T. D. 12/ 88 Decision rendered on August 9, 1988

TRANSLATION FROM FRENCH

CANADIAN HUMAN RIGHTS TRIBUNAL SITTING AT FIRST INSTANCE PURSUANT TO THE CANADIAN HUMAN RIGHTS ACT (S. C. (1976- 77) C. 33 AND AMENDMENTS)

BETWEEN Ginette Poliquin, Gihane Mongrain, Louise Labelle Complainants and The Department of National Defence

TRIBUNAL: NIQUETTE DELAGE

DECISION OF TRIBUNAL

APPEARANCES Anne Trotier Counsel for the Canadian Human Rights Commission
Johanne Levasseur Counsel for the Department of National Defence
Gihane Mongrain On her own behalf, as complainant

DATES OF HEARING: January 18 and 19, 1988, February 15 and 16, 1988

>THE EVIDENCE

After examining the evidence submitted by the parties to the case at bar, the Tribunal acknowledged the following facts: the three complainants, Mmes Ginette Poliquin, Gihane Mongrain and Louise Labelle, had been employed on a contractual basis by the Department of National Defence for a number of years at the St- Jean military base in Quebec.

Mrs Ginette Poliquin began work as a teacher of French as a second language in January 1981.

The first contract executed by Mrs Gihane Mongrain commenced on January 5, 1981.

As to Mrs Louise Labelle, she accepted her first offer in 1984, beginning work on January 4, 1984.

In each case, they provided French courses for military personnel whose first language was not French. Mmes Poliquin, Mongrain and Labelle were identified as teachers of French as a second language, and were part of the group known on the St- Jean military base as "E- D Lat I".

By whom were they appointed? Initially, it is the Public Service Commission that has the power to appoint persons to these teaching positions. It delegates its power to deputy heads or to departmental staffing or personnel officers, whom it authorizes for this purpose. Such delegation provides, for example, a staffing officer in the Department of National Defence with all the authority required to hire the personnel necessary for meeting the education objectives of the St- Jean military base in Quebec.

But in order to hire personnel it is first necessary to recruit it. What is the procedure? Competition. There are three types of competition:

1: CC or Closed Competition, restricted to employees, and CCI, competition restricted to employees on inventory.

2: OC or Open Competition. 3: WC or Without Competition.

The competition at issue here was a CCI held in July 1983; it was entered by every person who had decided to apply for listing on the inventory. Thus all the E- D language teachers employed by virtue of the Public Service Employment Act were considered for inclusion on an eligible list.

In this 1983 competition, Mrs Poliquin placed first; Mrs Labelle placed sixth; Mrs Mongrain placed eleventh. At the time relevant to this case, Mrs Poliquin was still first, Mrs Labelle third, and Mrs Mongrain eighth on the above list.

Mmes Poliquin, Mongrain and Labelle were therefore offered employment because they were on the eligible list, and thus could be named to a term appointment under the Act. But these were term positions, as opposed to the indeterminate positions held by permanent employees of the federal public service.

These term appointments were offered under sections 24 and 26 of the Public Service Employment Act. It should be noted that a person who had received an appointment after accepting

3/... >... 3/ an offer had no guarantee that another appointment would follow the expiry of the current one, nor that a new offer would be made. Was

there a way for Mmes Poliquin, Mongrain and Labelle to become permanent staff, indeterminate teachers? Yes, thanks to a federal Treasury Board policy which has been in force since 1979. It makes it possible for term personnel who have been employed continuously for five years to become permanent and to be appointed to indeterminate positions under the exclusion approval order for long- term employees. Order no 10 allows the exclusion of certain persons and positions because of length of employment. For this order to be applicable, the term employee's service cannot have been interrupted for more than sixty days.

What does this mean, in view of the fact that Mmes Poliquin, Mongrain and Labelle, being hired on contract for specified periods or terms, would see one engagement end on a certain date, and another begin on another, the next day, for example, or following a weekend? In such cases they would end work on Friday and return to start a new contract on Monday, the date set for the beginning of a new period of service of variable length.

As a result, as long as there was a need for teachers of French as a second language, offers were made, and if they were accepted by the persons approached, new contracts were drawn up. Those in charge of the French as a second language program on the St- Jean military base became

aware of requirements about fifteen days in advance, when they were notified of the arrival of "x" number of

4/... >... 4/ military personnel at the base.

How was the required number of teachers determined? The figures set by the Trenton military base in Ontario, the headquarters of the language school or education command, provided for a ratio of one and a half teachers per class of ten students. Theoretically, for example, for twenty classes there would be thirty teachers, consisting of twenty- seven regular staff and three supply teachers. At the time the events before the Tribunal occurred, each of these teachers was supposed to work forty hours every two weeks, or twenty hours per week, and to devote four hours of courses per day to each group. If requirements dictated, a teacher could work two hours' overtime, but these were to be credited in the two weeks following the overtime service.

