BRIGITTE LAVOIE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TREASURY BOARD OF CANADA

Respondent

DECISION

MEMBER: Kathleen Cahill

2008 CHRT 27
2008/06/20

I. INTRODUCTION

[1] On January 19, 2004, Brigitte Lavoie (Ms. Lavoie) filed a complaint against Treasury Board of Canada (the respondent) alleging that the new Term Employment Policy (the new policy) discriminates on the basis of sex.

[2] Ms. Lavoie alleges that paragraph 7(2)(*a*) of the new policy breaches sections 7, 8 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *Act*), based on the fact that periods of maternity leave or parental leave without pay are not counted in calculating the cumulative three-

year working period required for conversion from term employee status to indeterminate employee (permanent) status in the federal Public Service.

[3] The Canadian Human Rights Commission (the Commission) attended the hearing which was held at Ottawa on September 24, 25, 27 and 28, 2007, and from January 21 to January 25, 2008.

[4] Based on an agreement made when the first complaint of discrimination was filed by Ms. Lavoie on July 10, 2007, the respondent contends that Ms. Lavoie cannot dispute the new policy in a personal capacity, which includes claiming relief on a personal basis. For the reasons given in the decision, I dismiss this ground of inadmissibility.

[5] For the reasons stated below, I have determined that the respondent differentiated adversely against Ms. Lavoie in the course of employment when it refused to count the period of parental leave in determining her eligibility for an indeterminate appointment (section 7 of the *Act*). For the same reason, I find that the new policy deprived Ms. Lavoie of employment opportunities (section 10 of the *Act*).

[6] By not counting the maternity leave or parental leave, the respondent's new policy differentiates adversely in the course of employment (section 7 of the *Act*) female term employees who take maternity and/or parental leave and deprives or tends to deprive these employees of employment opportunities on the basis of their sex (section 10 of the *Act*).

[7] I also order the respondent to amend the new policy in such a way as to remove the discriminatory aspects to the effect that periods of maternity leave or parental leave longer than 60 consecutive calendar days are not counted for the purposes of calculating cumulative service for an indeterminate appointment.

[8] Accordingly, Ms. Lavoie's complaint is allowed.

II. THE FACTS

A. Evidence of the complainant, Ms. Lavoie

[9] Historically, the Long Term Specified Period Employment Policy (the former policy) provided the right to convert a term appointment to an indeterminate appointment for any person in a term appointment for a five-year period. Under the former policy, leave without pay, regardless of the period of time, was taken into account in calculating the cumulative service of five years.

[10] At the end of 2002, the respondent adopted a new term employment policy (the new policy) pursuant to which the necessary cumulative service to convert a position would thereafter be three years. This new policy excluded leave without pay of more than 60 consecutive calendar days from the calculation of cumulative service.

[11] Pursuant to the new policy, maternity leave and parental leave are considered as leave without pay. Accordingly, the period of this leave is not taken into account in calculating the three years of cumulative service.

[12] The new policy came into force at Industry Canada on April 1, 2003, with immediate application to term contracts already in effect. Therefore, as of April 1, 2003, for all contracts in

effect, periods of leave without pay of more than 60 consecutive days were no longer counted when calculating the cumulative service of three years.

[13] With the application of the new policy, Ms. Lavoie's parental leave, from April 1, 2003, until the end of her contract (August 5, 2003), was not counted as part of the cumulative service of three years. According to Ms. Lavoie, if the period of absence starting from April 1, 2003, had been counted, her term position would have been converted to an indeterminate appointment. Accordingly, Ms. Lavoie would have been given indeterminate employee status.

[14] Ms. Lavoie obtained her first term employment contract on August 7, 2000, as a programmer-analyst at the Intellectual Property Office at Industry Canada. This one-year contract was successively renewed in August 2001 and August 2002, specifically beginning on August 5, 2002 until August 5, 2003, inclusively. There was no interruption of service between the two contract renewals.

[15] During maternity leave in December 2000, the complainant was replaced in her duties by her spouse, himself a term employee hired after Ms. Lavoie.

[16] Regarding the nature of her work at the time that she took her leave in August 2002, Ms. Lavoie declared that she performed the same work as three male indeterminate employees, one female term employee and two consultants.

[17] At the beginning of 2002, Ms. Lavoie told her superiors that she intended to take a second maternity leave. In approximately April 2002, she was told that because of her impending absence, she would be immediately changing teams, since there had to be a person available for the project on which she was working. After indicating that she intended to file a complaint of discrimination, her superiors changed their decision, apologized for the imbroglio and advised her that she would be continuing in the same team.

[18] On August 19, 2002, Ms. Lavoie took maternity leave ending on December 8, 2002 (17 weeks), followed by parental leave until August 19, 2003.

[19] Initially, Ms. Lavoie undertook to return to work on March 3, 2003.

[20] On February 21, 2003, she notified Industry Canada by e-mail that she had to extend her parental leave because she had not found anyone to take care of her child and because there was no space available at the daycare before the summer.

[21] The same day, Sylvie Manseau, her immediate supervisor, sent the following e-mail to the complainant:

[translation]
As you plan to extend your maternity leave, I must advise you that your position will not be extended beyond August 5, 2003. As you are already aware, CS-02 competitions are currently taking place for indeterminate positions and, as indicated in the e-mail that I sent to you on December 5, 2002, the terms of employees who are not appointed to one of these positions will end at the close of the competition.

[22] At the end of the exams and interview (March, April and May 2003) in which Ms. Lavoie had participated, she was informed in May 2003 that she had finished last in the CS-02

competition, i.e. eighth where there were seven indeterminate positions. Ms. Lavoie explained that she placed eighth in the competition because of the refusal of her then-supervisor, Ms. Goulet, to allow her to participate free of charge in training on a new work method in electronic language. This training was held during her maternity leave absence. Ms. Goulet explained to her that if she wanted to benefit from this training, she had to personally assume the expense, which according to Ms. Lavoie was approximately $10,000. Ms. Lavoie could not afford this expense.

[23] Ms. Lavoie was the only one of the eight term employees at her workplace who did not obtain an indeterminate appointment. Her husband was among the seven individuals who did obtain an indeterminate appointment.

[24] On June 2, 2003, Marc Lalande, Supervisor, Compensation and Benefits Division, informed Ms. Lavoie that under the collective agreement, considering that she had extended her leave beyond March 3, 2003, and that her contract ending on August 5, 2003, would not be renewed, she had to reimburse Industry Canada for the maternity benefits she received pursuant to the Supplementary Unemployment Benefit Plan (SUBP), i.e. $12,897.62.

[25] On June 11, 2003, Ms. Lavoie received a letter from Sylvie Manseau of Industry Canada, confirming that her employment would end on August 5, 2003.

[26] On June 2, 2003, Ms. Lavoie filed a grievance contesting Industry Canada's refusal to pay her parental benefits (SUBP) for the period between January and August 2003.

[27] On July 10, 2003, Ms. Lavoie filed with the Canadian Human Rights Commission against Industry Canada a complaint of discrimination on the basis of sex, based on sections 7, 10 and 14 of the *Act*.

[28] On July 18, 2003, Ms. Lavoie filed a grievance contesting Industry Canada's refusal to pay her the maternity allowance retroactive adjustment (SUBP) following the salary increase negotiated between Treasury Board and her union, the Professional Institute of the Public Service of Canada.

[29] On July 30, 2003, a letter signed by Mario Blais, Compensation Advisor, stated that Ms. Lavoie owed a gross amount of $12,899.42 in maternity benefit overpayments (SUBP).

