. The email concerned a new driver, N. M., who was to come the following day at 10 a.m. to apply and whose first trip had been scheduled for April 11, 2018, with F. K., a coworker. Mr. Satarov requested that the new employee's file be finalized. However, after a check in the CannAmm system, Mr. Satarov saw that N. M. had never been registered in the system, meaning that he would not be able to do the drug tests before the trip scheduled for April 11, 2018. Mr. Satarov blamed the Complainant for the error and submitted that this type of mistake can have extremely serious consequences for his company.

[56] At the hearing, the Complainant stated that she had received this email, but since she had not been at work on March 28, she had not done the work requested. Under cross-

examination, she stated that upon her return to work, she had not done the work requested in the mistaken belief that Mr. Satarov had done it himself.

[57] Moreover, according to his testimony, Mr. Satarov checked some files on March 30, 2018. He found that the same type of mistake had been made in five drivers' files. He filed excerpts from these files before the Tribunal. These documents suggest that the verification was actually performed on October 24, 2019. Confronted about this, Mr. Satarov gave the explanation that the verification had been done on March 30, 2018, but that the document had only been printed on October 24, 2019, in preparation for the hearing.

[58] In any event, the document reveals that an error was noticed in the file of driver A. I., who was teamed up with S.I., who allegedly did not do a drug test before embarking on a trip on March 2 and 3, 2018.

[59] The same mistake was allegedly also made for a trip on March 11 and 12, 2018, for which drivers M. K. and F. D. did not appear in the CannAmm system. The same is true of a March 20, 2018, trip, for which drivers V. R. and A. R. also did not appear in the CannAmm system.

[60] Mr. Satarov blamed the Complainant for these major errors and told the Tribunal that the errors were ample justification for the Complainant's dismissal.

[61] In contrast, the Complainant testified that even when files had not been finalized, when drug tests had not been performed or when signatures were missing, Mr. Satarov was impatient to send drivers on the road and would send them anyway. According to the Complainant, the final decision as to whether or not to send a driver on the road was Mr. Satarov's alone to make.

[62] She also stated that she was not the only person with access to the system to do verifications and order tests. Indeed, the document filed by the Employer, the list of [TRANSLATION] "those responsible for drug testing with CannAmm" establishes that a number of other people on the list had [TRANSLATION] "active" status. The Complainant argues that there is no evidence that she was responsible for the mistakes.

[63] She added that if she had made the errors she is now accused of in the hearing before the Tribunal, they were never mentioned to her verbally or by email while she was working for the Respondent or even when she was dismissed. She noted that if she had been informed of them in a timely manner, she could have rectified her behaviour and learned from her mistakes.

[64] Instead she remembered being congratulated by Mr. Satarov for her organizational skills at work.

[65] On March 29, 2018, the Respondent adopted a drug and alcohol policy in order to comply with the rules and requirements imposed by the U.S. Department of Transportation.[14] The Complainant testified that she had neither received nor reviewed this policy, while Mr. Satarov affirmed the contrary.

[66] On April 2, 2018, the Employer hired an office clerk. The Complainant argued that this hiring was part of a strategy to replace her. She maintained that her April 6, 2018, dismissal was premeditated and that the Employer had merely waited for her next absence to terminate her employment.

[67] In contrast, Mr. Satarov testified that he took over the work previously done by the Complainant and that the new employee was hired to perform other tasks.

Record of Employment

[68] On April 18, 2018, Mr. Satarov completed the Service Canada Record of Employment, stating a shortage of work as the reason for the termination. In response to a question at the hearing, he explained that the accountant had told him to complete the form in that manner. The Tribunal questions this statement—if the termination was connected to the Complainant's bad performance or incompetence, then why not say so on the form?

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[14] *Omnibus Transportation Employee Testing Act of 1991*, H.R. 3361 102nd Congress (1991-1992).

Why would he knowingly make a false statement on the form? The question received no credible reply.

What the Evidence Reveals

[69] The Tribunal finds that the evidence demonstrates that the Complainant's pregnancy-related sick leave is one of the factors that explained her dismissal. Whether the dismissal was premediated, as the Complainant argues, or not, whether the Employer was waiting for the Complainant's next absence or not, is irrelevant as, in any event, one of the grounds for her dismissal relates to her pregnancy-related sick leave.