During the time that Mmes Poliquin, Mongrain and Labelle were among the term personnel of the St- Jean military base, the local authorities, for reasons of efficiency, deemed it preferable to have eight, or if possible seven students per class: consequently, for eighteen classes, there were twenty- seven regular teachers and three supply teachers. Of the thirty teachers employed, twenty could be indeterminate, that is, permanent, and nine were at that time term or contract teachers.

In short, if a teacher's contracts run back- to- back, under this federal Treasury Board policy the Public Service Commission can change that person's status to that of an indeterminate public servant or employee, provided, however, that his or her record shows five years of "continuous" service - not five calendar years, but

5/... >... 5/ five years of work, with no break in service of over sixty days.

Each of the three complainants has her own story. Mrs Poliquin's is as follows. For her, it all really began on March 8, 1985, when she informed her employer by letter that she would be taking maternity leave starting 15/ 4/ 85, her child being expected on 15/ 6/ 85. She drew from her sick leave from April 15 to 19 inclusive, and then took vacation leave on April 22 and 23. On April 24 she took leave under a provision in the collective agreement respecting birth of a child, and specified that her maternity leave without pay would begin on April 25, 1985. She communicated the period of her maternity leave verbally. A conversation took place between Mrs Poliquin and Mr Champagne on April 15, 1985, the day of her departure on unpaid maternity leave. She gave birth an June 7, 1985.

As mentioned earlier, Mrs Mongrain began work at the language school on January 5, 1981. She had a number of contracts, the last between July 24, 1984 and April 30, 1985. On April 12 she was offered another contract for the period from April 30, 1985 to May 24, 1985; she accepted this contract on May 18, but announced at the same time that she was taking the maternity leave provided for in the departmental employees' collective agreement. She did not report for work between April 30 and May 24, 1985.

On April 19, 1985 she began maternity leave, with a doctor's note, and therefore did not work to the end of her contract in April 1985. In April she gave notice that she would be back in three months.

On May 22, Mr Perron, administrator of civilian personnel at the base, replied to her letter of acceptance by informing her that work was no longer

6/ ... >... 6/ available. Mrs Mongrain was nearing the end of her five years of "continuous" work. If she had been offered contracts steadily until January 1986, with no interruption, the Treasury Board policy would have applied to her and she would have become a permanent employee.

Mrs Mongrain gave birth on May 31, 1985, in the forty- second week of her pregnancy.

She could have worked to the end of June 1985, but she did not, nor did she communicate with her employer in any way. Her record of employment states that Mrs Mongrain had planned to be back on November 25, 1985. Mrs Mongrain informed management far in advance of the maternity leave she was planning, and it was established at that time that she would be making the same application as Mmes Labelle and Poliquin.

At the end of August 1985, Mrs Mongrain called Ottawa. Why? Because the rules stipulated that term employees who were in breach of contract due to absence fell under the exclusion approval order, and she had to take such action if she wished to be on the inventory. The exclusion approval order at issue here is distinct from the one mentioned earlier, which is associated with the policy developed by Treasury Board. This one allows term employees to be hired by virtue of an order excluding application of the Public Service Employment Act, whereby not all the principles of that Act are observed and establishment of an eligible list is not required.

The maximum period of employment under this order is six months less a day. A person hired under the Public Service Employment Act,

7/... >...

7/ and who ceased to be employed within the meaning of that Act, was subject to the order if his or her employment was interrupted for five days.

As to Mrs Labelle, who placed sixth in the closed competition of July 1983, her last period of employment started September 29, 1984 and was to terminate May 24, 1985. She began maternity leave on January 28, 1985, after taking various leaves from January 6, 1985. Her delivery was anticipated March 22, 1985; she gave birth on March 13, 1985.

Mrs Labelle had set her return to work for after August 31, 1985, at the end of the 26- week maternity leave provided for in the collective agreement. Since she gave birth on March 13, 1985, the 26 weeks took her to September 11, 1985.

On April 18, she received an offer of employment for the period from May 27 to August 2, 1985, on condition that she reported for work. The offer was thus accompanied by an availability

clause. She accepted it, but also claimed the continuation of her maternity leave. Why did she accept when she had no intention of working? Because she knew that if she had a contract interruption of more than five days, the exclusion approval order would apply. Her employer's response was to declare the offer lapsed.

A grievance followed; filed May 27, 1985, it challenged the availability clause included in the offer of April 18, 1985. The grievance was dismissed. There was an appeal, and the grievance was dismissed again. The same happened to the grievances of the other two complainants, for they too had received a conditional offer on April 18, 1985 for the period from May 27 to August 2, 1985.

So what is at the origin of the problem facing us? It would seem to be poor information, and a poor interpretation of the collective agreement.

