CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

DANNIE BERNATCHEZ

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

THE COUNCIL OF THE INNU OF UNAMEN SHIPU

Respondent

DECISION

2006 CHRT 37
2006/08/29

MEMBER: Kathleen Cahill

[TRANSLATION]

I. INTRODUCTION

[1] Dannie Bertnatchez (hereinafter "the complainant") taught at the École Olamen located in La Romaine on the Lower North Shore. The Council of the Montagnais de Unamen Shipu (hereinafter "the respondent") is responsible for the École Olamen. From August 25, 2003 to December 27, 2003 (a period of 18 weeks), the complainant was on maternity leave, followed by parental leave until June 21, 2004. During her maternity leave, the complainant received supplementary maternity leave benefits (hereinafter "SMLB") from the respondent.

[2] The complainant submits that the respondent discriminated against her by refusing to calculate her annual salary for the purposes of the SMLB on the basis of daily remuneration equivalent to 1/200 of her annual remuneration. The respondent used daily remuneration equivalent to 1/260 of her annual remuneration to make the calculation. Furthermore, the complainant contests the respondent's refusal to pay her an amount equivalent to the unused sick days accumulated during her maternity leave. She submits that these refusals contravene section 7 of the *Canadian Human Rights Act*[1] (hereinafter "the Act") because they have the effect of disadvantaging her during her employment on the basis of a prohibited ground of discrimination, namely sex.

[3] At the hearing, the complainant was represented by counsel, as was the respondent. The Commission did not appear. Three witnesses were heard: for the complainant, she herself and another teacher, Marie-Josée Chamberland. The respondent called Réjean Laberge, Director of Educational Services in the respondent's employ.

II. FACTS

[4] The complainant has been employed by the respondent since September 1998. She teaches students at the secondary level. Since August 1999, the complainant has been considered to be a regular full-time teacher. The complainant explained that, as a regular full-time teacher, she is paid for 200 days of work corresponding to 40 weeks. Since regular teachers are not eligible for employment insurance during the summer period, it was agreed with the respondent that the annual salary of the regular teachers would be spread over 26 pay periods (260 days) to enable them to receive a salary during the summer period.

[5] During the 2003-2004 school year, the complainant began her maternity leave on August 25, 2003, followed by parental leave from December 29, 2003 to June 21, 2004. During her maternity leave (18 weeks), the complainant received from the respondent SMLBs equivalent to 93% of her annual salary based on 26 pay periods minus the maternity benefits paid by employment insurance. At the end of her parental leave, the complainant returned to work on June 22 and 23, 2004. For each of these two days, she was paid by the respondent on a basis of 1/200 of her annual salary rather than one of 1/260. The complainant did not receive remuneration from the respondent during the summer of 2004.

[6] The complainant explained that the only policy of the respondent brought to her attention throughout her employment was the [TRANSLATION] *Personnel Policy of the École Olamen in la Romaine-May 2001* (hereinafter the "May 2001 school policy").

[7] In her testimony, the complainant spoke about her meetings and telephone conversations during 2003-2004 with the respondent's Director of Educational Services, Réjean Laberge. He represents the respondent with respect to the application of the policies concerning the conditions of employment. First of all, she had to clarify with Mr.

Laberge the annual basic salary used to calculate the SMLB. Mr. Laberge admitted that this salary was $57,960 and not $57,860. Second, the complainant requested that the SMLB be paid to her during the waiting period imposed by employment insurance, that is weeks 1 and 2 and the last week of her maternity leave. The respondent acceded to the complainant's request. The complainant also asked Mr. Laberge to have the respondent give her the SMLB on an annual salary based on daily remuneration calculated on 200 days rather than on 260 days. According to the complainant's testimony, Mr. Laberge told her that he accepted her request. One month later, however, the complainant received a letter from Mr. Laberge denying her request. In this letter, Mr. Laberge explained to the complainant that he refused to pay her the equivalent of the sick days accumulated during her maternity leave.