[70] There may certainly have been other reasons in the Employer's mind at the time of the dismissal, but the Tribunal does not have to determine whether these reasons were based on proven facts or whether they sufficed to result in dismissal. To allow a complainant's complaint, it is sufficient for the protected characteristic or characteristics, in this case, pregnancy and disability, to have been one factor in the Employer's decision.

[71] In this case, the Complainant was pregnant when she was hired. She took sick leave as a result of her pregnancy in her first week of work and again over the course of four of the five weeks that made up her employment.

[72] The Tribunal is of the opinion that the April 6, 2018, text message justifying the dismissal cannot be interpreted in any other way than meaning that Mr. Satarov was exasperated with the Complainant's absences and was complaining that he had to do everything by himself. Nothing in the April 6 message mentions any mistake whatsoever that the Complainant might have made in her work. The Tribunal does not find the Respondent's explanation about the quality of her work to be persuasive as it only came after the fact.

[73] Indeed, the evidence establishes that at the time of the dismissal, Mr. Satarov gave no other verbal explanation and did not mention the quality of the Complainant's work. In addition, the Complainant was dismissed the day after she took sick leave again and right after she told Mr. Satarov that she would be away again on April 6, 2018. The close timing

of the events weighs in favour of recognizing a causal relationship between the absences and the dismissal.

[74] As we saw earlier, Mr. Satarov claimed that he lost customers as a result of the mistakes the Complainant allegedly made in the weeks of March 13 and 19. The Complainant disputed this.

[75] In any event, even if one believes Mr. Satarov's statement on this issue, it does not change the fact that the Tribunal finds that the reasons for dismissal suggested in the April 6 text message do not refer to it, even implicitly. The explanation came later and does not allow the Tribunal to rule out the assumption that the dismissal was related to the Complainant's many absences.

[76] The Tribunal also has doubts about the date on which Mr. Satarov checked the files of five drivers as the excerpt from the files is dated October 24, 2019. The Tribunal is not persuaded by Mr. Satarov's explanation that the verification was actually done on March 30, 2018, but that the printing was only done on October 24, 2019. In all likelihood, the verification was done well after the Complainant was dismissed.

[77] Even if one assumes that the verification was done before her dismissal, that Mr. Satarov discovered mistakes in it for which the Complainant was responsible and that he was unhappy with the Complainant's work, he did not share his grievances with her in a timely manner. He never gave her a chance to review her work methods or to rectify her mistakes for the future. The Tribunal finds the Complainant's statement that Mr. Satarov did not blame her for the errors that are now being raised in five files during her employment more convincing.

[78] The Tribunal nonetheless considers it possible that the verification done in October 2019 may have comforted Mr. Satarov about the decision he made to dismiss the Complaint 18 months earlier, if she was indeed responsible for the mistakes.

[79] Moreover, even the employment agreement, offered by the Employer and signed by the Complainant, contains clauses on termination on the ground of illness-related absences. They stipulate that the Employer may terminate an employment if the employee takes sick

leave for a specific number of days. The Tribunal infers a correlation between this and the discriminatory practices of the Employer.

[80] As for the argument that Mr. Satarov had no intention of discriminating against the Complainant on the basis of her pregnancy and the complications that led her to take leave on several occasions, this factor does not have to be taken into consideration in the analysis. As noted in *Bombardier*,[15] some discriminatory conduct can be completely unconscious.

[81] The Tribunal therefore finds that the evidence establishes on a balance of probabilities that the grounds for dismissal included the fact that the Complainant took leave for medical reasons related to her pregnancy. She therefore experienced an adverse impact with respect to her employment, and the characteristics protected by the Act were a factor in the adverse impact.

[82] As for having been dismissed on the basis of her ethnic or national origin, as argued by the Complainant, the Tribunal finds no evidence to support this allegation. The Complainant was able to express herself in English or French when dealing with her colleagues and her Employer. The fact that she did not understand all the private conversations between her colleagues does not demonstrate that her national or ethnic origin played a part in the Employer's decision to dismiss her. In fact, her lawyer does not mention this ground in his written submissions.

[83] Consequently, the Tribunal concludes that the Complainant has fulfilled her burden of establishing *prima facie*, on a balance of probabilities, that she was discriminated against, on the basis of paragraph 7(a) of the Act.

[84] The answer to question C is therefore yes.

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[15] *Bombardier,* above, note 5 at para 41.