8/... >-

... 8/ We must go back to September 1984 to understand what happened. On September 17, 1984 there was a meeting of the joint committee, consisting of management personnel, unionized employees and term employees.

According to our information, in attendance were Messrs Larocque and Bergeron, representing management (Mr Champagne's name appears in the minutes of this meeting, but he himself has no recollection of attending it), Messrs Beaulieu and Dubuc, representing the union, two observers, Mmes Poliquin and Landry, and Mrs Labelle who said she was representing the term employees.

As is usual in these meetings, general questions were discussed, and among these was one asked by Mrs Labelle regarding the collective agreement: "Do term employees have rights under the collective agreement?" The answer was yes.

Mrs Labelle had been pregnant since June 28, 1984, and felt that her condition was obvious. She was expecting in March 1985, six months later. She claimed that her question referred to the maternity leave provided for under the said collective agreement. In her testimony before the tribunal, however, she acknowledged that the question she had asked contained no specific reference to the maternity leave discussed in article 15.06 of the collective agreement in question.

On April 12, 1985 Mrs Labelle, who had just given birth to her fourth child on March 13,* 1985 and who had always planned to take 26 weeks' maternity leave, was advised by her employer that the administration had

The original French reads "le 31 mars" - Tr. 9/... >... 9/ made an error in indicating in her file that she would return on August 26, 1985. Mrs Labelle had applied for leave on January 22, 1985 for the period from January 28, 1985 to May 24, 1985, when her contract was to expire.

When an offer was made to her on April 18, 1985 for work to be done in the period from April 27, 1985 to May 24, 1985, she accepted it on the advice of her union, UPSCE, with which she, Mrs Poliquin and Mrs Mongrain had meetings after each of them received letters dated April 18, 1985, all of the letters including availability clauses.

At that time it was decided to lodge a complaint. Neither Mrs Labelle, nor Mrs Mongrain, nor Mrs Poliquin contacted her employer for clarification on the availability clause, which had never before been included in offers made to them.

The managers were asked before the Tribunal why there was a clause covering availability. To ensure that the person to whom an

offer was made reported for work. It was a prerequisite. Management knew, however, that the employees would be absent from work, and that their absence would exceed the contract period.

Why then offer employment? Because under the Public Service Employment Act, we are told, offers must be made according to rank on the eligible list. Before offering employment to a person on the list, one had to approach the first eleven persons. The list at that time had been in effect since July 15, 1983, and was valid for one year, with the possibility of renewal for a second year, but no more. The list of interest to us was thus renewed until

10/... > ... 10/ July 14, 1985, after which date it was no longer possible to make offers. There were plans to review the language instruction program, and new indeterminate appointments had been prohibited.

Mrs Labelle received another offer on July 12, 1985 for a contract from August 1985 to December 1985. But this offer was made under the exclusion approval order.

To reiterate what is involved: periods of employment under the exclusion approval order were for a maximum of six months less a day. On July 31, 1985 Mrs Labelle turned down the offer because careful calculation showed that she would be paid only some $15,000 instead of the possible $30,000 from a series of contracts in a year of "continuous" work. On August 26, 1985 Mrs Labelle wrote to her employer to announce her availability to return to work. She was told that there was no work and that her services were not required. In addition, we learned that after the month of August 1985, no offer of immediate employment was conveyed to the contract workers until September 30, 1985, when Mrs Labelle received a new offer under the exclusion approval order. Following the offers of April 18, 1985, the cases of Mmes Poliquin and Mongrain followed the same pattern of offers, acceptances with restrictions, and so forth.

What is at issue, then, is maternity leave. What does the collective agreement say on this subject? As cited above, article 15.06 stipulates that after the birth, the union member is entitled to 26 weeks' leave. Were the complainants members of the union? We learned that a person who is appointed for more than six months to a position is covered by the collective agreement for the duration of his or her contract. Whence the problem

11/ ... >... 11/ facing the three complainants.

The other question clearly at issue is this: were the complainants employees within the meaning of the definition given in the collective agreement, namely, persons belonging to the bargaining

unit? The notion of employee derives from the Public Service Staff Relations Act. To be an employee within the meaning of the collective agreement, one must first be an employee within the meaning of that Act. A person who, for example, at the end of a specified period of seven months begins a new specified period of over six months continues to be subject to the collective agreement, and there is continuity according to the Public Service Staff Relations Act, but not, we were told, according to the Public Service Employment Act.

QUESTIONS OF LAW Throughout their oral arguments, the two counsel discussed various issues before the Tribunal. For example, the Canadian Human Rights Commission cited sections 2, 3 and 4 of the Canadian Human Rights Act: first the purpose of the Act, then the prohibited grounds of discrimination listed in section 3, then the process of filing a complaint mentioned in section 4 together with the consequences for persons found guilty of a prohibited practice.