[30] During a mediation session on October 20, 2003, Ms. Lavoie and Industry Canada agreed to settle the complaint filed with the Commission on July 10, 2003. It is important to point out that at the hearing, the parties waived all immunity from disclosure in regard to the agreement.

[31] The principal elements of this agreement are as follows:

- Without [translation] "an admission of liability in regard to the complaint," Industry Canada gave Ms. Lavoie an indeterminate appointment to begin on November 17, 2003.

- M s. Lavoie undertook to reimburse the benefits received under the SUBP.

- Ms. Lavoie acknowledged that [translation] "this settlement is complete and final compensation for the alleged incidents and accordingly" Industry Canada "is discharged of all of the claims and causes of action resulting from the incidents in question".

- The grievances filed by Ms. Lavoie [translation] "would follow their normal course and were not withdrawn."

- [translation] 'The complainant and her union reserve the right to file a complaint against the Treasury Board Secretariat regarding its policy entitled `Term Employment Policy'."

[32] The Commission approved this settlement on October 27, 2003.

[33] Ms. Lavoie began her new indeterminate employment with Industry Canada on November 17, 2003.

[34] On January 19, 2004, Ms. Lavoie filed a new complaint before the Commission, this time against Treasury Board, alleging that the new policy was discriminatory, claiming losses resulting from the benefits of which she was allegedly deprived based on, in Ms. Lavoie's opinion, the application of the new policy.

[35] At the hearing, Ms. Lavoie stated that during the mediation meeting, all of the remedies resulting from the application of the new policy, including her request to have the new policy abolished, had not been discussed.

[36] Ms. Lavoie testified that the representatives of Industry Canada had never wanted to discuss all of her claims relating to the application of the new policy, so that the agreement settled only the matter of the indeterminate appointment.

[37] At the hearing, Ms. Lavoie stated that the Industry Canada representatives in attendance at the mediation stated that her claims resulted from the application of the new policy and that only Treasury Board had the authority to address these issues.

[38] According to Ms. Lavoie, it was in this context that it was agreed and stated in the agreement that she reserved the right to file a complaint with the Commission against Treasury Board contesting the new policy.

[39] Following the loss of her employment in August 2002, Ms. Lavoie testified that she lived on loans. Because of these accumulated debts, she had to file for bankruptcy in 2006. The complainant separated from her spouse and sold her house. In accordance with the terms of the agreement, she reimbursed the benefits received pursuant to the SUBP.

[40] Isabelle Pétrin, Labour Relations Officer for the Professional Institute of the Public Service of Canada, attended the mediation meeting held on October 20, 2003.

[41] Ms. Pétrin testified that at this meeting, the Industry Canada representatives had always maintained that they were not responsible for anything involving the new policy; as a result, the substance of the discrimination complaint was not discussed.

[42] According to Ms. Pétrin, the employment start date, i.e. November 17, 2003, was not negotiable from the point of view of the Industry Canada representatives.

[43] Before closing her case, Ms. Lavoie stated that she was including the Commission's evidence in her evidence.

B. The respondent's evidence

[44] Lise Séguin testified at the hearing.

[45] In 2002-2003, Ms. Séguin was Human Resources Director of the Intellectual Property Office at Industry Canada. At that time, Ms. Séguin was responsible for all of the complaints filed at the Commission against the department.

[46] Ms. Séguin attended the meeting held on October 20, 2003, as a human resources advisor. At that time, she was accompanied by Agnès Lajoie, Director of the Patent Branch at the Intellectual Property Office.

[47] Ms. Séguin explained that Ms. Lavoie had told her story. Then each party left to confer. On returning, Agnès Lajoie stated that they were prepared to offer a permanent position to Ms. Lavoie, namely an indeterminate appointment.

[48] Ms. Séguin testified that the date of November 17, 2003, is explained by the fact that management had taken a gamble by increasing its resources despite the lack of operational needs, but was however anticipating the departure of one person as of November 17, 2003. It was in this context that the date of November 17, 2003, was proposed.

[49] According to Ms. Séguin, there was no discussion regarding the new policy, apart from Ms. Pétrin's alleged statement at one point that the new policy discriminated against pregnant women.

[50] For Ms. Séguin, the new policy was not their responsibility; Industry Canada had not instigated this new policy, but rather Treasury Board.

[51] Ms. Séguin did not wish to discuss the new policy. To the contrary, Industry Canada had to apply the new policy and it did so.

[52] Ms. Lavoie and Ms. Pétrin were the ones who asked that the agreement specify the right to file a complaint against Treasury Board. For Ms. Séguin, Ms. Lavoie had the right to complain about any policy and this was not their responsibility.

[53] Ms. Séguin stated that she does not make it a practice to reserve compensation claims for other departments. She would not have signed an agreement of such magnitude if there had not been a waiver such as the one referred to in article 2 of the agreement.

[54] On cross-examination, Ms. Séguin acknowledged that she could not agree on relief measures inconsistent with the application of the new policy.

[55] Ila Murphy, Senior Project Officer with the Treasury Board Secretariat, was an active participant in developing the new policy as well as in the consultations preceding its adoption.

[56] Ms. Murphy explained that the Public Service Alliance of Canada (PSAC) had, during the collective agreement negotiations in the autumn of 2001, requested that the number of term employees be reduced.

[57] This is how, in November 2001, PSAC and the respondent came to agree to establish a joint committee made up representatives of PSAC and of the respondent to study the term employment situation in the Public Service of Canada.

[58] This committee carried out research to identify the categories of persons contemplated by term employment within the Public Service and consulted various interested parties, including employees and managers.

[59] In performing its mandate, this committee organized workshops across Canada with term employees as well as managers.

[60] There was a survey of term employees who were PSAC members. Ms. Murphy stated that of the 1,251 term employees who responded to the survey, 71% were women.

[61] This participation rate is representative of the percentage of women holding term appointments within the Public Service which, according to the report, was 61% at March 31, 2002. In September 2001, the average age of indeterminate employees was forty-three (43) years while the average age of term employees was thirty-seven (37) years.

[62] The joint committee filed a report in August 2002 setting out several observations including some regarding the treatment of term employees.

[63] One of the principal observations was the very significant insecurity felt by the majority of term employees: the inability to make plans for the future, difficulty obtaining loans and mortgages, hesitance to start a family, stress related to financial responsibilities, anxiety every year on each contract renewal.

[64] Without amounting to "a major finding," the report notes that "there was sufficient mention of term employees that were not extended for maternity reasons."

[65] As a supporting document of the report, there are the results of the 14 focus groups made up of term employees, PSAC members. The insecurities of these employees are reported, including those of some women who feared that if they were to become pregnant that their employer "would let their term lapse at the earliest opportunity."

[66] One of the principal recommendations is formulated as follows:

Term employees in the federal Public Service should be automatically converted to indeterminate status after two years of cumulative service, in the same department, without a break in service of more than 60 consecutive calendar days.

[67] The report recommends progressively implementing the reduction of the period of cumulative service, namely:

- When the policy comes into effect, employees with three or more years of service would be converted to indeterminate appointments;

- One year after the policy comes into effect, employees with two or more years of service would be appointed;

- Thereafter, term employees would be given indeterminate appointments after accumulating the required two years of service.

[68] Ms. Murphy explained at the hearing that one of the concerns was to avoid readjustments of the workforce within a department. Therefore, due consideration had to be given to the risk of having a surplus of indeterminate employees in a given unit, which could eventually lead to indeterminate employee dismissals. Dismissals involve costs.

