T.D. 9/96
Decision rendered on July 16, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JO-ANN DUMONT-FERLATTE et al
and SUZANNE GAUTHIER et al

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION
DEPARTMENT OF NATIONAL REVENUE (TAXATION)
TREASURY BOARD
PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

TRIBUNAL DECISION

TRIBUNAL: Roger Doyon, Chairperson
Andrée Marier, Member
Jean-Noël Carpentier, Member

APPEARANCES: François Lumbu and Odette Lalumière, Counsel for the Commission

Rosemarie Millar, Counsel for the Employment and Immigration Commission, the Department of National Revenue (Taxation) and the Treasury Board

James G. Cameron, Counsel for the Public Service Alliance of Canada

DATES AND LOCATIONS OF HEARINGS:

September 12, 13, 14, 25, 26 and 27, 1995, Quebec City
October 2, 3, 4, 5, 18, 19, 20, 30 and 31 and November 1, 1995, Quebec City
January 16, 17 and 18, 1996, Montreal
February 19,20,21 and 22, 1996, Quebec City

TRANSLATION

THE COMPLAINTS

On December 4, 1990, Suzanne Gauthier filed a complaint with the Canadian Human Rights Commission (CHRC) against her immediate employer, the Department of National Revenue (Taxation), and the general employer in the federal public service, the Treasury Board. (C-3, tab 4)

She maintained that she was treated in a discriminatory manner by the respondents, who refused to credit her with annual leave and sick leave during the time she was on maternity leave, thus contravening sections 7 and 10 of the Canadian Human Rights Act (CHRA).

On November 15, 1990, Jo-Ann Dumont-Ferlatte filed a complaint with the CHRC on the same grounds, against the Canada Employment and Immigration Commission and the Treasury Board. (C-3, tab 1)

On July 13, 1993, Ms. Gauthier filed a complaint with the CHRC against the Public Service Alliance of Canada, alleging that the Alliance had discriminated against her by negotiating a collective agreement under which she cannot receive annual and sick leave credits while absent on maternity leave, and that, by so doing, it had contravened sections 9 and 10 of the Canadian Human Rights Act (CHRA). (C-3, tab 5)

On July 23, 1993, Ms. Dumont-Ferlatte followed suit. (C-3, tab 2)

In addition, before and during the inquiry, one hundred and three (103) other women filed complaints alleging discrimination on the same grounds. Some also alleged that the discriminatory practice in question deprived them of the bilingual bonus that they were entitled to receive.

One of those complainants, Myriam Guay, died before the hearing, and her spouse is pursuing the complaint.

The duly constituted Tribunal (T-1 and T-2) held an inquiry over a period of fifteen (15) days, and seventy-two (72) complainants took the opportunity to be heard.

THE FACTS

The complainants were employed in the federal public service, and their working conditions were governed by a collective agreement. When pregnant, they were temporarily absent on a maternity leave recognized by their collective agreement. During their absence, they did not accumulate annual vacation or sick leave credits or, in some cases, the bilingual bonus they were entitled to receive under the collective agreement.

They were refused the credits and bonus because to earn such benefits they must receive at least ten (10) days' remuneration for each calendar month, which was not the case during their absence on maternity leave.

They feel that they were discriminated against on the basis of their sex.

Applicable Legislation

a) The Canadian Human Rights Act (R.S.C. 1985, c. H-6)

The sections relevant to this case are the following:

"2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976-77, c. 33, s. 2; 1980-81-82-83, c. 143, ss. 1, 28."

"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."

and in particular the following:

"3.(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex. 1976-77, c. 33, s. 3; 1980-81-82-83, c. 143, s. 2."

The CHRC claimed that section 7 was relevant, which section 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. 1976-77, c. 33, s. 7."

This section can have no bearing here, since the practices in question, although admittedly discriminatory, were unlikely to destroy the complainants' employment opportunities.

b) Collective Agreements

The complainants, depending on the positions they hold, belong to different employee groups, the working conditions of which are governed by different collective agreements. The groups relevant to this case are the following:

1. CR: Clerical and Regulatory
2. PM: Program Administration
3. ST: Secretarial, Stenographic, Typing
4. PE: Personnel Administration: Personnel officers whose working conditions are determined not by a collective agreement but directly by the Treasury Board.