Section 7 defines what constitutes a discriminatory practice, while sections 41 and following list the orders that the Tribunal can render. The three complaints filed before the Tribunal are similar, and their wording, in its humble opinion, presents no problem, since the three complainants are alleging the same things: first, withdrawal of an offer of employment made for the period from May 27, 1985 to August 2, 1985, on the grounds

12/... >... 12/ that the complainants were not available. Then in their second allegation, they refer to the case of another employee who, although unavailable - for a different reason from theirs - did not receive the same treatment as they did. Hence their complaint of discrimination at the hands of the same employer.

As established in the decision in the Ontario Human Rights Commission v the Borough of Etobicoke, the burden of proof lies with the person lodging the complaint. That person must establish a prima facie case, while the person against whom the complaint is lodged must refute it, demonstrating absence of discrimination on the basis of reasonably justified actions.

On the date the offer was made, Mrs Labelle, for example, was already on maternity leave. Mmes Mongrain and Poliquin were pregnant, and expecting in the next few weeks. Knowing that they would not be available, the three complainants none the less accepted the offer of employment, though also indicating to the employer that they would be absent for the duration of the coming contract. This led the employer to withdraw its offer on May 22, 1985, because the three teachers would not be available. At play here was a departmental policy applicable to all employees.

As we saw earlier, this is a special situation, for persons employed by the Department of National Defence for specified periods are "casual" or " contract" workers, not permanent employees. They are offered contracts for specified periods of time, one month, two months

or more, but they are not entitled to be called employees 13/... >... 13/ between two contracts, since upon expiry of one contract, they must await the beginning of a new contact to be able to claim the title of term employee.

Therefore, when in September 1984 Mrs Labelle asked the joint committee a question of a general nature regarding the application of the collective agreement, she received a general reply: yes, the collective agreement does apply to term employees. And as we know, in article 15.06 of that agreement, the maternity leave mentioned is 26 weeks starting from the birth of the child.

In other words, to qualify for this leave, one must be an employee within the meaning of the collective agreement and have been employed for at least six months.

One is employed under a contract, but the contract is finalized only in so far as the parties agree on a specific object, in order to accomplish specific tasks. The object of the offer made on April 18, 1985 was to provide a specific service, namely courses in French as a second language, to military personnel who would be present between May 27, 1985 and August 2, 1985 at the St-Jean military base.

We know the responses of Mmes Poliquin, Mongrain and Labelle: yes, we accept, but we will not teach, because we will not be present for work. Why will they not be present? Because they will be on maternity leave. Result: we are confronted with an impossibility. A veritable dialogue of the deaf has started up.

Actually, it is the system, as thus designed, that presents the difficulty; the Tribunal might be permitted an analogy between this system and the free- lance system, with which it is very familiar. A free- lance worker is offered contracts to perform specific tasks agreed upon by the contracting party and the free lance.

14/... >... 14/ Obviously, there is no job security in free- lance work. One depends upon contract offers, and no one is obliged to offer contracts. A free lance who is pregnant and who cannot provide the service for which she was hired must notify the other party to the contract in order to release herself from it. A free lance who relies on her contract income does all she can to avoid having to release herself from a commitment. And if she has no contract offers over a period of time, she will continue to look for a source of income all the same. It is her skill in selling herself that wins her contracts at the outset; afterward, the reputation she has acquired usually makes life easier. She is in demand. But there are slack periods, and the best reputation in the world cannot alter the fact that contracts may just not be

available. In an economic slump, free lances can either suffer or thrive, depending on the circumstances and the specialties they have developed.

It is not too much of an exaggeration to say that the three complainants were part of a system that is somewhat similar to that under which free lances operate. Did Mmes Poliquin, Mongrain and Labelle realize this? Did they see what might happen to them as a result of their status as term employees? Did they not understand that the system of which they had been part for years provided no job security? That they were at the mercy of the specific requirements to be filled by

the language school of the St- Jean military base? The fact that they had been offered one contract after another for years seems to have made them so confident that they lost sight of the basic insecurity of their employment conditions, especially in view of the fact that the

15/... >... 15/ federal Treasury Board policy on the acquisition of permanent status after five years of "continuous service" could not have been more attractive. The term employees anxious to enter the public service no doubt made this a goal in any career plan, for basically, as the testimony indicates, the three complainants were seeking permanent status.