[8] The second witness heard for the complainant was Marie-Josée Chamberland, a regular full-time teacher with the respondent since September 2000. In her testimony, she stated that the only policy of the respondent brought to her attention was the May 2001 school policy. She testified that in August 2004, Mr. Laberge informed the employees that the respondent had decided to no longer give the SMLB during 2004-2005. On that occasion, he gave all the employees a copy of the respondent's new policy. This policy was not filed in evidence.

[9] For the respondent, the only witness heard was Réjean Laberge. He has been in the respondent's employ since January 2001. Between January 2001 and September 2003, he held the office of school principal. In September 2003, he combined the duties of school principal and that of Director of Educational Services. Since January 2004, Mr. Laberge's duties have been exclusively those of the Director of Educational Services. In this capacity, Mr. Laberge is responsible for the application of the policies governing conditions of employment.

[10] Mr. Laberge explained that the reference document concerning the conditions of employment of all the respondent's employees is the [TRANSLATION] *Personnel Policy of the Council of the Innu of Unamen-Shipu* dated November 2001 (hereinafter "the November 2001 Council policy"). When he assumed his duties as Director of Educational Services in September 2003, his predecessor's Assistant Director of Educational Services gave him the [TRANSLATION] *Personnel Policy of the École Olamen-March 2003* (hereinafter the "March 2003 school policy"). The witness stated that prior to the March 2003 policy, there had been another policy entitled [TRANSLATION] *École Olamen Policy-May 2002* (hereinafter the "May 2002 school policy"). It emerged from Mr. Laberge's testimony that there was a school policy and a Council policy, which applied to all the employees of the respondent. The school policy he applied in the complainant's case was the policy dated March 2003.

[11] In his testimony, Mr. Laberge stated that, prior to the complainant's maternity leave, two other teachers received SMLB and he applied the same calculation, that is 93% of their annual salary over 260 days.

[12] Concerning the sick leave, Mr. Laberge explained his refusal as follows:

Q. [José Rondeau]: So, in the same way, the claim for sick days, what was your reason for refusing it?

There cannot be any sick leave that can be converted into pay, you cannot accumulate sick leave if you have not worked. Someone who is on unpaid leave does not accumulate any sick leave.

III. LEGAL BACKGROUND

[13] Section 3 of the Act includes sex as a prohibited ground of discrimination while stating: "Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex." The Supreme Court of Canada recognized a situation of discrimination in employment based on pregnancy in its decision in *Brooks* v. *Canada Safeway Ltd*.[2] In that case, the Court found that it was discriminatory for the wage insurance plan in effect at the employer to deprive pregnant employees of disability benefits for seventeen weeks beginning in the tenth week preceding the expected week of the birth and ending in the sixth week following the birth.

[14] It is not necessary for the discriminatory considerations to be the only reason for the alleged actions in order for a finding to be made that there was a basis for the complaint. It is sufficient for the discrimination to have been one of the factors on which the respondent's decision was based.[3]

[15] It is the responsibility of the person claiming to be discriminated against in terms of his or her human rights to establish this fact before the tribunal. According to *Ontario (Ontario Human Rights Commission) v. Etobicoke (Municipality)*, a complainant must "establish... a *prima facie* case of discrimination."[4]. *O'Malley* v. *Simpson Sears Ltd.* states that this *prima facie* case is one "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."[5]

[16] In *Canada (Minister of National Defence)* v. *Mongrain*,[6] the Federal Court of Appeal states that it is not sufficient for the complainant to assert that he or she has reasonable grounds to believe that he or she is the victim of discrimination in order to shift the onus of proof to the respondent. The complainant must establish a *prima facie* case.

[17] Once the *prima facie* case is established, the respondent has the onus of providing reasonable justification showing that the decision made concerning the complainant was not based on a prohibited ground of discrimination. The justification given must not be a mere pretext.[7]

IV. ANALYSIS

[18] There are two questions before the Tribunal. The first concerns the complainant's allegation that the respondent discriminated against her in refusing to calculate the SMLB on the basis of her annual remuneration divided by 200 days of work. More precisely, the complainant claims from the respondent: [TRANSLATION] "93% of the difference between my annual salary divided by 20 pay periods (200 days of work) and that divided by 26 pay periods (260 days), for 18 weeks."

