CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MAGALY GERMAIN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GROUPE MAJOR EXPRESS INC.

Respondent

REASONS FOR DECISION

MEMBER: Michel Doucet 2008 CHRT 33
2008/07/25

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I. INTRODUCTION

[1] By way of introduction, it would be worthwhile to review the purpose of the *Act*, as well as the Tribunal's role.

[2] The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended (the *Act*), is intended to give rise to individual rights of vital importance. Considering the powerful language of section 2, the purpose of the *Act* is clear. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the *Act* seeks to prevent all "discriminatory practices" based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted, which would deprive an individual of employment opportunities. It is the discriminatory practice itself that the *Act* seeks to prevent. The purpose of the *Act* is not to punish wrongdoing but to prevent discrimination (see: *Canadian National Railway Company v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at paragraphs 24 and 25).

[3] The purpose of the *Act*, therefore, is not to assign or punish moral blameworthiness. There is no doubt that Canadian legislation is usually drafted so as to avoid any reference to intent, evidently apart from subsection 53(3) of the *Act* where Parliament has provided that intent may have an impact on the compensation that the person who engages in a discriminatory practice may be ordered to pay to the victim.

[4] In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at page 547, the Supreme Court of Canada made its position clear regarding the purpose of such an *Act*, finding that its scope extends beyond intentional discrimination:

It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

[5] The importance of human rights legislation was recognized in *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145. Mr. Justice Lamer, as he then was, points out at page 158 that such legislation need not be treated "as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle was further articulated by Mr. Justice McIntyre, on behalf of a unanimous Supreme Court, in *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at page 156:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

[6] The case law therefore has recognized that the *Act* is fundamental and quasi-constitutional, so that human rights legislation prevails over other legislation (see also: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554).

[7] The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.

[8] In the following passage from the *Report of the Commission on Equality in Employment (1984)* (also called the "Abella Report"), at page 2 (passage referred to in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, at paragraph 37), the Commission eloquently explained that:

Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.

Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.

[9] In that legislative context, the main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Canadian Human Rights Commission (the Commission). It has many of the powers of a court of justice. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal must undertake its own independent investigations of complaints: the investigative functions have deliberately been assigned by Parliament to a different body, the Commission.

[10] The hearing before the Canadian Human Rights Tribunal is intended to give the Tribunal the opportunity to hear relevant evidence and arguments so that it can determine whether there has been discrimination. At the hearing, complainants have the opportunity to explain, through their evidence, how they were discriminated against and what remedy they are seeking. The respondent will have the opportunity to refute the complainant's allegations and, where applicable, to counter the claims for relief.

[11] It is not the Tribunal's place to presume facts which should have been adduced, to make determinations on unfounded speculation or to redo counsel's work. The Tribunal takes the record as it is and makes the decision that is the fairest in light of the facts and arguments before it.

A. LEGAL CONTEXT

[12] On September 12, 2004, Magaly Germain (the complainant) filed a complaint against Groupe Major Express Inc. (the respondent). The complainant alleged that the respondent had discriminated against her in the course of employment contrary to section 7 of the *Act*. More specifically, the complainant alleged that the respondent discriminated against her on the basis of her pregnancy by refusing to allow her to return to work following her maternity leave. The respondent, on the other hand, argued that it did not refuse to allow the complainant to return to work, but that rather it was she who voluntarily left her employment when she accepted a position elsewhere.

[13] Since the Supreme Court's decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also referred to as *Meiorin*], and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also referred to as *Grismer*], the classical distinction between direct discrimination and indirect discrimination has been replaced by a standardized analysis of human rights complaints. Under this analysis, the complainant must first establish *prima facie* evidence of discrimination.

[14] *Prima facie* evidence is evidence 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. The allegations made by the complainant must be credible in order to justify the finding that there is *prima facie* evidence (see: *Singh v. Statistics Canada*, [1998] C.H.R.T. No. 7, aff'd [2000] F.C.J. No. 417 (F.C.T.D.), and *Dhanjal v. Air Canada*, [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37). The decision-maker need not take the respondent's answer into account in determining whether the complainant has established *prima facie* evidence (*O'Malley v. Simpson-Sears Ltd.*, [1985], 2 S.C.R. 536, at paragraph 28; see also *Dhanjal v. Air Canada*, *supra*, at paragraph 6, and *Moore v. Canada Post Corporation and Canadian Union of Postal Workers*, 2007 CHRT 31, at paragraph 85).