With regard to leave related to family responsibilities, the employees of this group receive the benefits appearing in the PM Group collective agreement, in accordance with the Treasury Board directive issued on April 1, 1982. (I-7, tab 24)

The complaints originated between 1982 and 1995. During that period, the collective agreements for the groups to which the complainants belonged recognized the right to annual leave credits and paid sick leave credits. (I-7, tabs 1 to 22) These credits are earned in each calendar month in which the employee receives at least ten (10) days' remuneration.

The bilingual bonus is an annual amount of $800 spread over twelve (12) months. To receive the bonus, eligible employees must also have received a salary for at least ten (10) working days in a calendar month for the position(s) to which the bonus applies.

The collective agreements also contain provisions regarding unpaid maternity leave and its applicable terms and conditions.

c) Quebec Civil Code

Article 2085 of the Quebec Civil Code defines the term "contract of employment" as follows:

"A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer."

DEFINITION OF DISCRIMINATION

The CHRA does not define discrimination. A definition must be sought in the case law. The Supreme Court of Canada defined discrimination in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R., p. 143 as follows, at page 174:

"...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an

individual's merits and capacities will rarely be so classed."

Discrimination may be direct or indirect. In Ontario Human Rights Commission and Theresa O'Malley v. Simpson's Sears Limited [1985] 2 S.C.R., p. 536, the McIntyre J expressed the following view, at page 551:

"Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground [...] On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force [...] An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply." (Underlining is the Tribunal's.)

When it is demonstrated that the rule adopted constitutes direct discrimination, the rule is simply cancelled, unless it can be legally justified. If the rule constitutes indirect discrimination, it is not cancelled, but provision should be made to arrange a settlement with the victim without undue hardship to the employer.

In the present case, all parties have acknowledged that, if there is discrimination, it is a question of indirect, or adverse effect, discrimination.

THE BURDEN OF PROOF

The decision in Ontario Human Rights Commission v. Etobicoke, [1982] 1 SCR, p. 202, indicates that it is up to the complainant to establish a "prima facie" case of discrimination.

The following statement appears in O'Malley, at p. 558:

"The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context 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."

THE EVIDENCE

The complaints originate from certain working conditions negotiated by the employer and its employees, which can be found in the various collective agreements or employment contracts.

By definition, a contract of employment has three (3) main components: performance of work, remuneration, and subordination of the employee to the employer.

In his work entitled "Droit du Travail pour le cours de formation professionelle du Barreau du Québec" (1994-1995), Robert P. Gagnon, a lawyer and renowned labour relations author in Quebec, describes remuneration as follows (p.46):

[TRANSLATION] "The concept of remuneration covers a broad reality. In fact, it designates any consideration or benefit of monetary value that an employer owes to an employee in exchange for work done by the employee. (Underlining is the Tribunal's.) Therefore, besides the wage or salary, in the narrowest sense, that is paid on the basis of performance or hours worked, remuneration also includes benefits such as vacation allowances, pay for non-working days, or the employer's share of certain insurance or retirement plan premiums, as the case may be."

Remuneration, in any form, remains subject to the performance of work. The parties recognize this principle in their collective agreements, but they relaxed it by deciding that only ten (10) days' salary in a calendar month would be sufficient to entitle employees to the benefits described earlier. They carefully used the term salary instead of referring to the performance of work, because an employee who is absent from work while on paid leave, such as an annual vacation, is deemed to be at work.

In accordance with this principle, as soon as the performance of work amounts to less than ten (10) days in a calendar month, remuneration in the

form of earned annual leave credits, sick leave credits, or a monthly bilingual bonus stops. That is the rule. (Underlining is the Tribunal's.)

The CHRC and the complainants consider this rule neutral, in the sense that

it applies to both men and women. However, a woman, by reason of her sex and her pregnancy, is prevented from earning these benefits, since while she is absent on unpaid maternity leave she will not receive ten (10) days' salary in a calendar month. A man, on the other hand, will never find himself in this situation, as he will never use unpaid maternity leave and will regularly continue accumulating his annual and sick leave credits and receiving the bilingual bonus.

Therefore, according to the definition of adverse effect discrimination in O'Malley, the rule affects one group of people, pregnant women, more than another, men, to whom it cannot be applied and who are not affected by it.

To justify its claim, the CHRC relies on the Supreme Court decision in Brooks v. Canada Safeway Limited [1989] 1 SCR, p. 1219.