In the course of the hearings, the Tribunal was surprised that the three complainants had not asked specific questions on specific subjects of great concern to them. For in the final analysis, the decision to start or expand a family is a fundamental one, which carries consequences. In these days, one does not proceed blindly, except in the case of an accident, which is always possible. According to our information, these three births were planned, and in all honesty, the Tribunal cannot understand why the three complainants did not ask direct questions about their current and future status. Their testimony indicates that they considered themselves well informed following the response given at the joint committee meeting of September 24, 1984. But, to reiterate, the question asked was a general one. Mrs Labelle could have subsequently questioned her immediate superior in a specific manner. She did not do so. Nor did her companions. Mrs Poliquin notified the employer of her intentions in March 1985. We believe that the insertion of an availability clause in the three offers of April 18, 1985 was evidence of a decision by the management of the St- Jean language school to ensure the co- operation of

teachers whose services were appreciated. Their reputation had been established. These were good teachers, and it seems to us normal for an employer to seek out personnel who were without

16/... >... 16/ question experienced at that point in time, and in whom it had

confidence. Can it be reproached for this? We do not think so. But far from consulting the chief party concerned in this exchange, Mmes Poliquin, Mongrain and Labelle contacted the union, which suggested to them a specific response which they adopted in full knowledge of the situation, "after careful consideration", as they said. With the result that the offers were withdrawn.

Logically, as the Tribunal discovered at the time of the hearings, they would have had to regain the status of employees as defined in the Public Service Employment Act in order to be entitled to maternity leave, because such was the nature of the system that had applied to them for years.

Mrs Labelle, who had informed administrative services that she would not be available before September 1985, was sent a letter on April 12, 1985 notifying her that the recording of an extended leave in her file had been an error committed by someone who had, for all practical purposes, treated Mrs Labelle as if she were a permanent employee - which she was not in 1985. But then, argue Mmes Poliquin, Mongrain and Labelle, how do you account for Mrs Landry?

Mrs Landry had been absent for the duration of a contract between May 27 and August 2, 1985, and there was no availability clause in her offer of April 18, 1985, even though for some months she had been frequently absent.

Mrs Landry's case was incorporated in the complaint of Mmes Poliquin, Mongrain and Labelle because the treatment given this colleague had been brought to their attention. As they testified, none of the three complainants had any personal knowledge of the Landry case. At the suggestion

17/... >... 17/ of the union, they brought forward this case in an attempt to establish the discrimination allegedly exercised against them.

The testimony of the employer party sheds some light on this subject. Mrs Landry was a depressive. She had offered her resignation, which was refused. Appropriate medical consultation was suggested instead, and there was some slight recovery. Mrs Landry was absent at various times over a fairly extended period. The dates were provided to us by the management of the language school of the St- Jean military base. When she was made an offer for the same period as that pertinent to this action, it was not felt appropriate to include an availability clause. Mrs Landry had made no leave application from the beginning of April until April 18, 1985, the date on the offers of employment forwarded to Mmes Poliquin, Labelle, Mongrain and Landry, among others. Mrs Landry accepted, but she did not report for work on the day she was to begin her duties according to the contract arrangement. Her absence continued until August 2, 1985, the date of the expiration of her contract. Her leave application was signed August 2, 1985.

Mr Champagne, her immediate superior (he was also the superior of the three complainants at the time of these events), explained that he

was not present at the time, since his work required his presence elsewhere, and he subsequently took his annual vacation. No one seems to have taken steps to settle Mrs Landry's case, since her contract was not cancelled when it became apparent that she was not present. One must assume that she was replaced. Summer, we were told, is a very busy period at the base, in addition to being the time when the permanent teaching staff take their annual vacations; to meet requirements in 1985, it

>... 18/ was necessary to hire sixty term teachers! And to limit the absences of the permanent teachers, who had to divide up their vacation periods. Those entitled to four weeks could take only three, with the fourth postponed. The result was a number of grievances. It is clear that the Landry case was not closely examined at that time, and one can imagine why. This was no consolation to the complainants, who argued (and rightfully, we feel) that here was a person who did no work, and yet because she had no availability clause in her offer she got off lightly. There was no interruption of continuity in the calculation of her years of work. There is no doubt in the mind of the Tribunal that if her leave application for the period concerning us, that is, from April 27, 1985 to August 2, 1985, had been filed before the beginning of the contract, the result would not have been the same.

Let us now review the points of similarity between this case and those of the three complainants, since they have cited it in their complaint, and use it as the basis of their claim of alleged discrimination.

Mrs Landry was a depressive. The three complainants were pregnant. Except for Mrs Mongrain, who was recommended rest by her physician before the term of her pregnancy, the complainants seem to have had normal pregnancies and to have encountered no problems. Despite a few absences, Mrs Landry continued to teach, and there was no sign that her condition was worsening to the point of rendering her incapable of fulfilling her contract between May 27 and August 2, 1985. Consequently, there was nothing special about the offer made to her on April 18, 1985, at which time the language school management was aware of her progress, since she had been keeping it informed

19/... >... 19/ of her visits to a person who was giving her genuine help. It was the standard offer, with no availability clause. Not until his return did Mr Champagne discover for himself the complete absence of Mrs Landry between May 27 and August 2, 1985.