[15] Once *prima facie* evidence has been established, the burden shifts to the respondent to provide a reasonable explanation for the alleged conduct.

[16] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses (*Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3, at paragraph 81). A complainant need not establish that discrimination was the only factor influencing the conduct alleged in the complaint. The complainant need only establish *prima facie* evidence that discrimination was one of these factors (see: *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029).

B. THE FACTS

[17] The respondent is an interprovincial and international trucking business operating essentially in Quebec, Ontario and the United States. Daniel Gaudreau is the President. In 2002, the respondent made a proposal to its creditors under the *Bankruptcy Act*, R.S.C. 1985, c. B-3. The first meeting of the creditors took place on October 18, 2002. The proposal was accepted by the creditors and went into effect on November 5, 2003. (The issue of the effect of the proposal in this matter was the subject of a preliminary decision: *Germain v. Groupe Major Express Inc.*, 2007 C.H.R.T. 57.)

[18] The complainant was hired by the respondent on July 1, 2002. The terms of the employment agreement were documented in writing and signed by both parties. According to this agreement, the complainant was hired as a [translation] "company operations dispatcher". The agreement provided that her duties would be to assist management [translation] "in the daily management of client transport needs" and, more specifically, to plan client needs and the delivery service with the drivers, to oversee driver's logs and to support their needs, to verify road expenses and any other work required by management and related to dispatch.

[19] For this work, the employment contract provided that the complainant would receive a weekly salary of $770, the equivalent of an annual salary of $40,040. The agreement, drafted by the respondent, did not provide for a probationary period or a training period. However, on cross-examination, the complainant said that [translation] "on July 2, I was in `training'," thereby recognizing that there was a training period at the beginning of her

employment. During his examination, Mr. Gaudreau stated that when she was hired in July [translation] "[the complainant] had to become familiar with the business and the drivers. The second week, she began to take control and to better understand the business and the operation of our LINK computer system". Based on this, I find that if there was a "training period", it did not go beyond the first two weeks after she was hired.

[20] Around the end of July or beginning of August 2002, the complainant learned that she was pregnant. Her due date was March 23, 2003. She said that she immediately advised her employer of this, which Mr. Gaudreau did not deny.

[21] The first month of pregnancy was no picnic. The complainant often suffered from nausea. She said that she was not in the best physical shape. She stated that she had to miss work on several occasions at the beginning of September 2002. On September 26, 2002, her physician gave her a medical certificate stating that she would be absent from work on September 26 and 27 for health reasons. However, she did not return to work after these two days of sick leave.

[22] On October 25, 2002, her physician issued a new medical certificate, placing the complainant off work from September 26, 2002, until she gave birth. On the certificate, the physician indicated that she had stopped working [translation] "for health reasons (significant stress and insomnia incidental to her work)". When she testified, the complainant stated that she was on preventative cessation of employment because of complications due to the fact that the [translation] "placenta was not in place" which [translation] "could be dangerous for the baby". However, I note that the medical certificate did not refer to the medical condition described by the complainant and that the complainant did not file any evidence to support this statement. In any event, the respondent did not dispute this evidence.

[23] According to the complainant, she had a good relationship with her employer until she stopped working on September 26, 2002. To support this statement, she stated that in December 2002, despite the fact that she was on medical leave, she was invited to the company's Christmas brunch. According to her, her due date was then known by the respondent, but there was no issue as to the expected date of her return to work.

[24] The complainant gave birth as expected in March 2003. In April, she visited the respondent to show her newborn to her coworkers. She stated that it was at that time that she left a letter, dated April 14, 2003, indicating that she would be returning to work on January 12, 2004. It was also at that time that she met her replacement, Antoine Genest.