The Canada Safeway Limited employees belonged to a group insurance plan that provided for weekly benefits during absences due to illness or accident that resulted in lost wages. Although pregnant women were covered by the plan, they were excluded from it for a period of seventeen (17) weeks if they suffered an illness unrelated to the pregnancy. The women filed a complaint with the Manitoba Human Rights Commission on the ground that they were victims of discrimination on the basis of sex.

The following passage appears at page 1220 of the decision:

"The complete disentitlement of pregnant women during a seventeen-week period from receiving accident or sickness benefits under the respondent's plan constitutes discrimination by reason of pregnancy. Pregnant employees receive significantly less favourable treatment under the plan than other employees. The plan singles out pregnancy for disadvantageous treatment, in comparison with any other health reason which may prevent an employee from reporting to work." (Underlining is the Tribunal's.)

With all due respect for the opposite view, it is not sufficient here to compare the situation of a pregnant woman with that of a man who will never be pregnant. In taking this position, the Tribunal believes its reasoning

is consistent with that of Hugesson J of the Federal Court, who, in Suzanne Thibaudeau v. Her Majesty The Queen [1994] 2 F.C., p. 189, declared as follows at page 204:

"...surely it cannot be the case that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous. Such a mechanistic approach would be likely to defeat the purposes of the Charter. Indeed, in my view it is not because more women than men are adversely affected, but rather because some women, no matter how small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on grounds of sex.

In this connection it is important to recognize that sex differs significantly from the other enumerated grounds [in

the Charter, which are the same as in the Canadian Human Rights Act]. There is an almost infinite number of religions, races, nationalities etc. and no two subsets within any of those categories could properly be described as opposites. There are only two sexes. One excludes the other. A male is always the opposite of a female and vice versa. Women or any group or subgroup of women who claim that a law discriminates on the basis of sex necessarily do so because it draws a distinction based on their shared characteristic of femaleness which it does not draw for those who have the opposite characteristic of maleness [...]

Accordingly, it seems to me that one cannot logically say that an otherwise neutral rule discriminates on the basis of sex simply because it affects more members of one sex than of the other [...] The focus, surely, is not on numbers but on the nature of the effect; on quality rather than quantity. (Underlining is the Tribunal's.) If legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimnation is sex."

It is therefore necessary also to examine the effects of the rule and to ask oneself whether a pregnant woman, prevented from earning her annual

leave and sick leave credits and from receiving her monthly bilingual bonus because she is absent on maternity leave, is treated any differently than others to whom the same rule applies when they take similar kinds of leave.

To answer this question, the nature of maternity leave should first be reviewed, to determine how it is treated in comparison with similar kinds of leave.

IS MATERNITY LEAVE A FORM OF SICK LEAVE?

The decision in Brooks is very clear on this point. Pregnancy is not an illness. Furthermore, on March 16, 1987, the CHRC adopted a policy on pregnancy and childbirth discrimination. (I-7, tab 32) It states as follows: "The use of the words 'sick', as in sick leave, and 'disability', as in disability insurance plans, has given rise to other semantic difficulties. It is the Commission's position that pregnancy and childbirth cannot be categorized by the terms sick or disabled...."

IS MATERNITY LEAVE PAID LEAVE OR UNPAID LEAVE

The Tribunal refers to the testimony of David Swayze. Mr. Swayze worked in the federal public service from 1980 to 1994, in the Treasury Board Secretariat to be precise, as officer responsible for federal public service group benefit programs, including the disability insurance plan for public service managers, the parental benefits policy, and the maternity benefits policy.

From 1981 to 1993, he participated in and contributed to the development of the federal public service maternity benefits policy. Specifically, in 1981, Mr. Swayze was one of the principal framers of the policy that led to the establishment of the first maternity allowance in the federal public service.

He presented the history of maternity leave in the federal public service, which may be divided into four (4) stages:

1) From Confederation to World War II

According to an unwritten rule, no married women were employed by the federal public service, and any woman who married while employed was required to resign, with the result that there was no maternity leave

policy in the federal public service. An exception to the rule was introduced during World War I, when married women were hired by the federal public service to fill the gaps left by men who had gone to the front. This privilege was abolished, however, when the war ended.

2) From World War II to 1962

The advent of World War II meant the departure of many male public servants and the hiring of both married and single women.

In 1942, the government introduced its first policy on maternity. A pregnant employee was required to resign from her position at least two (2) months prior to the expected delivery date. She did, however, receive a preferential layoff right upon presentation of a medical certificate attesting that her child had been weaned.