[19] The second question concerns the complainant's allegation that the respondent discriminated against her in refusing to give her an amount equivalent to the sick days accumulated during her maternity leave converted into cash. According to the complainant, she had accumulated 3.15 days of sick leave during her maternity leave.

[20] First of all, the Tribunal will analyse the question concerning the calculation of the SMLB. Then, the Tribunal will examine the question of the sick leave.

A. Calculation of the SMLB

[21] It emerges from the evidence that the SMLB are given to regular employees who are eligible for employment insurance. The purpose of the SMLB, as set out in the school policies, is to [TRANSLATION] "supplement employment insurance benefits during a

temporary cessation of work caused solely by pregnancy." All the school's policies provide that the SMLB plan applies to [TRANSLATION] "regular employees who become pregnant." Finally, all these policies contain the following statement:

"The amount of the weekly benefits payable under the plan and the gross weekly employment insurance benefits correspond to 93% of the employee's usual remuneration."

[22] In the complainant's view, the usual remuneration of a regular employee correspond to the provision of 200 days of work, the remuneration for which is extended over 26 pay periods. Again according to the complainant, in the case of a part-time employee, the remuneration is not extended over 26 pay periods. It is only the regular employees who, in order to ensure remuneration throughout the summer, agree to have their remuneration extended over 26 pay periods.

[23] At the outset, the Tribunal finds that all the conditions governing the calculation of the SMLB are not expressly set out in the school policies. Besides the fact that all these policies state that the calculation of the SMLB corresponds to [TRANSLATION] "93% of the employee's usual remuneration", no indication is given as to whether this calculation must be divided by 20 or 26 weeks. However, all the school policies state that [TRANSLATION] "the 1/200-days calculation" is used to determine the salary of part-time employees (May 2001 school policy) or to determine the salary of part-time or contract employees (May 2002 and March 2003 school policies). All the school policies acknowledge the suppletive nature of the Council's policies. In fact, these policies state:

In the event that there are organizational vacuums in this document, the General Policy of the Band Council shall have the force of law.

[24] The November 2001 Council Policy provides the following for regular and casual employees:

The employee's remuneration is established on an annual basis reduced to a basis of two (2) weeks (or seventy (70) hours for full-time employees), by dividing the anticipated salary by a conversion factor of twenty-six (26).

[25] Mr. Laberge, the representative of the respondent, wrote (Exhibit P-8) that the provision of the SMLB was discretionary. He repeated this point during his testimony. In the Tribunal's opinion, this statement has no impact on this case because the respondent agreed to pay the SMLB to the complainant.

[26] The evidence shows that the representative of the respondent always considered the SMLB to be an accrued benefit of regular employees who were pregnant and that the compensation paid seemed to him to be [TRANSLATION] "fair". The Tribunal notes that it does not have a duty to determine whether the respondent's decision to calculate the SMLB by dividing by 26 weeks is fair. The Tribunal must determine whether discrimination occurred. In order for this question to be answered in the affirmative, the complainant must establish a *prima facie* case that she was disadvantaged during her employment on a prohibited ground of discrimination, namely her pregnancy.

[27] In this case, in order to determine whether the complainant was disadvantaged on a prohibited ground, a comparative analysis is required in order to ascertain whether the rule "affects a person or group of persons differently from others to whom it may apply".[8]

[28] Thus, the Tribunal must identify the group that is also affected by the same rule. The complainant submits that, as a regular employee, her situation must be compared with the group to which she belongs, that is the regular employees. In other words, according to

the complainant, the following question must be asked: "does the respondent, because of its method of calculating the SMLB, treat the complainant differently from the regular female employees who are not pregnant?" In the complainant's view, the expression [TRANSLATION] "usual remuneration" used to calculate the SMLB must be compared with the definition of "usual remuneration" allowed and paid to regular employees who are not pregnant and who receive remuneration.

