THE CANADIAN HUMAN RIGHTS ACT
(R.S.C. 1985, C. H-6 as amended)

IN THE MATTER OF AN APPEAL FILED PURSUANT TO THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:

GIHANE MONGRAIN

Appellant
(Complainant)

- and -

THE DEPARTMENT OF NATIONAL DEFENCE

Respondent

- and -

THE CANADIAN HUMAN RIGHTS COMMISSION

Commission

TRIBUNAL: CLAUDE D. MARLEAU, CHAIRMAN
MARIE-THÉRESE MOREAU-LANDRY
JACQUES CHIASSON

DECISION OF THE REVIEW TRIBUNAL

APPEARANCES: Gérard Mongrain, for the Appellant
Johanne Levasseur, for the Respondent
Anne Trotier, for the Canadian Human Rights Commission

DATE AND LOCATION: March 8-9, 1989
Montreal

TRANSLATION
FROM FRENCH

APPOINTMENT OF THE REVIEW TRIBUNAL

On October 6, 1988, the President of the Human Rights Tribunal Panel appointed the present Review Tribunal to hear the appeal filed by the appellant Gihane Mongrain on August 31, 1988, from the decision rendered on June 30, 1988, by the original Tribunal composed of Niquette Delage, which dismissed the appellant's complaint.

The appeal was heard in Montreal on March 8 and 9, 1989, before Mr. Claude D. Marleau, Ms Marie-Thérèse Moreau-Landry and Mr. Jacques Chiasson.

POWERS OF THE REVIEW TRIBUNAL

The powers of the Review Tribunal are set out in section 56 of the Canadian Human Rights Act, R.S.C. 1985, C. H-6 as amended, and more specifically in subsections (3), (4) and (5) of section 56:
(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.

THE FACTS

At the start, the appellant and two female colleagues were employed by the Department of National Defence as teachers of French as a second language to soldiers who were members of the Canadian Armed Forces. For several years, all three were hired on a contractual basis for term positions.

During the years in question, each of the complainants had new contracts without any interruptions of more than sixty days.

There is an Order under the Public Service Employment Act that would have allowed the complainants to become what is referred to as "indeterminate" if certain conditions were met. (This Tribunal will confine itself to mentioning the said Order because, in its opinion, the Order is not determinative in the appeal before it.)

The appellant worked until mid-April of 1985. Acting on her doctor's advice, she left her job before the end of her term contract, which expired on April 30, 1985. However, a few days before she left on maternity leave, on April 12, 1985, the employer offered her another contract for the period from April 30, 1985 to May 24, 1985. The appellant accepted the offer

that same day. She stopped working a few days later and did not report to work on April 30, 1985.

On April 18, the employer made the appellant a new job offer. This offer was for the period from May 27 to August 2, 1985, and included a condition not found in previous offers. This condition read as follows:

[translation]
Please confirm to us your availability to report to work on May 27, 1985. It goes without saying that if you are not available on that date, this offer will be automatically cancelled. We will then ask you to inform us of the date on which you would be available to take up duties, should we require your services.

On April 30, 1985, the appellant sent a letter saying that she accepted the offer but was taking the maternity leave provided for in the collective agreement. The employer replied on May 22, 1985, by withdrawing its offer, and notified the appellant that she would no longer have the status of an employee after May 24, 1985.
On January 29, 1986, the appellant and two female colleagues each filed a complaint with the Canadian Human Rights Commission. The complaints were similar in every respect except the dates. The appellant's complaint read as follows:

[translation]
I have reasonable grounds to believe that the Department of National Defence discriminated against me because of my pregnancy, in violation of section 7 of the Canadian Human Rights Act. The employer withdrew the offer of employment it had made me for the period from May 24 to August 2, 1985, citing my

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unavailability. However, this very employer renewed the contract of another employee who was unavailable for a different reason. I therefore believe I was treated differently because of my pregnancy.