In 1945, the government amended its policy to specify that an employee who had been absent by reason of pregnancy would lose her preferential layoff right if she were unable to return to work in the year following her departure.

With the end of World War II and the return of men to work, women left their jobs in the public service.

From 1962 to 1967

In 1962, the government passed the Civil Service Act and its regulation stipulating that a government employee who was absent by reason of pregnancy would no longer lose her job. On the other hand, she was required to take an unpaid maternity leave beginning at least two (2) months before the expected delivery date and ending at least six (6) weeks after the date of the child's birth or at the latest six (6) months after the date of delivery.

From 1967 to the present

In 1976, the government passed the Public Service Staff Relations Act, the intent of which was to allow the negotiation of collective agreements in

the federal public service. Thus the rules governing unpaid maternity leave that had been adopted in the Civil Service Act found their way into the collective agreements of government employees.

The Unemployment Insurance Act was amended in 1971 to establish a mechanism to provide unemployment insurance benefits in the event of absences for reasons of illness or pregnancy. It would consist of fifteen (15) benefit weeks out of a period of seventeen (17) weeks, at the rate of sixty per cent (60%) of the beneficiaries' insurable earnings.

In the case of unpaid maternity leave, the benefit period could begin ten (10) weeks before the expected delivery date and was to end no later than seventeen (17) weeks after the actual delivery date.

In 1976, however, during negotiation of the collective agreement for government employees belonging to the Clerical and Regulatory Group, the rule was relaxed to some extent, in that it was agreed that an employee could begin her unpaid maternity leave more than two (2) months before the expected delivery date or less than two (2) months before that date upon presentation of a medical certificate confirming that her state of health allowed her to remain at work, and she could return to work less than six (6) weeks after delivery upon presentation of a medical certificate confirming that her state of health allowed her to return to work.

In 1979, negotiation of the collective agreement for the same employee group led to an improvement in the conditions applicable to maternity leave without pay. The obligation to provide a medical certificate in order to delay the start of maternity leave without pay, or to return to work less than six (6) weeks after giving birth was abolished, unless the employer required a certificate.

In 1981, the Treasury Board adopted a comprehensive family benefits policy that introduced paternity leave without pay, adoption leave without pay, leave without pay for the care and upbringing of pre-school children, leave without pay for spousal relocation, and leave without pay for family responsibilities.

The same year, still at the time the CR Group contract was being negotiated, the employer's requirement that a medical certificate be produced under the circumstances described earlier was abolished. On the other hand, the employee was obliged to be on maternity leave without pay on the date of delivery, with the result that she was prohibited from using annual leave or sick leave credits on that date.

The negotiation of that contract also led to the adoption of the first form of maternity leave benefit to be paid by the employer, a "bridging benefit" of two (2) weeks' duration. It allowed a woman on unpaid maternity leave to receive from her employer, during the two-week qualifying period provided for in the Unemployment Insurance Act, a benefit equal to the unemployment insurance benefit applicable to maternity leave.

Also in 1981, negotiations between the Canadian Union of Postal Workers and the Treasury Board led to the creation of the first form of maternity allowance. It was paid by the employer on the basis of ninety-three per cent (93%) of the employee's wages, to cover the two-week waiting period required by the Unemployment Insurance Act. The employee subsequently

received unemployment insurance maternity benefits at the rate of sixty per cent (60%) of her insurable earnings according to that Act. The maternity allowance paid by the employer enabled the employee to receive ninety-three per cent (93%) of her income for fifteen (15) weeks, the period covered by the unemployment insurance maternity benefits.

During the same time, the Unemployement Insurance Act was again amended to introduce the employer-paid maternity allowance. This allowance was designed by the Unemployment Insurance Commission as part of the "Supplemental Unemployment Benefit Plan" program, to which the following eligibility requirements applied:

- an interruption of earnings due to leave without pay or lack of employment;

- eligibility for maternity leave without pay;

- allowance not to exceed ninety-five per cent (95%) of the employee's wages and not to be classed as wages, but strictly as an income replacement benefit;

- allowance not to be taken into account when calculating an employee's annual or deferred remuneration or severance pay.

The CHRC had received complaints alleging that the policy requiring a pregnant employee to be on leave without pay on the date of delivery was discriminatory.

In July 1983, the CHRA was amended to stipulate that any discriminatory practice relating to pregnancy and childbirth would constitute discrimination. Consequently, in 1983, the Treasury Board approved a new policy on maternity leave without pay and the use of sick leave.