[25] In June 2003, the complainant said that she received a call from Mr. Gaudreau, who asked her whether she would be able to return to work earlier, because he wanted to leave on vacation in July. She added that he even offered the services of his sister-in-law as a caregiver. The complainant stated that it was impossible for her to return to work at that time because her baby was only three months old and she had to breast feed.

[26] She said that she had another conversation with Mr. Gaudreau in August 2003. At that time, Mr. Gaudreau wanted to know when she would be returning to work. She added that he was insistent that she return to work as soon as possible. She said that his

insistence was stressful for her; she did not want to lose her job. She stated that she had attempted to find a caregiver for her child, but was unsuccessful. She said that she explained to Mr. Gaudreau that as long as she was unable to find a [translation] "reliable caregiver," she would not be returning to work until January 2004, as originally planned.

[27] Mr. Gaudreau had a different version of the events that occurred after the complainant gave birth. While acknowledging that she came to visit with her newborn in April 2003, he added: [translation] "She called us to say that she missed her job and that she was anxious to return. She said that she would return in June if she could find a caregiver." He added that in August 2003, she called him to tell him [translation] "that she knew that the company was not doing well financially. She asked whether there was a possibility that the company would close". According to Mr. Gaudreau, the complainant was concerned at that time about her job security.

[28] The respondent added that it was not until September 2003 that it learned of the letter dated April 14, 2003, in which the complainant stated that she planned to return to work in January 2004. At the hearing, Mr. Gaudreau added that he was [translation] "very surprised to see that the letter was dated April. This was wrong. It was in September that we received it and that she told us that she would be returning on January 12, 2004. We are categorical about that. I received that letter in September, not in April. She was still saying that she wanted to come back in June, that she was eager to return". When the Tribunal asked him whether he had a copy of the letter that the company had received with the date of receipt stamped on it, he answered that the respondent did not stamp the date of receipt on letters that it received. He was therefore not able to file evidence supporting his allegations to the effect that the complainant had antedated the letter.

[29] On cross-examination, Mr. Gaudreau testified that the complainant was supposed to return to work in June 2003. He added that in June, she contacted him to ask him whether she could return to work in August or September, because she was unable to find a caregiver for her child. Finally, he added that she wrote the employer in August to advise it that she would be returning on January 12, 2004. This letter from August, if it exists, was never filed in evidence at the hearing and there was no explanation given to the Tribunal to explain why it had not been filed.

[30] Even though he cross-examined the complainant on the contents of her letter dated April 14, 2003, the respondent's counsel never indicated that his witness, Mr. Gaudreau, would be testifying that he had not received the letter until September or that he would be alleging that the date on complainant's letter was false.

[31] In any event, whether or not the respondent received the letter in April or, as it alleged, in September, it never told the complainant, in writing or orally, that it did not accept her return-to-work date. At least, it did not provide any evidence to that effect.

[32] Mr. Gaudreau stated that the decision was made in September 2003 to hire a trainee to assist Antoine Genest, the complainant's replacement, because he was overwhelmed. Mr. Gaudreau added that indeed: "We negotiated that if he performed well we would keep him if [the complainant] did not return."

[33] On October 17, 2003, the complainant called Mr. Gaudreau to discuss her proposed return in January 2004. It was during this conversation that Mr. Gaudreau told her that she no longer had a place [translation] "on the team" and that he had hired Mr. Genest to work as a full-time dispatcher. According to the complainant, he added that he was willing to propose to her other companies where she could work.

[34] After this conversation, the complainant said that she called the "normes du travail du Québec", at which time it was suggested that she write a letter to her employer to determine whether the employment ties had indeed been severed.

[35] On October 22, 2003, the complainant sent a letter to Mr. Gaudreau confirming their conversation of October 17. In this letter, which she says was intended as a follow-up to their telephone conversation, she told her employer that she was [translation] "surprised to learn . . that he had waited until September" and that since she had not returned to work, he had to "hire François [the trainee] because [he] could no longer manage `dispatch'". The complainant added in her letter that she had asked Mr. Gaudreau whether she [translation] "still had a place with the company" and that he had answered [translation] "that his team of dispatchers was now complete [and] that he could no longer guarantee her a position". She said that he added that [translation] "it would be preferable that she begin to seek [new] employment". The complainant wrote that she had asked Mr. Gaudreau whether he had intended to wait until "January 10" to tell her that she no longer had a job, to which he responded, once again according to the letter, that he [translation] "no longer had her phone number".