The explanation given by Mr Champagne seems entirely plausible to the Tribunal, and in view of everything that has been said on the Landry case, the Tribunal feels that there was no similarity between that case and those of Mmes Poliquin, Mongrain and Labelle. Especially since Mrs Mongrain did exactly the same thing: after accepting a contract for the period from April 30 to May 24, 1985, she

did not make an appearance at all on April 30, 1985. In fact, she had already left on April 19, 1985. And her contract (April 30 - May 24, 1985) was not cancelled.

It is true that the Commission argued that the legislature's amendment to the Canadian Human Rights Act was intended to provide specifically "that pregnancy and childbirth were covered under the proscribed grounds of discrimination, in this case the ground of sex; the legislature has necessarily anticipated that the beneficiaries, the persons protected, would sooner or later have periods of absence."

While it subscribes to this argument, none the less the Tribunal cannot ignore the fact that everything depends on the concept of employment. It is the collective agreement that determines that to which the "employees" of the government, the union members, are entitled. And to enjoy the benefits granted by the government to the union in question, it is necessary to be an employee. Section 7 of the Act states that:

"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."

20/... >... 20/

Let us apply these provisions to the situation of Mmes Poliquin, Mongrain and Labelle.

1: Was there refusal to employ? An offer was made to certain employees at a specific moment in time, but for a future contract. Since the management of the language school required teachers, and contacted teachers whom it knew and valued but who had directly manifested their desire not to work when it needed them, management inserted an availability clause to draw their attention to the seriousness of the offer. Offers are not made for fun. An offer was made because there was no choice: a certain number of military personnel were coming, and there was a definite need for teachers; to be sure of their presence, management gave them notice of the necessity of making themselves available. Can an employer be blamed for expressing his requirements in the particular context before us? The Tribunal does not think so, and since these communications were in a contractual context, they were couched in a certain formality. In responding as they did, the complainants voided the offer that had been made to them. They in effect opposed a demurrer to the offer as formulated. No agreement was possible on the object of the contract, and no contract could be drawn up.

It can justifiably be said, a few years later, that the language school management should have proceeded differently. Instead of following procedure to the letter, in this case it should have

adopted a more flexible attitude. We believe that this would have been preferable, especially since relations between the parties were cordial at the outset. With distance and hindsight, both parties can therefore be reproached for demonstrating a lack of trust that is surprising, to say the least. But facts are facts.

21/... >... 21/ We have to live with them, and come to a decision in their regard. In our humble opinion, no agreement was concluded between the parties, and neither can be taxed with bad faith. Each had its own idea of the situation,, and confined itself to that. If there had been genuine discussion, if there had been consultation, if more flexibility and understanding had been demonstrated - so many ifs! - we would not be here today. And then there is something else to consider: Mr Champagne, the immediate superior, reported at least two grievances against him presented by the union, which did not want management intervening in its areas of competence, notably, interpretation of the collective agreement and of employee rights. Hence the fact that he did not try to meet with the three complainants. In our humble opinion, this was a failing, and one can only regret the rigidity of certain parties and the ill service this did to the interests involved.

2: Was there refusal to continue to employ any individual? The contract of the three complainants expired on May 24, 1985. As of May 27, 1985, there was to be a new contract. Taken literally, the terms of the Canadian Human Rights Act apply to a situation of uninterrupted employment. For example, a woman employed in a company informs her boss that she is pregnant. Whether she mentions it or not, her employer knows very well that she will have to be absent, if only at the time of childbirth. The duration of that absence may vary depending on the system in effect in that company. And then there are mothers who, for all sorts of reasons which it is not our business to discuss right now, return to work fairly quickly. In such cases, even if they could be absent from work longer, they are not.

22/ ... >... 22/ Let us return to our permanent employee in her company. Is she a union member? What does her collective agreement say? If she is not a union member, what does the pertinent legislation say? If the employer uses every means to terminate her services, and succeeds, he is refusing to continue to employ her within the meaning of the Canadian Human Rights Act; of that there can be no doubt.

In the circumstances before us, the employment was not permanent. It had a beginning and an end. The Department maintains that Mrs Labelle, for example, by virtue of the contract she had accepted of some eight months' duration (September 1984 to May 1985) was entitled to maternity leave, which she took starting in January 1985. She gave birth in March 1985, and prolonged her absence until the end of her contract in May 1985. Although her working conditions

were different from those of her husband, who was at the time and still is a permanent public service employee, while she was not, she does not seem to have taken this into consideration.