[29] For its part, the respondent argues that the complainant's situation must be compared with that of an employee [TRANSLATION] "who did not work". An employee is entitled to the residue (the overpayment deducted because of the extension of the remuneration over 26 weeks) only if he or she worked and solely for that part of the time that was worked. In the respondent's view, the complainant's situation must be likened to that of an employee on unpaid leave.

[30] In *Brooks*, the group with which the complainants identified was all the employees covered by the employer's group insurance plan. As we noted earlier, this plan included selective coverage and excluded pregnant workers from weekly benefits in the case of loss of wages on account of illness and accident for a period of seventeen weeks. During these seventeen weeks, pregnant women could not receive any benefits even if they suffered from an illness quite unrelated to their pregnancy. The plan accordingly had the effect of treating pregnancy differently from other forms of inability to work linked to health problems. The Court stated:

Increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination. Benefits available through employment must be disbursed in a non-discriminatory manner.[9]

[31] In the instant case, the SMLB are a benefit intended exclusively for regular employees who are pregnant. Regular employees who are not pregnant are not subject to the rule of the SMLB. In *Brooks*, the rule excluding pregnant women was contained in a health insurance plan that applied to all the employees. The facts in this case are different.

[32] In the judgment of the Tribunal, beyond the interpretation that may be given to the words [TRANSLATION] "usual remuneration", it is necessary above all to determine whether, when the complainant receives the SMLB, she must be considered to be an employee on paid or unpaid leave. Only once this has been determined can the Tribunal determine whether the complainant may properly refer to the regular employees who are not pregnant and who receive remuneration as a comparison group.

[33] A reading of all the school policies filed in evidence shows that the SMLB are described as benefits and not as salary or remuneration. Certainly, benefits are calculated on the [TRANSLATION] "usual remuneration" but this does not mean that they constitute remuneration or that they must be likened to salary or remuneration. In the opinion of the Tribunal, the SMLB are designed to make up for a lack of "remuneration" for maternity leave, but this does not mean that the SMLB can be described as "remuneration".

[34] Furthermore, all the school policies also use the words [TRANSLATION] "maternity leave allowance" to describe the SMLB. Once again, the word remuneration or salary is not used.

[35] In *Dumont-Ferlatte*,[10] the Canadian Human Rights Tribunal dismissed the claim of employees of the Public Service of Canada alleging discrimination on the basis of sex on the ground that annual leave and sick leave was not credited to them and that they were not paid monthly bilingual bonuses during their maternity leave. In that case, the complainants alleged that the SMLB received were remuneration. Consequently, according to the complainants, for the purpose of establishing the appropriate comparison group, they had to be regarded as being on paid maternity leave. The Tribunal found that the SMLB did not constitute remuneration and that whether or not there was discrimination had to be analysed by comparing the consequences attached to the different types of unpaid leave. The Tribunal stated:

The very essence of a contract of employment is a direct relationship between earnings or remuneration and the performance of work. When she is on maternity leave, however, a pregnant woman is not performing work for her employer and cannot receive remuneration.[11]

(...)

Since a pregnant woman is unable, by reason of her absence on maternity leave, to perform work for which she would receive remuneration, the maternity allowance paid by the employer serves to make good the unfavorable situation in which she finds herself and does not constitute remuneration.[12]

[36] In the opinion of this Tribunal, that decision applies to the facts in the instant case. It should be noted that the decision in *Dumont-Ferlatte* was the subject of judicial review in the Federal Court of Canada Trial Division. Madam Justice Tremblay-Lamer dismissed the application. In paragraph 46 of the judgment, she stated:

The evidence given before the Tribunal was that maternity leave is a form of leave without pay. Since no work is done because of maternity, the employee receives no pay. Accordingly, the Tribunal was correct to compare maternity leave with the other forms of leave without pay provided for in the collective agreement, including paternity leave without pay, adoption leave without pay, leave without pay for the care and nurturing of pre-school age children, leave without pay for relocation of spouse, leave without pay for personal needs, sick leave without pay, leave without pay for education and training, military leave without pay, leave without pay to participate in the activities of an international organization, leave without pay to run in an election and leave without pay for union activities.[13]

[37] Thus, the Tribunal finds that the complainant must be considered to have been on unpaid leave. The complainant cannot be compared with regular employees who are not pregnant and are not on unpaid leave. This is not the appropriate comparison group.