[69] The public interest and the additional burden on taxpayers were considered in developing a new policy. It had to be ensured that this new policy would not involve additional costs for the Crown.

[70] According to Ms. Murphy, it was a matter of balancing the fair treatment of term employees and maintaining a certain operational flexibility in favour of the managers.

[71] Then, Ms. Murphy and a colleague, André Carrière, prepared a first draft of the policy that was the subject of a consultation with the unions, including PSAC.

[72] This draft specifically provided for the exclusion of leave without pay in calculating cumulative service. The draft also included a change with regard to the recommendation made by the Joint Committee. Instead of the two years referred to in the report, the cumulative service provided in the draft policy was three years, without reference to a progressive implementation as the report had provided.

[73] Ms. Murphy explained that this change in regard to the service period was due to the managers who considered that the two-year period was too short. A two-year period could create a risk that managers would be prompted to prefer hiring temporary employees. Unlike term employees, temporary employees have fewer benefits, are not unionized and do not receive merit ratings.

[74] On December 20, 2002, the Right Honourable Lucienne Robillard, President of the Treasury Board, publicly announced the new policy, specifying in her news release that the deputy heads of the departments would have from April 1, 2003 to April 1, 2004, to implement it.

[75] The news release summarizes the changes, including the following:

- The threshold for term to indeterminate appointment will be three years in the same department without a break in service longer than 60 consecutive calendar days.

- A period of leave of absence without pay longer than 60 consecutive calendar days, while it will not constitute a break in service, will not be included in the calculation of the cumulative working period for appointment to indeterminate status.

[76] Ms. Murphy confirmed in her testimony that the new policy did not make a distinction between the various categories of leave without pay.

[77] Dr. Simon Langlois, a tenured professor of the sociology department at the Université Laval, testified as an expert. Dr. Langlois filed a report entitled [translation] "Parental leave in Canada. Sociological trend analysis."

[78] First, Dr. Langlois painted a sociological portrait of parental leave trends, pointing out the development of an increasing number of men taking parental leave. According to Dr. Langlois, this increase in fathers taking parental leave appears to be related to the adoption of new policies in the Employment Insurance Plan improved in 2001. Dr. Langlois reported that Statistics Canada qualified the trend as a "significant increase."

[79] A survey established that men tend to take shorter leave, i.e. generally less than six months. In fact, more than two thirds returned to work in the month following the birth or adoption of the child.

[80] The same survey indicates a willingness on the part of the parents to take longer leave when conditions are more favourable. Dr. Langlois pointed out that the adoption of the new Régime d'assurance parentale au Québec (RQAP) illustrates this trend of fathers' behaviour. In fact, men represented one third of the RQAP beneficiaries in the first year that the program came into effect. These results are higher than those recorded by Statistics Canada in all of Canada.

[81] Recognizing that equality of men and women in terms of taking parental leave has not been [translation] "perfectly" achieved, Dr. Langlois determined that an increasing number of fathers will take parental leave in the future.

[82] Second, Dr. Langlois noted an emerging trend of sharing duties and responsibilities in family matters. The responsibility traditionally assigned to mothers because of *inter alia* restrictive cultural norms are fading to give way to a better balance in sharing duties and responsibilities within the couple.

[83] Dr. Langlois analyzed the statistics provided by the respondent in regard to taking more than 60 days of leave without pay among term employees in the respondent's employ. He was of the opinion that a firm conclusion could not be made in terms of the causal relationship between women taking maternity leave and parental leave and the effect of this leave on indeterminate conversion. Dr. Langlois pointed out in his report that, except for 2003-2004, the statistics do not systematically establish a disproportionate effect on female term employees. Finally, Dr. Langlois was of the opinion that the statistics did not support a conclusion regarding the effect on the number of women having access to indeterminate employment.

C. The Commission's evidence

[84] Dr. Jeffrey G. Reitz, professor of sociology at the University of Toronto, testified as an expert witness. Dr. Reitz filed a report in which he principally assessed whether the statistical data provided by the respondent at the request of the Commission revealed a prejudicial effect of the new policy on women hired for term appointments within the Public Service of Canada.

[85] First, Dr. Reitz noted that there are more women among term employees. It is more likely that more women than men will become term employees with the Public Service of Canada. According to the statistics provided by the respondent, 59.8% were women in 2003-2004, 59.8% in 2004-2005 and 59.4% in 2005-2006.

[86] Dr. Reitz is of the opinion that a negative impact of the new policy on women can be assessed from two perspectives:

- Are women more likely to be affected by the fact that absences longer than 60 consecutive calendar days are excluded from cumulative service?

- Is there a decreasing incidence of indeterminate conversion among women or can we observe that a longer period is required for women to obtain indeterminate conversion?

[87] After analyzing the statistics provided by the respondent, Dr. Reitz determined that the new policy had a negative effect on women and created obstacles to their eligibility for indeterminate employment.

[88] Among term employees, the numbers indicate that women tend to take leave of more than 60 consecutive days. This difference between genders is explained *inter alia* by maternity, but also by an increased incidence of long-term parental leave among women. Finally, the number of men taking parental leave of less than 60 days is higher than the number of women.

[89] On the second perspective of his analysis, even though it is more difficult to assess in terms of causal relationship, Dr. Reitz observed *inter alia* that the percentage of women obtaining indeterminate conversion after three years was lower than expected, considering that there are more women among term employees.

[90] Indeed, he noted that a greater percentage of women had indeterminate conversion at the end of seven years. For Dr. Reitz, this observation could be the result of the application of the new policy and indicate that taking maternity leave and/or parental leave of more than 60 days significantly delayed a number of women in acquiring indeterminate employee status.

III. ISSUES

[91] Does the Tribunal have the jurisdiction to hear Ms. Lavoie's complaint filed on January 19, 2004, based on the settlement made in the previous complaint?

[92] In the affirmative, was Ms. Lavoie discriminated against on the basis of sex within the meaning of sections 7 and 10 of the *Act*?

[93] Are the provisions of paragraph 7(2)(*a*) of the new policy discriminatory toward women on maternity leave and/or parental leave under sections 7 and 10 of the *Act*?

IV. ADMISSIBILITY OF THIS COMPLAINT

[94] The respondent submitted that the complaint filed by Ms. Lavoie is inadmissible, taking into account that she waived claims to other relief in the settlement dated October 20, 2003. Specifically, the respondent contends that Ms. Lavoie compromised all aspects of this complaint against the respondent when she accepted the agreement dated October 20, 2003.

[95] From the outset, bear in mind that on February 5, 2007, Karen A. Jensen, member of this Tribunal, decided a motion on the inadmissibility argument filed by the respondent in this matter (see: 2007 CHRT 3).

[96] Ms. Jensen determined that the respondent's motion seeking the dismissal of the complaint on the grounds that the issues raised had been settled and would now be moot could not be granted.

[97] Relying *inter alia* on sections 40 and 53 of the *Act*, Ms. Jensen dismissed the respondent's motion on the grounds that the *Act* does not require that a complaint contemplate individual relief or that the complainant be the victim of discriminatory practices.

[98] Secondly, Ms. Jensen wrote that when the settlement was made, Ms. Lavoie reserved her right to file a complaint against the respondent Treasury Board in regard to the new policy. Ms. Jensen determined that the discriminatory nature of the new policy had therefore not been examined.

[99] Finally, Ms. Jensen left it to this Tribunal to determine, in the event that the complaint were founded, whether Ms. Lavoie was entitled to claim relief, given the settlement reached with Industry Canada.