[36] She also wrote in her letter that the employer had told her that her replacement's salary was $39,000 per annum, which was less than the salary that it had paid her and that this in itself justified its decision to [translation] "no longer guarantee her position". She wrote: "What you are forgetting is that maternity leave exists so that the mother can devote all of her time and energy to her newborn. However, in this situation, I will spend the last two and a half months of my leave worried and insecure and probably looking for another job because during this same conversation you made me feel as though you could not guarantee me a quality of life at work equivalent to the one I had before I left."

[37] Finally, she asked her employer to confirm in writing before November 5, 2003, that she could return to her work in January 2004, in the same position and with the same salary. The respondent did not respond to the complainant's letter.

[38] On cross-examination, the complainant stated that she had sent this letter to the respondent by registered mail. During his testimony, Mr. Gaudreau said that he did not recall receiving this letter. When asked by the respondent's counsel to file a copy of the postal receipt confirming the letter had been sent, the complainant gave him a document which appeared to have satisfied counsel since he did not continue that line of questioning. During the final submissions, the respondent did not revisit this point.

[39] Unfortunately, the postal receipt was not filed into evidence and the Tribunal therefore could not examine it. However, I am persuaded that if there had been a problem with the document, the respondent's counsel would not have hesitated to file it and, as he did not do so, I can only infer that this confirms that the letter had indeed been sent.

[40] As she did not receive a response from the employer, the complainant said that she began to look for work. On November 3, 2003, she was hired by a company by the name of "Royal Wood Shavings" for which she had worked before the respondent had hired her. The date she was hired for this new employment is somewhat surprising, considering that in her letter dated October 22, she had given her employer until November 5 to confirm whether or not it would let her return to her position in January 2004. She explained that she had decided to look for work, because she knew that it would be difficult to find work in Québec City in January.

[41] According to Mr. Gaudreau, on November 2, he called "Royal Wood Shavings", one of the respondent's clients, and [translation] "to his great surprise" the complainant answered the telephone. He added: [translation] "I asked her: What are you doing there? If you wanted to return to work, why didn't you return to us? All that she said to me was that Groupe Major Express was not secure. She was not sure whether or not we would remain open. I saw that [the complainant] was not interested in Groupe Major Express". A little later on, he added: [translation] "The conversation did not affect me. I was rather surprised that she was there. We did not know that she was there. As far as we were concerned, she was still ill, she was looking for a caregiver. I knew nothing of her efforts to find work elsewhere. She had never been dismissed. We were surprised to see . . . we wanted to know why she had gone to work elsewhere. We had been waiting for her at Groupe Major Express for more than a year at that point". To follow up on this conversation with the complainant and, faced with the [translation] "uncertainty of her return", Mr. Gaudreau said that he decided to confirm that Mr. Genest would be given permanent status as head dispatcher.

[42] During her testimony, the complainant did not refer to a telephone conversation that she allegedly had with Mr. Gaudreau in the beginning of November 2003. I also observe that the respondent's counsel did not question the complainant regarding this conversation.

[43] Mr. Gaudreau also referred to another conversation that he had allegedly had with the complainant in December 2003. According to Mr. Gaudreau, the complainant had called him to tell him that she wanted to return to work on January 12, 2004. He says that he told her that [translation] "she had to make up her mind. You are working at `Royal Wood Shavings.' Are you coming back or not?"

[44] According to the complainant, the conversation to which Mr. Gaudreau referred did not take place in December 2003, but rather in January 2004. According to her, Mr. Gaudreau called her to ask her to come back to work for the respondent. Also according to the complainant, he offered her a different position with a salary of $23,000, which was much less than what she was earning before her maternity leave. He also told her she would no longer be working as head dispatcher. In the complainant's opinion, this offer was unacceptable because even in terms of salary she was earning more at "Royal Wood Shavings", where her salary was $27,000. She stated that she asked Mr. Gaudreau to send her the offer in writing, adding that in any event [translation] "she was pregnant once again".