Thus, it was no longer compulsory to take maternity leave without pay and the time at which such leave was taken was left to the discretion of the individual concerned. She could use her unpaid maternity leave before, on, or after the date of delivery.

In addition, the employee could use her paid sick leave credits during any period of medical disability occurring in relation to her pregnancy. The new policy also provided for a period of remuneration payable to the natural parents, the father or the mother, for requirements related to the birth of the child. Previously, such remuneration was granted only to the natural father.

In the months that followed, this policy was incorporated into the collective agreements of federal public service employees.

In 1984, an amendment to the Unemployment Insurance Act allowed adoptive parents to receive the same benefits as those granted to natural mothers, but did not grant these benefits to natural fathers. Adoptive parents received adoption leave without pay for a period of six (6) months, which they could divide between them and for which they received unemployment insurance benefits but no supplementary benefit. Natural fathers received none of these benefits.

Following passage of this amendment to the Unemployment Insurance Act, many complaints were filed with the CHRC against the Treasury Board, alleging that the amendment did not grant the supplementary unemployment insurance benefit to adoptive parents and natural fathers, as it did to natural mothers.

A complaint was also filed with the CHRC by a citizen named Schachter, alleging that the Unemployment Insurance Act gave natural fathers no possibility of obtaining the same benefits as adoptive parents or natural mothers.

In October 1990, following a Supreme Court ruling, the Unemployment Insurance Act was amended to abolish the unemployment insurance benefits to adoptive parents in favour of a parental benefit of ten (10) weeks for all categories of parents.

Thus, a natural mother having a de facto unpaid maternity leave of seventeen (17) weeks received an additional parental leave of ten (10) weeks.

In short, a pregnant employee may use a maternity leave without pay beginning before, on or after her delivery date, as she sees fit. During her pregnancy, she may also use her paid sick leave credits or her annual leave credits. Thus, a pregnant employee could choose to take her paid

sick leave credits or her annual leave credits without taking an unpaid maternity leave.

During her maternity leave without pay, the employee is guaranteed that she will still have her job when she returns to work, and will receive any wage increases and advancements that came into effect while she was absent.

With regard to pension, life insurance and disability insurance plans, she may maintain the benefits she is entitled to under the collective agreement. The employer pays into the various plans the portion payable by the employee, who must reimburse the employer after returning to work in accordance with the agreed-upon terms. With regard to health insurance, however, the employee must pay her share during her absence.

Mr. Swayze's testimony clearly shows that both the employer and the unions representing the employees have always acknowledged that maternity leave was a form of leave without pay.

Section 57(3)(d) of the Unemployment Insurance Act stipulates that "payments received under a private supplemental unemployment benefit plan where such plan has been approved, for the purposes of this paragraph, by special or general directions of the Commission" are not considered to be earnings.

Even if this Act excludes the supplemental unemployment benefit from the concept of earnings, could it be considered earnings with respect to the present complaints?

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.

The Tribunal referred to the Dictionnaire Canadien des Relations du Travail, second edition, 1986, a labour relations dictionary designed by Gérard Dion, professor in the Labour Relations faculty at Université Laval.

This dictionary defines the term "benefit" ("prestation") as an allowance (allocation), and "allowance" ("allocation") as follows: [translation] "A usually lump sum paid to cover certain expenses, or to provide relief or assistance in an unfavorable situation [...] (Underlining is the Tribunal's.) The allowance may be the result of custom, a formal agreement, or legislation."

As Dickson J stated in Brooks, at page 1237,

"It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society."

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.

The Tribunal therefore concludes that maternity leave is a form of leave without pay.

OTHER FORMS OF LEAVE WITHOUT PAY

It having been established that maternity leave is a form of leave without pay, it is important to determine the other forms of leave without pay recognized by the collective agreements. The evidence reveals leaves without pay that can potentially last more than three (3) years. They are listed below:

a) Paternity leave without pay: is intended for the natural father of a child. It may begin on the day the child is born and must end no later than six (6) months following the birth of the child. When the couple takes both the maternity leave without pay and the paternity leave without pay, they must be shared in such a way that the leave does not exceed six (6) months.

b) Adoption leave without pay: is available to adoptive parents as of the date on which they receive the child and is of a maximum six (6) months' duration. If the spouses intend to use it, they must share the period of six (6) months.

c) Leave without pay for the care and upbringing of pre-school children: employees may avail themselves of this leave as they see fit for a maximum period of five (5) years during the period of their employment.

d) Leave without pay for spousal relocation: is accessible to an employee whose spouse must relocate, and varies in duration from one (1) to two (2) years.

e) Leave without pay for personal reasons: is authorized for any reason and may extend to a period of three (3) months, but may not exceed one (1) year over the course of the employee's career.

f) Sick leave without pay: may be taken by employees who have used up all their sick leave credits but are still unable to work because of illness or disability and wish to keep their job.