[100] At this hearing, the respondent acknowledges that Ms. Lavoie may challenge the new policy. It disputes, however, her right to contest it on a personal basis, including the right to claim relief measures.

[101] For the reasons given below, I determine that Ms. Lavoie reserved the right to challenge the new policy on a personal basis in every aspect, including that of claiming relief measures on a personal basis. It is important to refer to the principal aspects of this agreement (see: *Bushey v. Sharma*, 2003 C.C.R.D. No. 7, paragraph 20):

- Without [translation] "an admission of liability in regard to the complaint," Industry Canada gave Ms. Lavoie an indeterminate appointment to begin on November 17, 2003.

- Ms. Lavoie undertook to reimburse the benefits received under the SUBP.

- Ms. Lavoie acknowledged that [translation] "this settlement is complete and final compensation for the alleged incidents and accordingly" Industry Canada "is discharged of all of the claims and causes of action resulting from the incidents in question."

- The grievances filed by Ms. Lavoie [translation] "would follow their normal course and were not withdrawn."

- [translation] 'The complainant and her union reserve the right to file a complaint against the Treasury Board Secretariat regarding its policy entitled `Term Employment Policy'."

[102] Note that the agreement was between the complainant and Industry Canada and that the waiver (article 2) specifically contemplates Industry Canada. Ms. Lavoie expressly reserved the right to file a complaint against the respondent Treasury Board in regard to the new policy. Ms. Lavoie did not receive any financial compensation for the alleged discriminatory aspect of the new policy.

[103] On reading the agreement, I find that Ms. Lavoie did not waive the right to challenge the policy on a personal basis or the right to claim relief measures in the event that her complaint were allowed.

[104] At the hearing, the parties asked me to receive testimony regarding the discussions which took place during the mediation. According to the parties, the agreement is clear on reading, but they do not interpret it the same way.

[105] After analyzing the testimonial evidence given on this point by Ms. Lavoie and the respondent, I find that the discussions between the parties on October 20, 2003, confirm that the agreement contemplated only the settlement of the claims that were the responsibility of Industry Canada.

[106] Ms. Séguin confirmed the testimony of Ms. Lavoie and that of Ms. Pétrin to the effect that there was no discussion of the new policy because it was not their responsibility, but rather that of Treasury Board. In short, Ms. Séguin could not discuss the discrimination alleged by the complainant or the resulting relief measures. This is how the complainant came to reserve the right to challenge the new policy.

[107] The respondent submitted at the hearing the argument on the indivisibility of the Crown. Ms. Lavoie responded that Ms. Jensen had already decided this issue on the first motion. In any event, I find that in this case, Ms. Lavoie and Industry Canada agreed to leave pending all of Ms. Lavoie's allegations bearing on the new policy and the resulting relief measures. The parties did not divide the Crown into two distinct legal entities, but rather severed the allegations. Accordingly, the respondent's motion for inadmissibility is dismissed (see: *Bushey v. Sharma*, 2003 C.H.R.D. No. 15, paragraph 143).

V. LEGAL BACKGROUND

[108] Section 7 of the *Act* provides that it is a discriminatory practice to refuse to continue to employ any individual, or in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination, including sex.

[109] According to section 10 of the *Act*, it is a discriminatory practice for an employer to establish or pursue a policy or practice, or to enter into an agreement affecting any matter relating to employment that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[110] In a matter such as this, the burden of proof is first on the complainant, Ms. Lavoie, and the Commission, who must establish *prima facie* evidence of discrimination (see: *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R.D/1616,1618; *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R.D/5029; *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04; and *Lincoln v. Bay Ferries*, [2004] F.C.A. 204).

[111] *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 (see: *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at page 208; *Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, at paragraph 28).

[112] In *Lincoln v. Bay Ferries Ltd* (*supra*, at paragraph 22 of the decision), the Federal Court of Appeal states that to answer the question as to whether *prima facie* evidence has been established, the Tribunal must not, at this stage, take into account the respondent's answer.

[113] Once *prima facie* evidence has been established, the respondent's explanations must be "reasonable" or "satisfactorily explain" the otherwise discriminatory practice (see: *Lincoln v. Bay*

Ferries Ltd., *supra*, paragraph 23 of the decision; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2005] F.C.A. 154, at paragraphs 26 and 27).

[114] It must be pointed out that the conduct of an employer will not be considered discriminatory if the employer is able to establish that any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement (BFOR) (paragraph 15(1)(*a*) of the *Act*). For a practice to be considered to have a BFOR, it must be established that the accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (subsection 15(2) of the *Act*).

[115] Discrimination on the basis of pregnancy or childbirth is discrimination on the basis of sex (subsection 3(2) of the *Act* and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219). Subsection 3(2) also contemplates the period following childbirth (see for example: *Tomasso v. Canada (Attorney General)*, 2007 FCA 265, paragraphs 117 and 119).

[116] In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1279 (Dickson J.), the Supreme Court of Canada defined discrimination on the basis of sex as follows:

. . . practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

[117] The case law recognizes the difficulty establishing allegations of discrimination through direct evidence. The Tribunal must take into account all of the circumstances to establish whether there is what was described in *Basi* (*supra*) as "the subtle scent of discrimination."

[118] To determine whether there is discrimination on the basis of sex, I must examine the evidence filed by Ms. Lavoie regarding the effect of their policy on Ms. Lavoie's personal situation. I must also determine whether the new policy has discriminatory effects on female term employees based on gender. It is important to note that even if Ms. Lavoie's personal situation did not establish *prima facie* evidence of discrimination, I must nevertheless determine whether the respondent's new policy makes distinctions based on gender.

[119] At the hearing, Ms. Lavoie and the respondent did not make any specific arguments regarding section 8 of the *Act*. I find on this basis that Ms. Lavoie abandoned this argument. Accordingly, my analysis will not bear on an alleged breach of this section.

[120] In this case, Ms. Lavoie and the Commission must establish the following:

- The respondent differentiated adversely against Ms. Lavoie in the course of employment when it refused to count the parental leave absence in determining her eligibility for an indeterminate appointment (section 7 of the *Act*). For the same reason, the new policy deprived Ms. Lavoie of employment opportunities (section 10 of the *Act*).

- By failing to include the maternity leave and parental leave, the respondent's new policy differentiates adversely in the course of employment (section 7 of the *Act*) in regard to female

term employees who take maternity leave and/or parental leave and deprives or tends to deprive these employees of employment opportunities on the basis of their sex (section 10 of the *Act*).

[121] Ms. Lavoie alleges that in the course of employment, there was adverse differentiation in her regard because of the application of the new policy on the basis that from April 1, 2003, her leave of absence was no longer counted for the purposes of calculating cumulative service. Accordingly, she was four months short of the three years of uninterrupted service, depriving her of the right to become an indeterminate employee.

[122] The respondent contends that all of the evidence submitted by Ms. Lavoie and the Commission is not sufficient to find that there was *prima facie* evidence of discrimination for the reasons that I would summarize as follows:

- Paragraph 7(2)(*a*) of the new policy applies to all persons who are on leave without pay, including those on sick leave or disability leave, educational leave, secondment, personal obligation leave, etc. Accordingly, maternity leave and parental leave are not the only ones contemplated by the new policy. Considering the foregoing, the respondent submits that Ms. Lavoie as well as all of the female term employees taking maternity leave and/or parental leave must be compared with others who are on leave without salary;

- Men and women are also contemplated by paragraph 7(2)(*a*) since, for example, men as well as women may take parental leave, sick leave or disability leave. As soon as a measure affects men as much as women in the same way, which would apply to this case, this measure cannot be considered discriminatory based simply on the fact that more women than men are likely to be affected by this measure;

- Only a measure with a disproportionate effect on female persons could be considered to discriminate on the basis of sex.