[45] The complainant added that she never did receive a written confirmation of the offer that Mr. Gaudreau made to her in January 2004. She added that she had also never followed up on this conversation because she [translation] "did not take the offer seriously".

[46] Mr. Gaudreau did not deny that he had called the complainant at home, although his testimony on this point was somewhat confused: [translation] "I called [the complainant] at home. She had called to find out whether her job was still available for January 12. I told [the complainant] that given your experience we would make her an offer. We offered her $30,000 per annum. The young man [trainee] was earning $27,000. She had more experience than him so I gave her a raise [*sic*]. At the end of three months we would see. She never talked about putting it in writing. She said okay, I'll call you back. She called me back 15 minutes later to tell me that she refused my offer. You give me $40,000 a year or I will not come back. I told her that I could not pay her $40,000 a year. I asked her to do her three months of `training'. You did not even finish your first month. I have not finished showing you the `job'. She categorically refused. She hung up on me. She called back and said she wanted $40,000. I said no, I cannot give you $40,000 and I cannot let you have the position you had before, because you do not have the experience to do it. She refused and said that, in any event, I am pregnant again and she hung up on me."

[47] On cross-examination, he added that following this conversation "her refusal [to accept his offer] liberated us".

[48] After their conversation in January, Mr. Gaudreau called the complainant back in May or June 2004. According to the complainant, he wanted to know how she planned to repay the $1,500 that the employer had paid her when she left on maternity leave. In fact, the employer had at that time paid the complainant three weeks of salary, two of which were to be reimbursed by the Commission de la santé et de la sécurité au travail du Québec (the CSST), at least according to what the parties believed at the time. However, since the respondent was a federal undertaking, the CSST refused to reimburse the employer. In an agreement dated January 7, 2003, the complainant undertook to repay this amount in increments of $100 per week for 15 weeks upon her return to work after her maternity leave. According to the complainant she told her employer during their conversation in June 2004 that she did not at that time have the means to pay back this amount. The issue was finally settled in an arbitral award dated March 3, 2005, in a proceeding under Division XVI of Part III of the *Canada Labour Code* involving the same two parties.

C. APPLICATION OF THE LAW TO THE FACTS

(i) Credibility of the witnesses

[49] The complainant has the initial burden of proof to establish a *prima facie* case of discrimination. Once this initial burden has been met, the respondent must then provide a justification or an explanation for the alleged discriminatory practice. In this case, the evidence filed by the parties was limited to the complainant's testimony and the testimony of Mr. Gaudreau, for the respondent. As expected, these witnesses did not have the same recollections or the same interpretation of relevant events. On many points, their

testimony was contradictory, forcing me to choose whose testimony was the most credible, which is never an easy task.

[50] Even though her testimony was not free of inconsistencies and ambiguities, on the issue of credibility I tend to prefer the evidence submitted by the complainant for the reasons that follow. *Inter alia*, the complainant supported many of her claims with evidence in writing. For example, she submitted in evidence a letter dated April 14, 2003, informing her employer that she would not return to work until January 2004. On the other hand, on this point the respondent's witness made only an unfounded statement to the effect that the date of this letter had been falsified and that, in any event, he had not received it until August or September 2003. However, he did not file the copy of the letter received by his company and, when I asked whether the respondent had in its possession a letter with a stamp indicating the date of receipt, he answered that the respondent did not stamp the dates of receipt on the letters it received. This explanation did not persuade me and indeed it did not explain why the "letter" of August or September 2004 had never been filed.

[51] I also observed that, during the complainant's cross-examination, the respondent's counsel did not really question her about the substance of this letter and in particular he did not draw her attention to the fact that his witness was going to testify that he had not received the letter in April and that he was indeed going to impugn the date indicated on the letter. On this point, I note that the rule established in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), requires counsel to warn witnesses that counsel later intends to impugn their credibility, unless witnesses have already been notified that their credibility will be challenged. The justification for this rule was explained as follows by Lord Herschell, at pages 70-71, of the decision:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

(See also: *R. v. Lyttle*, [2004] 1 S.C.R. 193 and Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed., LexisNexis Butterworth, pages 954-957.)