Did the employer then have an obligation to re- employ her? From what we know of the matter, no. Offers were extended to fill specific needs, and in order to meet equally specific objectives, the persons capable of achieving them were approached. As we had occasion to mention earlier, everything in this case depends on the concept of employment; and in the situation as described and explained to us, no guarantee of employment existed. Furthermore, it should be remembered that the appointment of persons whose future absence was known beforehand, as management testified, would have prevented the planned hiring of three supply teachers, whose presence was deemed essential in the event that a regular teacher fell

23/ ... >... 23/ ill, took leave and so forth. The Tribunal is convinced that it was necessary for teachers to be on the job if the language school was to function satisfactorily.

3: Did the employer differentiate adversely in relation to an employee in the course of employment?

Mrs Labelle, for example, took maternity leave. When her employment terminated, her leave ended. The employer had nothing against the fact that she had become pregnant. She was already pregnant when she was made the offer in 1984, and, according to her, when she began work in September 1984 her condition was obvious. In April 1985, when she was on maternity leave, she was made an offer, as in the past. And because she had been absent for several months, and had not provided her services in compliance with her contract, the employer told Mrs Labelle that she was needed, that her presence was required. The intention of her reply, as we well understand, was to protect her conditions of employment, since in order to benefit from the Treasury Board policy, she could not be absent for more than sixty days without compromising her access to permanent status, which was slated for 1989 or possibly later. What could be more natural than for her to reply as she did, after consultation with the union? But, as she herself acknowledged, she was not acting on the best information.

She realized this later. If she had contacted her employer, who knows what might have happened? It is our understanding that possibilities existed. It is certain that no one reproached

her or said anything negative about her pregnancy or her maternity leave. Everyone would agree that the system in place was perhaps not flawless in all respects, but it worked. And the brutal reminder of

24/... >... 24/ the true nature of that system produced a definite effect upon

Mrs Labelle and her two colleagues. They felt deprived, disparaged and reduced to their real status, which they had temporarily forgotten, though we are convinced, and in this we agree with counsel for the Commission, that it had not been deliberately forgotten.

CASES CITED The Commission cited abundant case law in defence of the complainants, who considered themselves the object of a discriminatory practice prohibited by the Canadian Human Rights Act.

First, regarding the Commission's role in receiving a complaint, the case of Latif v the Canadian Human Rights Commission and R G L Fairweather. The Tribunal does not feel it necessary to dwell on the points raised by the Commission. In its humble opinion, the complainants placed themselves in the union's hands and acted according to its instructions, as they told us. The fact of citing the case of Mrs Landry, without having any personal knowledge of it, is in keeping with a line of thought and action which the complainants have seen fit to endorse, and which the Tribunal has duly noted.

Regarding the case of The Winnipeg School Division No 1 and Doreen Maud Craton, and The Winnipeg Teachers' Association No 1 of the Manitoba Teachers' Society, is this applicable to the case at bar? No one contests its conclusion, which we deem just, that the Human Rights Code has primacy over a legislative text with which it might be in conflict. As far as we are concerned, the employer followed the staffing rules: the circumstances surrounding the decisions made by the complainants

25/... > ... 25/ and the reference to the case of their colleague Mrs Landry - even though management neglected a formality - do not permit a conclusion of discrimination, in our opinion. We should explain that this conclusion reached by the Tribunal took shape independently of the decision handed down at the final level within the Department of National Defence with respect to the grievances filed by the three complainants; in this regard, the Tribunal concurs with the Commission's argument that there was no res judicata because, indeed, "the deciding authority did not have the same jurisdiction as the Tribunal . . . nor could it conclude that withdrawal of an offer constituted a discriminatory practice."

Consequently, the Tribunal also subscribes to the reasoning of the Court in Edwin Erickson v Canadian Pacific, as cited by the Commission. There was no res judicata here.

However, the Commission's review of the evidence regarding the availability of the three complainants contains flaws: for example, after showing her hand, Mrs Labelle discouraged all attempts at conciliation with management. Mrs Mongrain had "made her bed" as well, and Mrs Poliquin also, as the Commission pointed out, expressed herself in such a way as to leave no doubt as to her intentions and to her interpretation of the conditions of her employment.

In the opinion of the Tribunal, management did not presume, as the Commission maintains. It simply took stock of a hitherto unexperienced situation which placed it in a kind of impasse, especially with respect to its external constraints, since its personnel requests were evaluated at Trenton, and were not always filled. The situation was complicated by

26/... >... 26/ the departmental ban on appointing new people to indeterminate positions because of the review of the language program.

The Tribunal notes various factors which it cannot ignore, and which it feels explain many things. When these factors are added up, it is clear that management, while at fault in certain respects, did not cross the line of discrimination. As management explained, a person invited to perform a task and knowing that she would not carry it out should be content to refuse the offer made. Such was not the case here.