[38] In the instant case, it is also necessary to consider the fact that the complainant did not do any work. In *Cramm* v. *Canadian National Railway Co.*,[14] the Human Rights Appeal Tribunal stated:

In our view, the reasoning in *Dumont-Ferlatte* is also more consistent with the essential nature of the employment contract. To reiterate: the employer's obligation to pay is conditional upon work being performed. There is no general obligation on employers to compensate employees who are not providing services.[15]

[39] The decision in *Cramm* was the subject of an application for judicial review, which was dismissed. In that decision, Justice MacKay stated:

The Commission urged that the Review Tribunal erred by considering the nature of the employment contract in coming to the conclusion that there was no *prima facie* case of discrimination. That was done in assessing the purposes of ESIMA, an assessment essential in considering the purpose of employment related rules, in accord with the process established in *Gibbs*. In my opinion, the nature of the rule in question, based on the underlying principle of an employment contract that one is paid for service performed, is an essential element in assessing the purpose of the rule in question...[16]

[40] The complainant did not receive SMLB from the respondent in consideration of any work that was done. The regular employees are not therefore in the same situation as the complainant, the reason being that their remuneration is consideration for work that is done. To be sure, a regular employee who leaves in the middle of the school year will be entitled to reimbursement of the amount that was deducted to ensure that the payment was extended over 26 weeks. However, the calculation of the excessive amounts deducted is in consideration of the work done, for which X remuneration was paid. In the instant case, the Tribunal may not compare the complainant's situation with that of the regular employees who were not pregnant and who did work.

[41] Thus, the Tribunal finds that the complainant has not established a *prima facie* case showing that the respondent discriminated against her because of her pregnancy.

B. Reimbursement of sick leave

[42] Concerning this aspect of the complaint, the complainant considers that the respondent discriminated against her by refusing to reimburse her for the sick leave accumulated during her absence on maternity leave. The complainant relies on the May 2001 school policy. This policy provides as follows:

22.1 An employee on maternity leave shall retain her days of sick leave and shall remain covered by the insurance plan in effect.

[43] In the respondent's view, the May 2001 school policy submitted by the complainant does not apply. The respondent submits that the policy in effect at the time the complainant exercised her right to take maternity leave was the March 2003 school policy. Article 22.1 is no longer included in this or the earlier policy, namely the May 2002 school policy.

[44] Consequently, the respondent no longer recognizes an employee on maternity leave as having the right to convert the sick leave she accumulates during her absence into cash.

[45] In the complainant's view, it is the May 2001 school policy that applies since the respondent never communicated the March 2003 and May 2002 school policies to her.

[46] This having been said, the jurisdiction of the Tribunal is to determine whether, by refusing to reimburse her for the sick leave accumulated during her maternity leave, the respondent discriminated against the complainant. First, the Tribunal must ascertain whether there is a *prima facie* case of discrimination.

[47] It emerges from the evidence that the respondent justified its refusal to reimburse the complainant for the accumulated sick leave because, in the respondent's view, the May 2001 school policy no longer applied (Exhibit P-11, p. 3). It is established that the complainant never received a copy of the May 2002 and March 2003 school policies. Assuming that the respondent was required to apply the May 2001 school policy to the complainant because it had not notified the complainant that it no longer applied, the Tribunal cannot conclude that there was a *prima facie* case of discrimination.

[48] The respondent's refusal to apply the May 2001 school policy does not in itself create a *prima facie* case of discrimination against the complainant. To be sure, there was a misunderstanding between the parties as to whether the respondent's decision to apply a policy that was never communicated to the complainant was correct. However, the Tribunal cannot link this misunderstanding and the prohibited ground of discrimination that is pregnancy.