[52] Furthermore, although in certain respects the complainant's testimony was somewhat inconsistent, I found her testimony far more credible overall than the testimony of the respondent's witness.

[53] In regard to the telephone conversation of October 17, 2003, the complainant filed in evidence a letter dated October 22, 2003, confirming the substance of the discussions that she had allegedly had with Mr. Gaudreau. Mr. Gaudreau did not deny receiving this letter, even though he said that he did not remember it. I also observe that during the complainant's cross-examination, the respondent's counsel asked to see the postal receipt confirming that the letter had been sent by registered mail. After reviewing this document, Mr. Jobidon did not ask the witness any other question on this point, and did not ask that the receipt be filed in evidence. I find on this basis that the document confirmed that the letter was sent on or about the date indicated. I also find that the content of the letter faithfully reflects the conversation that took place between these two individuals, since it was not challenged by the respondent.

[54] When he testified, Mr. Gaudreau referred to two conversations that he had with the complainant in November and December 2003. The complainant never referred to these conversations and she was never cross-examined about them. According to Mr. Gaudreau, it was during this conversation in November that he learned that the complainant was working at "Royal Wood Shavings". He added that following this conversation, he decided to confirm the permanent status of Mr. Genest, the complainant's replacement, as head dispatcher. Then Mr. Gaudreau's testimony became difficult to follow. According to him, the complainant contacted him again in December 2003 to tell him that she was still interested in returning to work for the respondent in January 2004. Mr. Gaudreau told her that [translation] "she had to make up her mind. You are working at `Royal Wood Shavings'. Are you coming back or not?" If the respondent had learned at the beginning of November that the complainant had accepted employment elsewhere and if this had prompted the confirmation of Mr. Genest's position as head dispatcher, as Mr. Gaudreau stated, why then would he in December again have discussed the possibility of her returning to work?

[55] On cross-examination, Mr. Gaudreau explained that he had [translation] "agreed to take back" the complainant even though Mr. Genest had just been given permanent status. He added that the second dispatcher position was still available [translation] "because we decided to lay off the second dispatcher [the trainee] to replace him with the [complainant]". Why then would he act this way when already in November 2003 he considered that the complainant had left her job? According to Mr. Gaudreau, the decision to dismiss the [translation] "trainee" from the position of [translation] "second dispatcher" on December 22, 2003, was made because of the complainant's possible return. Accordingly, this conversation, if it took place, must have taken place before December 22, 2003, the date that the trainee was relieved of his duties. In that case, why did Mr. Gaudreau not inform the complainant at that time that the respondent was not going to take her back as head dispatcher, especially since he had already confirmed that Mr. Genest was head dispatcher?

[56] The chronology of the events as presented by Mr. Gaudreau is difficult to follow. Even though he had spoken with the complainant about her possible return during a telephone conversation in December 2003, it appears that he did not tell her that the business was [translation] "reviewing employees' salaries because of financial difficulties" until a conversation in January 2004. He even stated that all [translation] "the salaries were decreased by 15%". He added that during this conversation: [translation] "[The complainant] was told that we would take her back, but that we would renegotiate her salary, because the business could not pay two salaries of $40,000. François [the trainee] left on December 22. The complainant called back on January 10 and asked if the work was ready. I told her that yes, we are ready to have you back. Given the "training" that you were unable to complete at the beginning of your employment, given your lack of experience, we will put you on as second "dispatch" behind Antoine who at this time has one year of experience. We cannot appoint you as head dispatcher with only two weeks of training. In 2003, we had 30 trucks and not 20 as we had when she began."