Under such circumstances, employees receive benefits from the long-term disability insurance plan, which gives them benefits equal to seventy per cent (70%) of the insured earnings. Employees become eligible for these benefits after a waiting period of thirteen (13) weeks and after having met the requirement of using up all their accumulated paid sick leave credits.

If the use of paid sick leave credits is not enough to cover the waiting period, the employee may make good the difference with unemployment insurance sickness benefits.

g) Educational leave without pay: is granted to employees who wish to pursue their education or training. If the employer feels that the pursuit of further education or training will be in its interest, the employee may receive an allowance.

h) Military leave without pay: leave available to employees who are generally members of the reserve forces and who temporarily leave their position to enter the military on a part-time basis.

i) Leave without pay to participate in the activities of an international organization: offers employees the opportunity to work within an international organization such as the World Health Organization, the World Food Bank or the International Monetary Fund.

j) Leave without pay to seek election: is offered to allow employees to stand for office in an election, because while they are taking part in election activities they cannot perform their job for their employer, the Government, and receive remuneration.

k) Union leave without pay: may be obtained by any employee wishing to act as a permanent officer of federal public service unions.

TREATMENT OF MATERNITY LEAVE WITHOUT PAY COMPARED WITH OTHER FORMS OF LEAVE

14

WITHOUT PAY

After having established that maternity leave is not a form of sick leave, the CHRC, in its Policy on Pregnancy and Chilbirth Discrimination quickly added the following statement:

"...yet it is the Commission's policy that, where some form of leave is provided to employees temporarily unable to work for health reasons, employees temporarily unable to work for reasons related to, or unrelated to, but occurring at the same time as, pregnancy or childbirth shall be eligible for such leave."

Mr. Swayze brought to the Tribunal's attention a table (I-10) identifying the different forms of leave without pay and the benefits each provides.

An analysis of this document reveals that the rule is the same for all leaves without pay, with no distinction being made for maternity leave without pay or sick leave without pay.

No form of leave without pay allows employees who take such leave to accumulate annual leave and sick leave credits or receive the monthly bilingual bonus during their absence if they do not receive ten (10) days of salary in a calendar month.

Whenever any of these leaves without pay is taken, job security is maintained and the time used is recognized in calculating continuous service for retirement purposes.

With the exception of the leaves without pay for the care and upbringing of pre-school children, for spousal relocation and for personal obligations, the time used in taking leaves without pay is recognized in calculating accumulated annual leave and the years of continuous service required for an increase in remuneration.

Not only was maternity leave without pay given the same treatment as the other forms of leave without pay, it had better benefits.

For example, in the case of disability sick leave, employees receive long-term disability insurance plan benefits with a qualifying period of

thirteen (13) weeks, or unemployment insurance sick benefits, only after first using up all their accumulated paid sick leave credits. No such requirement applies to maternity leave without pay.

While sick leave without pay provides an income equal to seventy per cent (70%) of insurable earnings, an employee on maternity leave without pay receives ninety-three per cent (93%) of her wages.

Thus, the following principle, stated in the case law and in the CHRC policy, is observed: "That for all purposes concerning the receipt of benefits and eligibility terms under which coverage is available from any benefit plan, employees temporarily unable to work for medically certifiable reasons related or unrelated to pregnancy or childbirth but occurring at the time of pregnancy or childbirth shall be treated at least as favourably as any other employee temporarily unable to work for medically certifiable reasons."

15

CONCLUSION

The CHRC has not succeeded in providing prima facie proof to the satisfaction of the Tribunal that the rule imposed by the respondents in regard to annual leave credits, sick leave credits and the monthly bilingual bonus discriminated against the complainants.

The complaints are therefore dismissed.

SIGNED at Ville de Saint-Georges, on June 12, 1996

ROGER DOYON, Chairperson

ANDRÉE MARIER, Member

JEAN-NOEL CARPENTIER, Member