[49] Despite what has been said above and assuming that the complainant has established a *prima facie* case of discrimination, the Tribunal considers that all the evidence adduced does not show that the respondent discriminated against the complainant. In his letter to the Canadian Human Rights Commission (Exhibit I-3), the representative of the respondent stated that a provision allowed them to amend a policy before the beginning of each school year. The May 2002 and March 2003 school policies contained such a provision. The May 2001 school policy stated the following: [TRANSLATION] "This policy may be amended by the Council in office". The respondent accordingly reserved the right to amend the May 2001 school policy. It did so when it reviewed and amended this policy on two occasions. Consequently, the respondent's refusal to apply the May 2001 school policy is not a pretext and is a reasonable explanation.

[50] Concerning the respondent's refusal to acknowledge that it was possible for a regular employee who was pregnant to convert the sick leave accumulated during her maternity leave into cash, the Tribunal analysed the testimony of the representative of the respondent and the letter he sent to the complainant (Exhibit P-8). From this evidence, the Tribunal understands that when the representative of the respondent wrote to the complainant (Exhibit P-8) and answered the questions of José Rondeau, counsel for the complainant, concerning the sick leave, he referred to the policy he felt was applicable, that is the March 2003 school policy. The reason why this March 2003 school policy no longer recognized this benefit lies in the fact that, according to the representative of the respondent, employees on maternity leave are considered to be on unpaid leave. Since they do not work, employees on unpaid leave cannot accumulate sick leave during their absence. In the Tribunal's judgment, the decision in *Dumont-Ferlatte*[17] confirms the correctness of such a justification.

[51] Certainly, the respondent could have maintained the benefit recognized in article 22.1 of the May 2001 school policy. However, the decision to remove this benefit and the reasons given in support of its removal constitute a reasonable explanation that was not a pretext.

[52] Consequently, the Tribunal finds that the complainant did not establish a *prima facie* case of discrimination and that, if she had done so, the respondent gave a reasonable explanation that was not a pretext or contrary to the Act.

V. CONCLUSION

[53] The Tribunal finds that the complainant did not establish that she was discriminated against.

[54] For the reasons given above, the complaint is dismissed.

Kathleen Cahill

OTTAWA, Ontario

August 29, 2006

[1] R.S. 1985, c. H-6.
[2] [1989] 1 S.C.R. 1219.
[3] *Holden* v. *Canadian National Railway Co.* (1991), 14 C.H.R.R. D/12, para. 7 (F.C.A.).
[4] [1982] 1 S.C.R. 202, p. 208, para. 7.
[5] [1985] 2 S.C.R. 536, p. 558, para. 28.
[6] [1991] 1 F.C.J. No. 945 (Q.L.).
[7] *Lincoln* v. *Bay Ferries* 2004 FCA 204, para. 23, and *Morris* v. *Canada (Canadian Armed Forces)* 2005 FCA 154, paras. 26 and 27.
[8] *Supra*, note 5, para. 18.
[9] *Supra*, note 2, page 1240.
[10] *Dumont-Ferlatte* v. *Canada (Employment and Immigration Commission)*, [1996] CHRD No. 9, (Q.L.).
[11] *Id*, para. 76.
[12] *Id*, para. 80.
[13] *Dumont-Ferlatte* v. *Canada (Employment and Immigration Commission)*, 1997 F.C.J., No. 1734, para. 47. (Q.L.).
[14] *Cramm* v. *Canadian National Railway Co. (Terra Transport)*, H.R.R.T., [1988] C.H.R.D. No 4, (Q.L.).
[15] Para. 63.
[16] *Canadian Human Rights Commission* v. *Canadian National Railway Co. (Terra Transport)*, F.C.A., D.T.E. 2000T-1007, para. 26.

[17] *Supra*, note 10.

PARTIES OF RECORD

TRIBUNAL FILE:	T1060/4105
STYLE OF CAUSE:	Dannie Bernatchez v. The Council of the Innue of Unamen Shipu
DATE AND PLACE OF HEARING:	May 1, 2006 Sept-Îles (Quebec)
DECISION OF THE TRIBUNAL DATED:	August 29, 2006

APPEARANCES:	
Mr. José Rondeau	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Mr. Serge Belleau	For the Respondent