D. If the dismissal is related to one or more of the characteristics protected by the *Canadian Human Rights Act*, did the employer justify its decision under s15 of the Act or was it able to limit its liability under section 65 of the Act?

[85] The Employer did not raise a defence under section 15 of the Act and did not file any evidence that could justify limiting its liability under section 65 of the Act. The Tribunal therefore does not have to deal with these aspects.

[86] The Tribunal's answer to question D is no.

E. If not, what are the applicable remedies?

[87] Since the Tribunal finds that the complaint is substantiated, it may order remedies under subsection 53(2) of the Act.

[88] The Complainant testified that her dismissal had come as a shock. It had hurt her deeply to the point that it had undermined her self-confidence. She stated that she had slept badly at night, had been stressed and had been afraid that her unborn baby would be malformed because of the stress she experienced as a result of her dismissal.

[89] Financially speaking, she had to ask for help from her parents and parents-in-law because her spouse had a low-paying job.

[90] The Complainant believes that had it not been for her dismissal on April 6, 2018, she would have carried on working throughout her pregnancy since, except for the first trimester, her pregnancy went smoothly afterwards. According to her assessment, she would have carried on working until October 12, 2018, which was two weeks before she gave birth.

[91] The Complainant tried to find another job after her dismissal. She applied for three different jobs in administration on April 12, 2018, and two on April 16, 2018, and further jobs on May 3, May 8, May 10 and June 19, 2018. On May 15, 2018, she attended a job search support meeting organized by the Government of Quebec's Ministère du Travail, de l'Emploi et de la Solidarité sociale.

[92] Given the fruitlessness of her efforts, she gave up on the idea and applied for maternity benefits in July 2018.

[93] According to the documents filed by her lawyer, the Complainant estimates her financial losses to be $75,918.92, plus interest, broken down as follows:

- $18,038.84 in lost wages;
- $10,981.88 for the Régime québécois d'assurance parentale (RQAP) shortfall;
- $6,898.50 for lawyers' fees;
- $20,000 for pain and suffering; and
- $20,000 for wilful or reckless discriminatory practices.

[94] The Complainant is also asking the Tribunal to order public interest remedies so that the Respondent:

- ends its discriminatory practices;
- prepares a non-discrimination and support policy for pregnant employees and the workplace; and
- develops or reviews its training program to incorporate mandatory training to implement its non-discrimination policies.

(a) Financial Losses

[95] Paragraph 53(2)(c) of the Act provides that the Tribunal may order compensation for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice. In *Chopra*,[16] the Federal Court of Appeal noted that this discretion belongs to the Tribunal. The Court also stated that there has to be a causal link between the recognized discriminatory practice and the wage loss claimed and

[16] *Chopra v.Canada (Attorney General)*, 2007 FCA 268 at para 37.

that in exercising this discretion, the Tribunal may consider the principles underlying the mitigation of losses that might apply in other contexts.[17]

[96] The Complainant is seeking $18,038.54 in lost wages; $10,981.88 for the RQAP shortfall; and $6,898.50 for the reimbursement of her lawyers' fees, which comes to a total of $35,918.88.

[97] The Tribunal will award $29,020.41 for financial losses for the following reasons.

[98] The Tribunal finds that had it not been for the discriminatory practice, the Complainant would have carried on working from April 9 to October 12, 2018, until about two weeks before her delivery date of October 25, 2018. According to the evidence, the second and third trimesters of the pregnancy went smoothly, meaning that in all likelihood the Complainant would have carried on working as normal. The Complainant would therefore have received her salary for an additional 26 weeks and 4 days during the April 9 to October 12, 2018, period. The Complainant was earning $673.08 gross a week, meaning an $18,038.54 ($673.08 x 26.8) shortfall.

[99] She therefore lost $18,038.54 in wages.

[100] As for the RQAP shortfall, the Complainant estimates this to stand at $10,981.88, which matches the evidence on file. Indeed, the Complainant was entitled to 50 weeks of benefits, the amount of which is based on the average weekly salary of the 26 weeks preceding delivery. According to the evidence on file and the Complainant's statement of particulars, which is not disputed on this aspect, she would have received benefits totalling $21,033.75 had she kept her job, yet she only received $10,051.88. There is therefore a $10,981.87 ($21,033.75 – $10,051.88) shortfall.