[57] When Mr. Gaudreau stated that the business [translation] "could not pay two salaries of $40,000", he was clearly referring to the fact that Antoine Genest was now employed as head dispatcher and that he received a salary of $40,000. Yet on cross-examination, he stated that [translation] "[Antoine Genest] was employed as a dispatcher until September 2004. He left the employment for health reasons. He knew from the beginning that it was a temporary position, but because we did not know when [the complainant] was coming back, it was extended" [emphasis added]. Therefore, Mr. Genest had to fill this position on a temporary basis until the complainant's return. The respondent therefore had not originally intended to employ him on a permanent basis; it had asked him to replace the complainant during her maternity leave. When Mr. Genest was hired, there was also no issue about the complainant having failed to complete her training period.

[58] Mr. Gaudreau did not deny that he had called the complainant at home in January 2004, even though his testimony was somewhat confused: [translation] "I called [the complainant] at home. It was she who called to ask whether her job would still be there on January 12." He contradicted himself from one sentence to the next, first stating that he called the complainant, then immediately adding that it was the complainant who called him. According to the substance of this conversation, set out above, the respondent wanted to renegotiate the complainant's salary, claiming that she had not completed her training. The employment contract did not provide for any training period, or for a salary decrease in the event of prolonged absence.

[59] On cross-examination, Mr. Gaudreau added an interesting comment: [translation] "Her refusal liberated us". I interpret this remark as an indication that as of that moment the respondent considered the employment ties with the complainant to be severed. This statement is surprising to say the least in light of his earlier testimony to the effect that he had decided to confirm Mr. Genest's employment as head dispatcher, the position that the complainant had held, following his conversation with the complainant in November 2003. When Mr. Gaudreau confirmed Mr. Genest's employment, he was aware of the fact that the complainant was still expecting to return to work for the respondent. It appears now that it was the complainant's refusal to accept a different position at a lower salary in

January 2004 rather than the conversations of November and December 2003 that was [translation] "liberating".

[60] For all of these reasons, I do not assign much credibility to the testimony of the respondent's witness and where this testimony is inconsistent with the complainant's testimony, I prefer the complainant's testimony.

(ii) The maternity leave

[61] Although pregnancy is not an accident or an illness and is often a condition that is desired, it is undisputable that it is a valid health ground for leave from employment. For the employee, the economic consequences of the inability to perform the tasks involved in the employee's work are the same, regardless of whether this inability is the result of a pregnancy or another health ground resulting in leave from employment. The failure to consider pregnancy in this way is contrary to one of the purposes of anti-discrimination legislation, namely the removal of unfair disadvantages which have been imposed on individuals or groups in society (see section 2 of the *Act* which refers to the right to be equal with other individuals to make for themselves the lives that they are able and wish to have). Further, we can consider this disadvantage as a disadvantage imposed on women, because they are the only ones capable of giving birth. Indeed, Parliament codified this observation at subsection 3(2) of the *Act* which provides specifically that "[w]here the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex".

[62] It also indicates that in finding that women, following childbirth, are not entitled to maternity leave without deleterious effects on their employment, we undermine the objectives of anti-discrimination legislation by sanctioning one of the most significant ways in which women have been disadvantaged. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at paragraphs 28 and 29).

[63] The purpose of maternity leave is not to encourage family formation. It is rather to protect the health and well being of pregnant women and new mothers. It goes without saying that pregnancy and giving birth are very stressful on the health of new mothers. Maternity leave is intended to allow them to recover, so that they can reasonably effectively return to the work force (see *B.C. Government and Service Employees Union v. British Columbia* (2002), 216 D.L.R. (4th) 322, at paragraph 17, as interpreted in *Tomasson v. Canada (Attorney General)*, 2007 F.C.A. 265).

[64] In the case before us, the complainant was on parental leave when her employer advised her in October 2003 that she no longer had a place with its company and that she had to seek employment elsewhere. Although it is true that in January 2004, the employer offered a position to the complainant, that position was not the one that she had before going on sick leave as a result of her pregnancy. The employment that was offered to her by the employer was a demotion with a substantially lower salary.

[65] From all of the evidence filed before me, I find that the complainant established a *prima facie* case of discrimination against her by the respondent based on her pregnancy in refusing to let her return to work, in the same position and at the same salary, following her maternity leave and her parental leave.