[123] For the reasons stated hereafter, I find that the complainant, Ms. Lavoie, and the Commission established *prima facie* evidence of discrimination based on sex.

VI. ANALYSIS

A. *Prima facie* evidence of discrimination

(i) The facts particular to Ms. Lavoie

[124] Ms. Lavoie was given her first term employment contract in August 2000 as a programmer-analyst with Industry Canada. This contract for a term of one year was successively renewed in August 2001 and August 2002. There was no interruption of service between the contract renewals. I agree with Ms. Lavoie's claim that she had acquired the three years of cumulative service on August 5, 2003.

[125] Ms. Lavoie's evidence indicates that Ms. Manseau told her that because of the extension of her maternity leave, she had to advise Ms. Lavoie that her employment contract would not be extended beyond August 5, 2003. There was therefore a need until August 5. I note indeed that this e-mail does not make any reference to the availability of work or the time for the duties to be performed. To the contrary, it is specified therein that there were competitions open for indeterminate appointments. Accordingly, I determine on this basis that the needs for which the complainant had been hired existed until August 5, 2003, and continued to exist beyond that date.

[126] I also accept based on the evidence that before she left for her maternity leave, her future unavailability was called into question to such an extent that it was decided that she would change teams. Certainly, the supervisors changed their minds, but we cannot disregard the fact that the complainant's availability because of her announced maternity leave preoccupied Industry Canada representatives. Finally, the refusal to accommodate Ms. Lavoie by refusing her the opportunity to participate in training unless she assumed the costs herself appears to me to reinforce the idea that Ms. Lavoie's maternity leave was not appreciated.

[127] Ms. Lavoie also testified that before she left on maternity leave in 2002, she was performing the same work as the indeterminate employees.

[128] As stated earlier, in the time surrounding the coming into effect of the new policy, there were competitions held to fill seven indeterminate positions. These positions were filled, one of them by Ms. Lavoie's spouse.

[129] From the preceding, I find that at all relevant times there was a permanent need for the term appointment of programmer-analyst for which the complainant had a contract ending on August 5, 2003, and that this need existed beyond August 5, 2003.

[130] Ms. Lavoie's evidence establishes that but for the application of the new policy, i.e. not counting the parental leave time, Ms. Lavoie would have been appointed as an indeterminate employee as of August 6, 2003. The next step is to examine the new policy.

(ii) The new policy

[131] As already stated, the Long Term Specified Period Employment Policy (the former policy) provided for conversion of a position for any person who had worked in a term appointment for five years of cumulative service. Under the former policy, a period of unpaid leave was taken into account in calculating the five years of cumulative service.

[132] According to the new policy which came into effect at Industry Canada on April 1, 2003, three years of cumulative service would be required to convert a term appointment to an indeterminate one. This new policy excludes unpaid leave from the calculation of cumulative service.

[133] Maternity leave and parental leave are considered as leave without pay. Specifically, paragraph 7(2)(*a*) reads as follows:

Departments/agencies, in determining whether a period of term employment in the same department/agency will count as part of the cumulative working period, must take the following into consideration:

(*a*) a period of leave of absence without pay longer than 60 consecutive calendar days does not constitute a break in service and will not be included in the calculation of the cumulative working period for appointment to indeterminate status under this policy;

[134] Ms. Lavoie and the Commission submit that this paragraph is discriminatory toward the complainant and all female term employees on maternity leave and/or parental leave.

[135] Ms. Lavoie was entitled to 17 weeks of maternity leave and 37 weeks of parental leave. In fact, the complainant's period of absence coincided with the period during which she qualified for employment insurance benefits, i.e. 17 weeks of maternity leave, two weeks of waiting period and 37 weeks of parental leave.

[136] In order to decide whether there is *prima facie* evidence of discrimination on the basis of sex, I must first determine the purpose of the plan conferring the benefit or the right at issue (see: *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, paragraph 33).

[137] The purpose of the new policy is to "balance the fair treatment of term employees with the need for operational flexibility." The policy statement states that the term employment option cannot be used "to [fill] a permanent ongoing need."

[138] In order to meet this objective, the respondent provided that term employees employed for a cumulative working period of three years without a break in service longer than 60 consecutive calendar days "must [be] appoint[ed] . . . indeterminately at the level of his/her substantive position." For the purposes of the analysis, I will describe the right to be appointed as an indeterminate employee the [translation] "conversion entitlement".

[139] This "conversion entitlement" is the issue in this matter. In matters of discrimination, a distinction must be made between the rights resulting from compensatory benefits and non-compensatory benefits, i.e. those relating to the employee's status. And so, a bilingualism bonus conditional on the performance of work falls under the first category. Performance of the work is required to obtain the bonus. Accrual of seniority, the right to employment, the right to keep one's employment, the right to tenure are described as non-compensatory benefits and relate to the status of the employee. Underlying this second category is the notion that performance of the work is not required to acquire or maintain the right. We are therefore referring to a benefit or a right that results from employee status (see primarily: *Ontario Nurses Association v. Orillia Soldiers Memorial Hospital*, (1999), 42 O.R. (3d) 692, paragraphs 63, 70 and 71, applying the same criteria: *Fernandes v. IKEA Canada*, (2007) BCHRTD. No. 259, paragraphs 24, 25, 26, 27 and 31).

[140] In this case, the "conversion entitlement" falls under the second category. It is intrinsically connected to the status of the employee. Accordingly, this implies that Ms. Lavoie and the other female term employees who take maternity leave and/or parental leave must be compared to all term employees who did not take a break in service longer than 60 consecutive calendar days (see: *Ontario Nurses Association* v. *Orillia Soldiers Memorial Hospital*, *supra*, at paragraphs 63, 70 and 71).

[141] The respondent submitted that the relevant comparator group was all of the employees on leave without pay. Accordingly, I could not find *prima facie* evidence of discrimination since all of the employees of this classification were treated equally (see: *Bernatchez v. La Romaine (Conseil des Montagnais)*, 2006 CHRT 37 and *Dumont-Ferlatte v. Canada (Employment and Immigration Commission)*, 1996 D.C.D.P. No. 9). In both of these decisions, the complainants were claiming benefits described as compensatory, i.e. those that I described from the first category. Therefore in *Bernatchez*, the complainant was challenging the fact that her employer did not calculate the additional maternity leave benefits on the basis of the annual earnings of the persons who performed the work. The indemnity at issue was a benefit extended to employees on

maternity leave and did not constitute earnings. Accordingly, the complainant had to be compared to persons on leave without pay. In *Dumont-Ferlatte*, the complainants alleged that it was discriminatory to deprive women on maternity leave of cumulative annual leave and sick leave credits and of the right to benefit from a monthly bilingualism bonus. Once again, the rights at issue are described as compensatory benefits.

[142] The respondent also referred to *Cramm* (see: *Cramm v. Canadian National Railway Company*, 1998 IIJCan 2938 H.R.R.T. and *Canadian Human Rights Commission v. Canadian National Railway Company* (*re Cramm*), (2000) IIJCan 15544 (F.C., Mr. Justice MacKay). Contrary to *Ontario Nurses Association*, I note that in *Cramm*, the debate bears primarily on the performance of work requirement. The Tribunal does not describe the nature of the right sought by Mr. Cramm. In other words, for the reviewing court, was this a right under the first or second category? In my opinion, this question is fundamental since the answer identifies the comparator group. As I already stated, I consider that the "conversion entitlement" falls under the second category. For the reasons given in the foregoing paragraphs, I find that the comparator group is that of employees who did not take a break in service longer than 60 consecutive calendar days.