[101] The RQAP shortfall is therefore $10,981.87.

[102] As we saw earlier, the Complainant has a duty to mitigate her losses. The Employer claims that she failed in this duty. The Employer wonders why, when she realized that she

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[17] *Idem* at paras 37, 40.

was not finding any work in the field of administration, she did not try to find a job in the food service industry or in another field.

[103] According to the evidence on file, the Complainant allegedly worked in an administrative position with a real estate agent from October 2017 until she was hired by the Respondent in February 2018. The evidence establishes that she applied for 10 or so job openings in administration between April and July 2018. She started her job search within a matter of days of being dismissed. She also attended a job search support meeting organized by the government. She made a serious effort revealing a true intention to find a new job before giving birth. The Tribunal finds that it was wise for her to try to leverage her administrative experience for a new employer. She was not required to find a job in an area in which she had no work experience. The Employer's suggestion in this regard is unreasonable to say the least.

[104] The Tribunal finds that the Complainant made a critical, necessary effort to mitigate the loss she suffered, and she is therefore entitled to a full reimbursement of her lost wages.

[105] The Complainant is also asking that her lawyers' fees in the amount of $6,898.50 be paid.

[106] The Tribunal notes that it may not award costs, be they legal expenses or fees for services incurred in the course of litigation. This principle was developed by the Supreme Court of Canada, which established that the Tribunal's authority to award a complainant any expenses incurred by the victim as a result of the discriminatory practice under section 53 of the Act does not include the authority to award legal costs. The Court held that "the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions".[18]

[107] The Tribunal is therefore not awarding any amount for legal fees.

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[18] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para 64.

[108] Consequently, the Complainant is entitled to $18,038.54 for lost wages and $10,981.87 for the RQAP shortfall, which comes to $29,020.41 for financial losses under paragraph 53(2)(c) of the Act.

(b) Pain and Suffering

[109] The Complainant is seeking $20,000 for pain and suffering.

[110] Under paragraph 53(2)(e) of the Act, the Tribunal may award a maximum of $20,000 to compensate a victim of discrimination for any pain and suffering the victim may have experienced.

[111] The case law establishes that this maximum amount is awarded only in the most egregious of circumstances, where the extent and duration of the pain and suffering warrant the full amount.[19]

[112] In order to set a fair amount for pain and suffering, the Tribunal must therefore assess, among other things, the emotional consequences, frustration, disappointment, loss of self-esteem and self-confidence, grief, emotional well-being, stress, anxiety and sometimes even depression, suicidal thoughts and other psychological symptoms resulting from the discriminatory practice. That type of demonstration is not necessarily easy to do.

[113] A medical record can be helpful in proving an individual's emotional state, but it is certainly not mandatory for establishing pain and suffering. In some cases, a medical record can support the evidence for the mental health consequences for a victim of discrimination; in other cases, the testimony of the victim, and of his or her work colleagues and loved ones can shed light on the extent, intensity and duration of the pain and suffering experienced by the victim.

[114] In this case, there is no medical or other evidence to suggest that the pain and suffering, even though it has been established, was of great magnitude. Futher, the intensity

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[19] *Closs v.Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30 (CanLII) at para 81.

of the emotional stress seems to have been fairly limited in time. The Complainant testified that she was very surprised about the dismissal, that she had not been expecting it and that it had come as a shock. She noted that it had undermined her self-confidence. However, the key element seems to have more to do with the stress related to the financial consequences of the dismissal at a time in her life where she was expecting a child and her spouse was earning a low income. Her family and her in-laws had to help out financially to support the Complainant and her family. Today the Complainant reports that she no longer dares work for a small company, having lost trust in this type of business. She now works for herself and is self-employed.

[115] Her spouse testified at the hearing that the dismissal had been very stressful for the Complainant.

[116] In these circumstances, taking into account the legal limit of $20,000, the Tribunal finds that $7,000 is fair compensation for the pain and suffering experienced by the Complainant.

(c) Special Compensation

[117] The Complainant is also seeking $20,000 in special compensation under section 53(3) of the Act. This provision allows the Tribunal to order a person to pay such compensation not exceeding $20,000 to the victim as the Tribunal may determine if the Tribunal finds that the person is engaging or has engaged in a discriminatory practice wilfully or recklessly.