After the complaints were filed, the President of the Canadian Human Rights Tribunal appointed Ms Niquette Delage chairperson of the Tribunal of first instance. Ms Delage heard the complaints in Montreal on January 18 and 19 and February 15 and 16, 1988. On August 9, 1988, Ms Delage dismissed the three complaints.
On August 31, 1988, the appellant filed a Notice of Appeal which read as follows:

[translation]
The appellant bases her appeal on the following grounds: the Tribunal, in the appellant's opinion, erred in its judgment on the following points:

1) Mistake in the date of the appellant's acceptance of the contract for the period from April 30 to May 24, 1985.

2) Affirmation that the employee, namely the appellant, had advised the employer she would return to work in three months.

3) Planning of the appellant's pregnancy.

4) Report of the joint committee dated September 13, 1984.

5) Case of Françoise Landry.

6) Contract of April 30, 1985, versus contract of May 24, 1985.

7) The fact that the appellant was not contacted in July 1985.

8) The workload at the St-Jean-sur-Richelieu military base in the summer of 1985.

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9) The availability clause.

10) The fact that some people were hired before the list expired.

The appellant was represented at the hearing of the present case by her husband, who had also drafted the Notice of Appeal.
Although the Notice of Appeal was not written in strict legal style and language, the Tribunal has come to the conclusion that this appeal is based on questions of mixed law and fact, contrary to the claims of counsel for the Department of National Defence, who submitted that the appeal was based solely on fact. In our view, it is in keeping with the spirit of the Canadian Human Rights Act that form does not prevail over substance, so as to ensure that the Act's objectives are fully met. One need only look at the fifth point of the Notice of Appeal to conclude there are mixed grounds.
The Review Tribunal had agreed to hear, without prejudice, some new evidence in the appellant's favour, but the appellant's representative withdrew his request at the start of his submissions.
The Review Tribunal, having examined the decision rendered at first instance, the transcripts of the proceedings and the testimony, and having considered the pertinent case law and the arguments put forward by counsel and the appellant's representative, finds that the original Tribunal was clearly and plainly wrong in its assessment of the evidence submitted to it, so that the present Review Tribunal is authorized to intervene

and substitute its own conclusions, in accordance with the criteria set out in Stein v The Ship "Kathy K", [1976] 2 SCR 802.
The Review Tribunal will in the following paragraphs set down the legislation and precedents bearing on this appeal, and will then proceed to demonstrate the errors made by the original Tribunal.

THE LEGISLATION

Section 3 reads as follows:
3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

Section 7 reads as follows:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 15 reads as follows:

15. It is not a discriminatory practice if

(a) 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.

THE PRECEDENTS

It has been a well-established principle since the decision in Latif v Canadian Human Rights Commission, [1980] 1 FC 687, that a person who alleges discrimination need not establish a prima facie case; it is sufficient for the individual to be able to affirm reasonable grounds for belief that he or she was a victim of a discriminatory practice. At this point the machinery of the Act is set in motion and the burden of proof is shifted to the employer, who must show, in accordance with section 15 of the Act, that the ground alleged by the complainant is based on a bona fide occupational requirement. Further, it was held in Ontario Human Rights Commission, Dunlop, Hall and Gray v Borough of Etobicoke, [1982] 1 SCR 202, that a bona fide occupational requirement within the meaning of the Code should exhibit the following characteristics:

1) It must be imposed honestly, in good faith.

2) It must be imposed in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy.

3) It must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

A number of points regarding the bona fide occupational requirement defence were clarified by the Supreme Court decision

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in Ontario Human Rights Commission and O'Malley v Simpson-Sears Limited, [1985] 2 SCR 536. In particular, the Court ruled that the onus is on the employer to show that not applying the action complained of would result in undue hardship for the employer.

This decision also established that there is no need to prove intent to discriminate on a ground prohibited by the Act; it is sufficient to prove that the action had a discriminatory effect.

Finally, this decision laid down the principle that the employer has a duty to accommodate the employee, as long as this does not cause undue hardship to the employer.