[143] I must point out that it is not always necessary to determine a comparator group. In this case, it is my opinion that for maternity leave, determining a comparator group appears pointless since only women take maternity leave. On this point, I agree with the comments made by the Court of Appeal of Québec in *Commission des écoles catholiques du Québec v. Gobeil*, (see: [1999] R.J.Q. 1883 (Robert J.)) where the Court held that a school board's refusal to hire, on a part-time basis, a teacher who was not available based on her pregnancy was discriminatory:

[translation]
Pregnant women, but for their pregnancy, would be available. *For this reason, I cannot adhere to a comparative analysis likening them to unavailable persons in order to determine whether or not there is a distinction. A rule that has the effect of depriving pregnant women of the right to be hired when they otherwise would have had access thereto necessarily breaches the right to full equality.* The distinction created by the availability clause arises from the fact that childbirth and maternity leave hinder women from getting the contract to which they would be entitled.
[Emphasis added.]

[144] On its very face, excluding maternity leave absences of more than 60 consecutive days from the calculation of the cumulative service, in the course of employment, differentiates adversely in relation to term employees exercising their right to this leave (section 7) and deprives or tends to deprive them of employment opportunities (section 10). To use the wording of the Court of Appeal in *Gobeil* (*supra*), the connection between discrimination on the basis of sex and not including maternity leave "is self-evident." In fact, only women take maternity leave. Further, when a woman takes maternity leave for 17 weeks, the time recognized for term employees, her absence necessarily exceeds the 60 calendar days. As a result, women who take maternity leave also extend the time for acquiring the "conversion entitlement" and even risk being deprived of this right if the term contract is not renewed in such a way as to recover the time that was not counted. This is in itself sufficient to establish *prima facie* evidence of discrimination on the basis of sex.

[145] For parental leave, *prima facie* evidence must include establishing that there is a disproportionate negative effect on women since parental leave applies to men as well as women.

For this reason, I must examine the statistical evidence (see: *Walden v. Canada (Social Development*), (2007) CHRD No. 54, paragraphs 39, 40 and 41, *Premakumar*, *supra*, paragraph 80).

[146] Ms. Lavoie and the Commission submit that the statistical data clearly establish that it is largely women who take parental leave of more than 60 consecutive days. Ms. Lavoie and the Commission relied on table 12j (October 2007), primarily on the figures for the years 2003-2004. In this timeframe, 204 women took maternity leave and 164 took parental leave in the 52 weeks following the birth or adoption of a child. Indeed, we observe that 49 men benefited from parental leave in the same timeframe. In 2004-2005, 151 women took maternity leave, 169 women and 38 men took parental leave. In 2005-2006, 141 women took maternity leave, 136 women and 36 men took parental leave. During the same periods, table 12d (October 2007) indicates that a majority of men take parental leave for less than 60 days.

[147] Besides the fact that we note that the data provided by the respondent at the request of the Commission indicates that in 2003-2004, one man went on maternity leave, it is my opinion that these figures are trustworthy. Accordingly, I dismiss the respondent's argument to the effect that the statistics are unreliable. These figures establish sufficient evidence of a disproportionate negative effect of the new policy on women who take parental leave. In fact, it is clear that more women than men take parental leave for more than 60 consecutive days. In 2003-2004, 77% of persons taking parental leave exceeding 60 consecutive days were women. This is a statistical reality that I cannot disregard. Like Ms. Lavoie, we must remember that women who take parental leave following the birth of a child have also taken maternity leave. Men are not likely to take both types of leave. Like women who take maternity leave, women who go on parental leave delay the time for acquiring the "conversion entitlement" and are deprived of this right if the term contract is not renewed in such a way that they will be able to recover the time that was not counted. In the case of Ms. Lavoie, this clearly had the effect of depriving her of the "conversion entitlement."

[148] In analyzing the *prima facie* evidence, I also considered the testimony of the Commission's expert, Dr. Reitz, whose findings were stated earlier. Bear in mind that Dr. Reitz determined, on analyzing the statistics, that the new policy has a negative effect on women and creates obstacles to their eligibility to become indeterminate employees and that some figures appear to suggest that the new policy significantly delays a number of women in acquiring indeterminate employee status.

[149] Certainly, I observe that certain statistical data on the time required for women to obtain an indeterminate appointment includes appointment conversion situations, but also situations where the person obtains a permanent appointment through a competition. As the figures were filed by consent, certain explanations in their regard would have been desirable.

[150] That said, I am of the opinion that I must take into consideration all of the circumstances to determine whether *prima facie* evidence of discrimination has been established (see: *Premakumar*, paragraphs 80 and 81). As I pointed out, *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 (see: *Ontario (Ontario Human Rights Commission) v. Etobicoke (Borough),* [1982] 1 S.C.R. 202, at

page 208; *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at paragraph 28).

[151] The respondent submits that the reviewing court in *Cramm* (*supra*) determined that quantitative evidence is insufficient to determine that more women than men suffer prejudicial effects. First, I observe that the reviewing court made these remarks after finding that it must compare the treatment of other employees absent on leave due to sickness or injury to those absent for other reasons. In this case, I dismissed the respondent's argument to the effect that the comparator group was all of the term employees on leave without pay. Therefore, I need not ask whether women on parental leave are differentiated more adversely than other employees on leave without pay. For the purposes of establishing whether or not there is *prima facie* evidence of discrimination, I can use statistical evidence to determine whether there is sufficient evidence. The statistical data submitted in this case clearly establishes that contrary to men, a substantial majority of women take more than 60 consecutive days of parental leave. The figures indicate that there is *prima facie* evidence of a disproportionate negative effect of the policy in regard to women who take parental leave.

[152] Of the evidence filed, I find that the refusal to include maternity leave and/or parental leave is *prima facie* evidence of discrimination in the course of employment, differentiating adversely (section 7 of the *Act*) in relation to female term employees who take maternity leave and/or parental leave. This refusal to include the leave also establishes *prima facie* evidence of discrimination under section 10 of the *Act*, as it deprives or tends to deprive these employees of any employment opportunities on the basis of their sex (section 10 of the *Act*).

[153] Finally, in the case of Ms. Lavoie, I find that the refusal to include her period of absence for parental leave establishes *prima facie* evidence of discrimination by differentiating adversely in her regard in the course of employment under section 7 of the *Act* and by preventing her from acquiring indeterminate employee status, which according to the terms of section 10 of the *Act*, deprived her of her employment opportunities.

[154] In conclusion, all of the evidence submitted by Ms. Lavoie and the Commission establishes *prima facie* evidence of discrimination in breach of sections 7 and 10 of the *Act* (see: *Premakumar*, paragraph 80 and 81).

[155] At the hearing, the possibility was raised that the complaint could also have been examined on the ground of discrimination on the basis of family status. However, the complaint exclusively contemplates discrimination on the basis of sex and the submissions at the hearing were based on the proposal to the effect that the discriminatory conduct was on the basis of sex. Accordingly, I will not formulate any conclusion on the ground of discrimination on the basis of family status.