[66] The burden is now on the respondent to provide a reasonable explanation of the impugned conduct. The respondent did not file evidence to satisfy this burden. First, it offered an explanation to the effect that the complainant had accepted employment elsewhere in November 2003. Later, it explained that it was prepared to employ the complainant in January 2004, but in another position and a lesser salary since she had not completed her training and her replacement was more experienced. Yet, as we saw earlier, this explanation was not persuasive and contradicted the evidence filed by the complainant. The incomplete and inconsistent evidence filed by the respondent prompts me to find that it failed to provide a reasonable explanation for the impugned conduct.

[67] I therefore find that Ms. Germain's complaint against her employer, Groupe Major Express Inc., is founded.

D. RELIEF

[68] In terms of the relief sought by the complainant, I must tackle the same problem that I had when I made the decision on the merits based on the respondent's evidence, but this time it is the complainant's evidence that is far from satisfactory and conclusive. What follows is therefore a summary of the evidence filed before me.

[69] The complainant is not seeking reinstatement with the respondent's team. She is claiming, however, the salary that she says that she lost as a result of her dismissal. I observe however that there was no concrete evidence filed to support this claim.

[70] At best, she filed her employment history from November 2003. So, from November 2003 until March 2004, the complainant worked for "Royal Wood Shavings". In March 2004, her physician put her on preventative cessation of employment because of her pregnancy. On August 25, 2004, she birth to her second child. Following her maternity leave, she did not return to work for "Royal Wood Shavings". She explained that she had just separated from the father of her second child and since he also worked for "Royal Wood Shavings", she was not comfortable returning there.

[71] After leaving "Royal Wood Shavings", she said that she worked, as of September 2005, for three months, for a transport brokerage named "Voyageur 2000". She added that it was full-time employment and that she received a salary of $35,000 per annum. She explained that she left this employment because she had to leave the family household and return to live with her mother as a result of her recent separation.

[72] Since she had exhausted her employment insurance during her maternity leave, she said that she received social assistance for the period following her departure from "Voyageur 2000". In July 2006, she went to work for "Saint-Lambert Transport", a transport brokerage. Finally, on November 20, 2006, she found part-time employment with "FEDEX." Although she said that she is still working for "FEDEX", she added that

she has been on parental leave since March 2, 2008, because she is due on June 16, 2008. Further, she stated that she stopped working in September 2007.

[73] I cannot, based on this incomplete evidence, find that the complainant lost salary and I will therefore not make any order to that effect.

[74] The complainant is also claiming $20,000 in compensatory damages under paragraph 53(2)(*e*) of the *Act*, arguing that the respondent's conduct deprived her of three months of maternity leave. She stated that she had to find a caregiver in a panic in November because she had to find work and that her life was [translation] "turned upside down", at the same time causing her some stress.

[75] The evidence filed at the hearing in support of this claim appears to me to be meagre to say the least and certainly insufficient to justify the amount claimed by the complainant which is the maximum provided under the *Act*. This evidence is limited to the complainant's testimony to the effect that she had been affected by the respondent's conduct (see *Transport Jeannot Gagnon v. Dumont* 2002 FCT 1280).

[76] However, I agree that the respondent's conduct caused pain and suffering to the complainant, if only in terms of anxiety. I therefore award compensation in the amount of $3,500 for pain and suffering.

[77] The complainant is also claiming an amount for the reimbursement of her legal fees. In support of this claim, she filed a contingency fee agreement that she had signed with her counsel. I cannot on the basis of this evidence allow the complainant's claim. A contingency fee agreement cannot be considered as evidence of the fees that the complainant must pay to counsel.

[78] The interest on the $3,500 awarded as relief is payable in accordance with subsection 53(4) of the *Act*. It must be calculated in accordance with subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure (03-05-04)* at simple interest on an annual basis awarded at the bank rate set by the Bank of Canada. Interest shall run from the date of the complaint to the date of the payment of the compensation.

Signed by
Michel Doucet

OTTAWA, Ontario

July 25, 2008

PARTIES OF RECORD

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	Inc.
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APPEARANCES:	
Jérôme Carrier	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
Jacques Jobidon	For the Respondent