DECISION RENDERED AT FIRST INSTANCE

From the official transcripts of the initial hearing and the submissions made to this Review Tribunal, we conclude that the original Tribunal erred in its assessment of the employer's testimony and in its assessment of the meaning of a bona fide occupational requirement. Indeed, to accept the employer's argument that the availability clause is based on a bona fide occupational requirement would be to take away all the significance the Supreme Court intended the Bhinder decision to have, in that the bona fide occupational requirement defence should not be interpreted so broadly as to defeat the very purpose of the Act.

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The initial Tribunal, moreover, did not accept the complainants' submission on what the appellant describes in her Notice of Appeal as "the Landry case".

The reason for this refusal to accept the case of Ms Landry was that the complainants, as they testified, had no personal knowledge of the facts surrounding the hiring or the unavailability of Ms Landry.

However, from the evidence given by the employer's two witnesses, Mr Champagne and Mr Perron, it is clear Ms Landry was not treated in the same way as the complainant: when the former was offered employment in May,

the contract did not include an availability clause. In fact, when asked about the use of this clause in the past, Mr Perron answered that it was perhaps the first time the availability clause had appeared (page 455 of transcripts of original hearing). It was also learned that a case like that of the complainants had never arisen in the ten years in which Mr Champagne had been on the job. Finally, according to the evidence given by the employer's two witnesses, prior to the actions complained of, it was not the employer's practice to cancel the contracts of teachers who for one reason or another did not report for work after they had accepted an offer from the employer.

We are of the opinion that, as soon as the original Tribunal heard the employer's testimony to the effect that Ms Landry had been treated differently from the complainants, it should have

found the allegations of discrimination in the complaint to be substantiated, or at least made a finding of prima facie evidence, which would have shifted the burden of proof onto the employer. The employer would then have had to establish a bona fide occupational requirement which applied to all its employees, in accordance with the precedents noted above.

It also appears to us, from the evidence submitted at the first hearing, that the employer did not successfully prove that the availability clause was introduced as a result of a bona fide occupational requirement which met all the conditions laid down in earlier decisions.

Further, even if we conceded that the availability clause was a purely administrative measure associated with human resources planning, the employer would still have had a duty to accommodate his pregnant employees, and we have difficulty understanding how this accommodation could have resulted in undue hardship for the employer.

In conclusion, it seems very clear to us that the reason behind introducing the availability clause was the fact that the complainants, and the appellant in particular, were pregnant. In addition, we should not forget that the authorities are very exacting, given the goals and very nature of human rights legislation, and do not require that the discrimination being complained of be intentional or premeditated, but only that it exist. This is referred to as adverse effect discrimination.

In light of the foregoing, and from the testimony given at the first hearing and the arguments we have heard, we conclude that the original Tribunal was clearly and plainly wrong in its assessment of the evidence, which led it to an incorrect finding with regard to the assessment of the principles of the legislation and precedents bearing on the case before us. This Review Tribunal would therefore set aside the decision given in the respondent's favour and allow the appellant's appeal, ruling that she was the victim of discrimination based on the fact she was pregnant, in contravention of sections 3(1), 3(2), 7(a) and 7(b) of the Canadian Human Rights Act, R.S.C. 1985, C. H-6, as amended.

DAMAGES

In accordance with section 56(5) of the Act, the Review Tribunal may dispose of an appeal by dismissing it, or by allowing it and substituting its own decision or order.

The Review Tribunal therefore has the same powers as the Tribunal of first instance in this connection, and under section 53 of the Act may either dismiss the complaint or find it substantiated and proceed in accordance with subsections 53(2) and (3).

In view of the evidence that, even if Ms Mongrain had been kept on the availability list, she would not have had another

contract after the one containing the availability clause, we do not believe that reinstatement or compensation for loss of wages would be appropriate.

CONSEQUENTLY, the Tribunal orders the respondent to pay the appellant a sum of three thousand five hundred dollars ($3,500.00) as special compensation for pain and suffering, in accordance with section 53(3) of the Act.

Done at Quebec City, this 27th day of June, 1990.

(signed)
Claude D. Marleau, Chairman

(signed)
Marie-Thérèse Moreau-Landry

(signed)
Jacques Chiasson