B. Did the respondent provide a reasonable explanation?

[156] As mentioned earlier, once there is *prima facie* evidence of discrimination, the respondent must give a reasonable explanation. In this case, the respondent must establish that the refusal to include the period of absence of more than 60 consecutive days because of maternity leave or parental leave is based on a BFOR (paragraph 15(1)(*a*) of the *Act*). To this end, the respondent must establish that counting these absences for the purposes of "conversion entitlement" would impose undue hardship on the respondent in terms of health, safety and cost (subsection 15(2) of

the *Act*). Before embarking on this analysis, I will address the evidence submitted by the respondent on the subject of parental leave trends and then the respondent's argument on the statistical evidence filed at the hearing.

(i) Parental leave trends

[157] The respondent contended that in my analysis, I must consider that more and more men are taking parental leave. The respondent's expert, Dr. Langlois, testified regarding an emerging trend in that area. Dr. Langlois is of the opinion that in Canada [translation] "restrictive cultural norms" in regard to women appear to be diminishing, resulting in an increase in the number of fathers taking longer parental leave, in part or entirely in the mother's place. That said, this trend does not mean that men take parental leave in the same proportion as women and for the same time. Dr. Langlois points out that in Canada, one inquiry established that more than two thirds of men returned to work in the month following the birth or adoption of the child.

[158] For maternity leave, this trend is of no use given the biological reality associated with the birth of a child, including the psychological and physiological aspects for the mother in connection with the pregnancy and childbirth (see: *Tomasso v. Canada (Attorney General),* 2007 FCA 265, paragraphs 117 and 119).

[159] I must emphasize that the right to equality of Ms. Lavoie and other term employees taking parental leave must be assessed in the present based on the evidence filed. It cannot be inferred from a trend, or be deferred based on a trend.

(ii) Statistical evidence filed at the hearing

[160] While I consider that this aspect must be addressed in the *prima facie* evidence analysis, which was done, I would add a few remarks about the statistical evidence filed at the hearing. The respondent submits that according to *Cramm* (*supra*), mere numerical superiority of a group affected by a neutral rule does not establish in the absence of other evidence that there is a disproportionate negative effect on the largest numerical group. I think it worthwhile to point out that this remark was inspired by a decision of the Supreme Court bearing on section 15 of the *Canadian Charter* (see: *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 and *Thibaudeau v. M.N.R.*, [1994] F.C. 189 (C.A.)). I am of the opinion that we cannot systematically apply this comment without taking into consideration the issues specific to each matter; especially in a context where the litigation does not arise from the *Charter* but from a human rights act. In *Brooks* (*supra*, paragraph 29), the Supreme Court of Canada pointed out, in a matter of discrimination based on pregnancy, that the removal of unfair disadvantages which have been imposed on individuals or groups in society is a fundamental objective of human rights legislation.

[161] In a context where the respondent's expert recognizes that there are [translation] "restrictive cultural norms" in respect to women, we cannot abide by these norms or principles set out in *Brooks* when I note that a substantial majority of female term employees are the predominant users of the parental leave exceeding 60 consecutive days.

(iii) *Bona fide* occupational requirement

[162] The Supreme Court set out a three-step method for determining whether a BFOR has been established (see: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 3 (*Meiorin*)). Hence, the respondent can justify the impugned standard if it establishes:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose;
(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. The respondent must show that it considered and reasonably rejected all viable forms of accommodation.

(i) Did the respondent adopt the standard for a purpose rationally connected to the performance of the job?

[163] The objective of the new policy is to "balance the fair treatment of term employees with the need for operational flexibility." The policy statement states that term appointments cannot be used "to [fill] a permanent ongoing need". Therefore, the justification of reducing the cumulative service from five years to three years is largely supported by the evidence, particularly the testimony of Ms. Murphy and the report filed by the Joint Committee in August 2002. This report sets out several observations regarding the situation of term employees including primarily the great deal of insecurity felt by the majority of term employees. Insofar as the exclusion of leave without pay of more than 60 consecutive days from the cumulative service must be assessed in a more general context, such as the objective of the new policy, I find that this standard is rationally connected to the performance of the job and the duties at issue.

[164] Accordingly, the first element of the defence has been established.

(ii) Did the respondent adopt the standard in good faith?

[165] On this point, I am of the opinion that the respondent adopted its standard in good faith. Accordingly, the second element of the defence has been established.

(iii) Is the standard reasonably necessary to the accomplishment of the respondent's objective in such a way that it cannot accommodate the complainant and the other women who take maternity leave and/or parental leave without undue hardship?

[166] From the outset, it must be emphasized that the new policy applies to employees like Ms. Lavoie, term employees of the respondent and "who have been appointed under the *Public Service Employment Act* (PSEA) or any exclusion approval order made thereunder." While the new policy was the subject of a consultation with certain unions, this consultation cannot be used to justify the identified discriminatory effects.

[167] The respondent argued that the exclusion of leave without pay of more than 60 consecutive days from the cumulative service must be assessed in the context where under this new policy, the period was reduced from five years to three years. In her testimony, Ms. Murphy explained that one of the concerns was avoiding workforce adjustments within the department. The risk of having a surplus of indeterminate employees in a unit could eventually lead to dismissals of indeterminate employees. This involves costs. Ms. Murphy stated that it had to be ensured that this new policy would not involve additional costs for the Crown.

[168] Ms. Murphy also stated that the new policy is intended to strike a balance between fair treatment for term employees and maintaining a certain operational flexibility in favour of the managers. Ms. Murphy explained that for some managers, the two-year service period was too short to assess whether there was an ongoing need. According to the managers consulted, a two-year period would have prompted some of them to retain the services of temporary employees.

[169] With regard to the work performance requirement, Ms. Murphy stated that this requirement was necessary in order to be able to assess the permanent needs of a position.

[170] Ms. Murphy explained that these were all considerations in the adoption of the new policy, in its current form.

[171] In my opinion, these considerations do not establish that it is impossible for the respondent to accommodate Ms. Lavoie and the other women taking maternity leave and/or parental leave without undue hardship.

[172] On the subject of the work performance requirement, I must admit that the respondent did not establish a connection between this requirement and the exclusion of unpaid leave of more than 60 consecutive days. First, I note that paid leave is counted for the purposes of calculating cumulative service. Therefore, the fact that the person is absent from work does not appear, at least in part, to always be a requirement.

[173] Further, the former policy did not count leave without pay while the wording of this policy also provided that term appointments should be used only "in situations where a need clearly exists for a limited time and is not anticipated to [fill] a permanent ongoing need." The new policy uses in essence the same wording, indicating that term employment cannot be used "to [fill] a permanent ongoing need." From the foregoing, I must find that it is the needs of the position itself that are assessed and the performance of the work by the person appointed to that position does not determine these needs. People can, for example, be replaced. This is what occurred when Ms. Lavoie's spouse replaced her during one maternity leave. The needs for the position were therefore connected to the work to be performed.

[174] The evidence does not establish that the respondent proceeded with an analysis contemplating the possibility of counting the unpaid leave in the calculation of cumulative service, specifically, maternity leave and parental leave. The respondent did not provide any evidence on this subject, or on how including this leave could cause undue hardship for the respondent. *Inter alia*, I do not have any evidence of the additional cost associated with counting this leave in calculating the three-year period. I cannot assess the existence of undue hardship on the basis of the evidence filed. In short, the respondent has not shown me that it would be impossible to include the time for maternity leave and parental leave in the calculation of cumulative service.

