

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

BRIGITTE LAVOIE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TREASURY BOARD OF CANADA

Respondent

RULING

MEMBER: Karen A. Jensen 2007 CHRT 3
2007/02/05

[1] This is a ruling on a preliminary motion to dismiss a complaint against the Respondent, Treasury Board of Canada, without a hearing. The Complainant, Ms. Brigitte Lavoie, filed a complaint against Treasury Board alleging that its new Term Employment Policy is discriminatory. The Policy does not allow maternity and parental leave time to count towards the three year cumulative service requirement needed to advance from term to indeterminate (permanent) employment status in the Federal Public Service.

[2] Treasury Board argues that the Tribunal does not have the jurisdiction to hear the complaint because, as a result of a settlement in a previous complaint, there is no longer a live controversy to be resolved. Therefore, according to the Respondent, the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, applies, and the complaint is moot.

Background

[3] Ms. Lavoie was hired on a one year contract with Industry Canada as a programmer-analyst in August 2000. Her contract was renewed in August 2001, and again in August 2002. On August 19, 2002, Ms. Lavoie went on maternity leave. She returned to work from her leave on or about August 5, 2003.

[4] Prior to her return to work, Ms. Lavoie was informed by her employer that she would be given an opportunity to compete for several permanent ("indeterminate") positions within Industry Canada. Those who were unsuccessful would be given three weeks to find a new position. Ms. Lavoie was unsuccessful in the competition for the indeterminate positions. Her contract with Industry Canada ended in August 2003, and was not renewed.

[5] Prior to her departure on maternity leave, Ms. Lavoie's employment was subject to a Treasury Board Policy regarding Term Employment. That Policy stipulated that where a person had been employed in the same department as a term employee for a cumulative period of five years without a break in service longer than sixty days, the department was required to appoint the employee indeterminately at the level of his or her substantive position. Time spent on unpaid leave counted towards the cumulative five year working

period that was required to become an indeterminate employee. Maternity and parental leave were considered to be "unpaid leave".

[6] While Ms. Lavoie was on maternity leave, however, the Treasury Board Term Employment Policy changed. The five year requirement was reduced to three years, but time on unpaid leave no longer counted towards the cumulative working period. Were it not for the fact that she was on maternity and parental leave for a year, Ms. Lavoie would have qualified, under the new Treasury Board Policy, for an indeterminate position.

[7] In July 10, 2003, Ms. Lavoie filed a complaint with the Canadian Human Rights Commission against Industry Canada alleging that the new Treasury Board Policy was discriminatory. She also alleged that the way in which Industry Canada handled the competitions for the indeterminate positions was discriminatory. Among the remedies that she requested was an appointment to an indeterminate position in Industry Canada.

[8] On October 20, 2003, Ms. Lavoie entered into a settlement agreement with Industry Canada in which she agreed to withdraw her complaint in exchange for certain concessions. Specifically, Industry Canada granted her an indeterminate position as a programmer-analyst effective November 17, 2003. Ms. Lavoie agreed that the settlement constituted full and final compensation for all of the incidents alleged in her complaint against Industry Canada. In the settlement agreement, however, Ms. Lavoie reserved the right to file a complaint against Treasury Board regarding the new Term Employment Policy.

[9] On January 19, 2004, Ms. Lavoie filed another complaint with the Canadian Human Rights Commission, this time against Treasury Board, in which she has alleged that the new Term Policy is discriminatory. Although one of the consequences of the allegedly discriminatory Policy has been remedied since she now holds an indeterminate position with Industry Canada, Ms. Lavoie claims that she continues to suffer other negative consequences as a result of the Policy for which she has not received compensation. In addition, she seeks an order from the Tribunal requiring Treasury Board to amend its Term Employment Policy to permit maternity and parental leave to count towards the cumulative working period.

Analysis

[10] The Respondent argues that by virtue of the settlement of October 2003, with Treasury Board, the Complainant relinquished the right to claim any personal remedies flowing from the allegations made in the first complaint. Given that the allegations and the relief claimed in the first complaint are similar, if not identical, to those in the second complaint, the Respondent argues that the Complainant cannot claim a personal remedy in the second complaint. The Respondent also bases its argument on the principle of the indivisibility of the Crown.

[11] Thus it is argued that, even though the Complainant reserved the right to file a complaint against Treasury Board regarding the Term Employment Policy, there is no longer a live controversy between the Complainant and the Respondent because the Complainant does not have a personal interest in the resolution of the complaint. Without that, Treasury Board argues, the complaint is moot and should not be heard by this Tribunal. Finally, the Respondent argues that the allegations regarding the discriminatory nature of the new Policy have been conclusively determined in other forums and thus, there is no public interest in having the Tribunal examine this issue.

[12] For the following reasons I find that these arguments are without merit.

[13] Firstly, the *Act* does not require a complainant to pursue a personal remedy against the respondent in order to bring a complaint. Indeed, the *Act* does not require the complainant to be the victim of the alleged discriminatory practice. Section 40 of the *Act* stipulates that "any individual or group of individuals" having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file a complaint with the Commission. Moreover, section 53 of the *Act* provides the Tribunal with the authority to issue orders, in the event that the complaint is substantiated, that are not necessarily of a personal nature, but serve a broader public purpose in their remedial goals. Therefore, it is not necessary that the complaint be filed in pursuit of a personal remedy in order for the Tribunal to have the jurisdiction to hear it.

[14] Secondly, this Tribunal has held that a change in circumstances following the filing of a complaint or the settlement of the personal interests in a complaint does not necessarily deprive the Tribunal of the jurisdiction to hear the complaint (*Parisien v. OC Transpo* 15 July 2002; CHRT, at para. 42; and *Kavanagh v. Canada (Correctional Services)* 31 August 2001; CHRT, at paras. 7-9). Rather, these may be issues that will go to the question of the appropriate remedy in the event that the complaint is substantiated.

[15] It appears from the complaint form that Ms. Lavoie is asking for additional remedies that were not claimed in the first complaint. Whether she is barred from doing so in light of the settlement that she obtained from Industry Canada is an issue to be determined by the Tribunal in the event that the complaint is substantiated.

[16] In the settlement agreement, Ms. Lavoie specifically reserved the right to file a complaint against Treasury Board with regard to the new Term Employment Policy. The question of whether the new Policy is discriminatory has not therefore, been settled. Furthermore, I agree with the submissions of counsel for Ms. Lavoie that there has, to date, been no binding determination regarding the precise question that has been put before this Tribunal in Ms. Lavoie's complaint. Other than *Braconnier v. Treasury Board*, 2006 CRTFP 109, none of the authorities provided by the Respondent deal with the Policy in question in this complaint. In *Braconnier*, the arbitrator did not deal with the question of whether the new Policy was discriminatory since he found that he did not have jurisdiction to deal with this issue as a result of s. 7 of the *Public Service Labour Relations Act*. Thus, the question of whether the Treasury Board Policy on Term Employment is discriminatory is a live issue that has yet to be decided.

[17] For all of these reasons I find that the Respondent's motion to dismiss the complaint on the grounds that the issues raised have been settled and are now moot cannot succeed. The motion is therefore, dismissed.

"Signed by"

Karen A. Jensen

OTTAWA, Ontario

February

5,

2007

PARTIES OF RECORD

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STYLE OF CAUSE:	Brigitte Lavoie v. Treasury Board of Canada
RULING OF THE TRIBUNAL DATED:	February 5, 2007
APPEARANCES:	
Lise Leduc	For the Complainant
Giacomo Vigna	For the Canadian Human Rights Commission
Vincent Veilleux	For the Respondent