[118] The Federal Court[20] notes that "[i]n making an order for special compensation under subsection 53(3) of the Act, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly". The Court states that "[t]his is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate", adding that "[a] finding of wilfulness requires the discriminatory act and the

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[20] (*Canada (Attorney General) v.Johnstone*, 2013 FC 113 (CanLII) at para 155, affirmed by the Federal Court of Appeal, 2014 FCA 110 (CanLII).

infringement of the person's rights under the Act [to be] intentional". Recklessness "usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly".

[119] According to the case law, the maximum award of $20,000 must be reserved for the very worst cases.[21] Various behaviours can lead to compensation under this heading, such as wishing to discredit, humiliate, insult, shame, offend or belittle; adopting an adversarial, hostile and mean attitude; or ignoring or marginalizing the victim, depriving the victim of support or actively discouraging him or her. This type of conduct could justify punitive compensation within the meaning of subsection 53(3) of the Act. As with any other harm, the burden is on the victim to demonstrate it on a balance of probabilities.

[120] In this case, no evidence of such conduct, be it direct or implicit, or that might arise from the facts was submitted. In short, the Complainant merely relied on the provision without establishing the elements that could trigger its application.

[121] Consequently, the Tribunal will not award amount as special compensation within the meaning of section 53(3) of the Act.

(d) Interest

[122] The total amount of compensation awarded is therefore $36,020.41, namely $29,020.41 in compensation for lost wages and $7,000 for pain and suffering. The Complainant is asking the Tribunal to order that interest be awarded on the amount of the remedy. The Tribunal is allowing the claimed interest under subsection 53(4) of the Act.[22]

[123] Under subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure*,[23]any award of interest shall be simple interest calculated on a yearly basis at the

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[21] See, for example, *Gilmar v.Alexis Nakota Sioux Nation Board of Education*, 2009 CHRT 34 (CanLII) at para 341.

[22] See, for example, *Nielsen v.Nee Tahi Buhn Indian Band,* 2019 CHRT 50 (CanLII).

[23] *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04).

Bank Rate (monthly series) established by the Bank of Canada. The award of interest shall accrue from the dismissal date until the date of payment of the award of compensation.

(e) Systemic Remedies

[124] The Complainant is requesting that systemic remedies be imposed on the Respondent. She is asking the Tribunal to order the Respondent to end its discriminatory practices; to prepare a non-discrimination and support policy for pregnant employees and the workplace; and to develop or review its training program to incorporate mandatory training to implement its non-discrimination policies.

[125] The Tribunal finds that since the Respondent does not have a human resources policy with respect to sick and pregnancy leave, systemic measures such as those the Complainant is seeking are mandated under paragraph 53(2)(a) of the Act. In the circumstances, the Tribunal orders the Respondent to immediately stop discriminating against its pregnant employees or employees taking pregnancy-related sick leave; and to adopt, in accordance with the requirements of paragraph 53(2)(a) of the Act*,* measures to prevent future incidents of discrimination on the basis of pregnancy or disability within six months of this decision.

[126] The Tribunal will require the Respondent to consult the Canadian Human Rights Commission to develop and implement these measures.

VI. Orders

The Canadian Human Rights Tribunal concludes that the complaint of discrimination on the basis of sex and disability is allowed and orders Transport Fortuna to:

> **PAY** Lise Shannen Jovel Abreu the amount of $36,020.41, that is $29,020.41 in compensation for lost wages and $7,000 for pain and suffering, within 30 days of this decision being served;

PAY Lise Shannen Jovel Abreu the interest that has accrued on the sum of $36,020.41 from April 6, 2018, until the payment of the award of compensation, within 30 days of this decision;

END the discriminatory practices based on pregnancy or disability;

ADOPT measures to prevent future incidents of discrimination based on pregnancy or disability within six months of the date on which this decision is served; and

CONSULT the Canadian Human Rights Commission to develop and implement the measures provided for in the previous paragraph of this order.

Signed by

Marie Langlois
Tribunal Member

Ottawa, Ontario
October 26, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2393/5219

Style of Cause: Lise Shannen Jovel Abreu v. Transport Fortuna

Decision of the Tribunal Dated: October 26, 2020

Date and Place of Hearing: July 28 and 29, 2020

By videoconference

Appearances:

Shahrooz S. Mahmoudian, for the Complainant

Marin Guzun, for the Respondent