[175] This same finding also applies to Ms. Lavoie's situation because the respondent's evidence does not establish the existence of undue hardship justifying the respondent's refusal to include the complainant's parental leave in calculating the three years. Finally, the respondent's evidence does not establish that it was impossible to include the time of the complainant's parental leave.

[176] Yet, the collective agreement applicable to the parties provides in certain situations that maternity leave and parental leave are considered as service. The respondent thus appears to recognize the principle of accommodation and the relevance of counting this leave in service.

[177] The evidence does not reveal any specific consideration or study on the part of the respondent on the possibility of accommodating women who take maternity or maternity leave. In a context where term employment with the respondent is a more vulnerable professional activity and where it is clearly recognized that women are very much in the majority in this type of precarious employment, the opportunity to accommodate these women taking maternity leave or parental leave became an incontrovertible issue.

[178] The respondent, to use the words of Madam Justice McLachlin in *Meiorin*, chose "a standard that is uncompromisingly stringent" (*supra*, paragraph 62). A formula that can only be accepted *en bloc*, i.e.: three years excluding leave without pay, including maternity leave and parental leave. This "*en bloc* formula" establishes a lack of flexibility.

[179] As pointed out by Julie C. Lloyd, member, in *Hoyt v. Canadian National Railway*, 2006 CHRT at paragraph 33: "Employers must be innovative in their search to accommodate an employee. They must be flexible and creative."

[180] The respondent has not established to me that it sought the flexibility and creativity that was necessary in this case.

[181] I find that the respondent did not examine all of the options that would enable it to accommodate Ms. Lavoie and woman with term appointments taking maternity leave or parental leave.

[182] The respondent is a significant employer with human and technical resources at its disposal enabling it to perform an appropriate analysis of the measures available that would not cause it undue hardship.

[183] In short, the respondent did not file any evidence enabling me to find that in calculating cumulative service there is or was undue hardship caused by including Ms. Lavoie's parental leave, i.e. four months, or the maternity leave or parental leave taken by female term employees of the respondent since the new policy was adopted.

[184] For all of these reasons, I find that the complaint is founded and must be allowed.

VII. THE RELIEF REQUESTED BY MS. LAVOIE AND THE COMMISSION:

A. Amendment of the policy to eliminate discriminatory aspects

[185] Ms. Lavoie and the Commission are asking me to order the respondent to amend the new policy so as to eliminate the discriminatory aspects. In my opinion, such a request is appropriate. Insofar as the respondent maintains a standard whereby maternity leave or parental leave of more than 60 cumulative calendar days is not taken into account in calculating cumulative service for an indeterminate appointment, I am of the opinion that it is appropriate to order the respondent to amend the policy, so as to remove the aspects that discriminate on the basis of sex.

[186] Accordingly, I order in accordance with paragraph 53(2)(*a*) of the *Act*, that the respondent cease the discriminatory practice and take measures, in consultation with the Canadian Human

Rights Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring, and specifically order the respondent to amend the new Term Employment Policy which came into force on April 1, 2003, so as to remove the aspects that discriminate on the basis of sex, namely those relating to the exclusion of maternity leave and/or parental leave from the calculation of cumulative service for indeterminate appointments.

B. Loss of opportunities or privileges and loss of salary

[187] In accordance with paragraph 53(2)(*b*), the Tribunal may order the respondent to make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.

[188] In accordance with paragraph 53(2)(*c*), the Tribunal may order a respondent to compensate the victim 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.

[189] The respondent acknowledged that if the complaint were allowed, the relief requested by Ms. Lavoie was admitted, including the amount claimed. This relief is as follows:

- Two-week waiting period for employment insurance (August 19 to September 1, 2002): $2,008.00

- Additional benefits (SUBP) for the period from September 2, 2002 to August 5, 2003: $28,959.00

- Additional benefits (SUBP) for the period from August 6, 2003 to August 20, 2003: $1,864.26

[190] However, the respondent contests the loss of salary claimed by the complainant for the period from September 19, 2003 to November 18, 2003. The amount claimed for this period is admitted, i.e. $5,790.99. However, the respondent argues that in signing the agreement with Industry Canada, Ms. Lavoie waived her claim to any loss of salary before the date she began the indeterminate appointment, i.e. November 19, 2003. For the same reasons stated in the matter of inadmissibility submitted by the respondent, I find that Ms. Lavoie did not waive the loss of the salary of which she was deprived as a result of the non-conversion of her appointment.

[191] I would add that in acknowledging the right to the indemnity for the period from August 6, 2003 to August 20, 2003, the respondent acknowledges that Ms. Lavoie did not waive the claim to any loss of salary as of August 6, 2003, the date that she obtained the "conversion entitlement" for her appointment.

[192] Accordingly, I award all of the relief sought by Ms. Lavoie pursuant to paragraphs 53(2)(*b*) and 53(2)(*c*), including $5,709.99 for the loss of salary for the period from September 19, 2003 to November 18, 2003.

[193] Considering the foregoing, I order the respondent to pay to the complainant, Ms. Lavoie, $38,622.25 for loss of privileges and salary under paragraphs 53(2)(*b*) and 53(2)(*c*) of the *Act*.

C. Special compensation

[194] Pursuant to paragraph 53(2)(*e*), the Tribunal may award compensation of up to $20,000 to a victim as special compensation.

[195] In my opinion, while the evidence was not substantial as to the moral repercussions that the respondent's practices had on the complainant, it is clear from her testimony that these events undeniably affected Ms. Lavoie and caused her loss of dignity. The right to employment is fundamental in our society and is an important component of human dignity. Further, I acknowledge *inter alia* the stress associated with financial responsibilities and with the fact that she knew it was all over as of August 6 2003. In short, it is apparent to me that Ms. Lavoie experienced periods of insecurity at a time when she had to assume the responsibility of three children.

[196] Considering all of these circumstances, I order the respondent to pay to the complainant, Ms. Lavoie, $5,000.00 as compensation as provided under paragraph 53(2)(*e*) of the *Act*.

D. Interest

[197] Interest is payable in regard to all of the monetary claims awarded pursuant to this decision in accordance with subsection 53(4) of the *Act*. I order that the interest be paid on the amounts awarded pursuant to this decision, in accordance with subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure*. The interest on the amounts awarded to compensate for the loss of privileges shall run from August 6, 2003, calculated from the time when benefits would have been payable. For the loss of salary corresponding to the amount of $5,790.99, interest shall run from September 19, 2003, also calculated from the time when benefits would have been payable to Ms. Lavoie. The interest on the compensation to be paid for moral prejudice shall run from the date of the filing of the complaint, i.e. January 19, 2004.

VIII. THE TRIBUNAL'S ASSERTION OF JURISDICTION

[198] The Tribunal shall retain its jurisdiction to receive evidence, to hear additional arguments and to make additional orders in the event that the parties disagree regarding the interpretation or the implementation of the relief ordered.

[199] I retain my jurisdiction pursuant to the foregoing paragraph for 60 days from the date of receipt of this decision by the parties.

Kathleen Cahill
OTTAWA, Ontario
June 20, 2008

PARTIES OF RECORD

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STYLE OF CAUSE:	Brigitte Lavoie v. Treasury Board of Canada
DATE AND PLACE OF HEARING:	September 24, 25, 27 and 28, 2007 January 21, 22, 23, 24 and 25, 2008

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DECISION OF THE TRIBUNAL DATED:	June 20, 2008
APPEARANCES:	
Lise Leduc/Colleen Bauman	For the Complainant
Giacomo Vigna	For the Canadian Human Rights Commission
Nadine Dupuis/Vincent Veilleux	For the Respondent