Apparently, the complainants were looking for "the best of both worlds". And, contrary to the Commission's position in its oral argument to the effect that "when permanent or term employees announced that they were taking leave to which they were entitled, they were to be accommodated - in other words, this was part of the rules of the game", the complainants could not classify themselves in the second category because they were not employees during the period with which we are concerned. To assimilate their status to that of term employees in the context at hand is a step too hastily taken. And as counsel for the Department of National Defence maintained in her own argument, term employees were appointed to fill absences or gaps at times when the Department did not have sufficient indeterminate teachers to meet requirements. Therefore, if at a given time permanent teachers announced that they would be absent, the management of the military base's language school was required to find other teachers, and consequently appealed to "casual" help, persons recruited for a specified period of time.

27/... >... 27/

"But here," according to counsel for the Department, "what Mr Champagne is being asked is to accommodate those who allow him to accommodate others."

"As I was saying to Mr Champagne, where will this lead us? There is no request for an accommodation, Mr Champagne is not being asked to make an accommodation,* he is asked to accommodate those who allow him to accommodate others, and I do not really think that this is the meaning of the Act. Lastly, my colleague also referred to the CN case as grounds for giving a broad interpretation to the Act and to the rights set forth in it; but here again, I must point out that there is

no right to employment if one is not in a position to carry out the duties."

The Tribunal has taken due note of the citations from O'Malley v Simpson- Sears made by the Commission: "The Code aims at the removal of discrimination . . . . Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause

discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory." And the Commission recalled the conclusion of the Supreme Court, namely the duty to accommodate.

In Bonnie Robichaud v the Queen, to quote the Commission again, "a broad, liberal and realistic point of view was adopted, in line with the objectives that the Human Rights Act is intended to promote". Still in the same vein, the Commission cited the Supreme Court in

* French unclear - Tr. ... 28/ >... 28/ Action Travail des Femmes v The Canadian National Railway Company, which once again concluded that "in the interest of guaranteeing the scope of the Act and of ensuring that victims have a means of recourse, it was necessary to retain a certain broader interpretation for the benefit of another".* After examining these two judgments, the Tribunal, in view of all the circumstances surrounding this affair and of the consequences which a different attitude on the part of the language school management might have had, can only conclude that the offers were withdrawn from the complainants because they were pregnant.

Christine Marie Davies v Century Oils (Canada) Inc also appears on the list of decisions cited by the Commission. In the Tribunal's opinion, the circumstances surrounding the company's offer of employment to Mrs Davies, who was pregnant at the time, differ substantially from those before us in the present case. Mrs Davies did not reveal her condition to Mrs McHugh at the outset, and gave no notice that she wished to accept an offer, even though she knew that she would not be working, since she had made that decision. This would not have made sense.

The Canadian Human Rights Act cannot intend to impose upon employers an obligation to hire a person who will not report for work. If the person is employed and has to take leave of absence due to illness, pregnancy or some other acceptable reason, the Act will intervene, as the Tribunal understands it, to protect the person from arbitrary decisions by an employer who might use her legitimate absence to dispose of her services.

*Original French: "au profit d'une autre"; meaning unclear. Also

unclear is the attribution of this citation to the Supreme Court case mentioned Tr.

29/... >... 29/

In the case of a pregnancy, it is important that a person not be penalized and lose her job because she has given birth and spends "x" number of weeks caring for the newborn child. In this case, the three complainants were not yet employees for the period offered. Yet they claimed to be employees, even though they did not intend to carry out the duties attached to the employment in question.

Naturally, they were thinking of the future; and two of them were no doubt more immediately motivated by the prospect of attaining permanent status in January 1986 to respond as they did, after consulting the union.

But the fact is that they had no assurance of a new contract. And it has been shown that since requirements had greatly diminished for the period after August 2, 1985, offers were directed to a few people who had provided service between May 27 and August 2, 1985; since the eligible list expired on July 14, 1985, the complainants found themselves in an awkward position.

At no time did they state that they did not understand the contract system which had applied to two of them since 1981 and to the third, Mrs Labelle, since 1984; the latter's husband, let us remember, is a permanent public service employee. The fact that they may have had contract " extensions" or "renewals" up to 1985 does not remove the basic condition of every offer of employment conveyed to them over the years: the changing needs of the moment! The offer- of-employment letters make constant mention of this.

30/... >... 30/

Regarding the economic defence raised in the Paul A Carson case, as cited by the Commission, the Tribunal considers that since the Department of National Defence did not raise this argument at the outset, there is no need to dwell on it. What the Department argued was the problem caused by the absence of teachers and the necessity of replacing them - in short, the issue of ensuring that positions which were absolutely required in order to meet the demand and to operate adequately could be filled, so that action could be taken on a project of the Canadian government to train its military personnel to express themselves in the both of the country's official languages.

Regarding the matter of intent discussed in O'Malley, Robichaud, Bhinder and other recent decisions of the Supreme Court of Canada, the Tribunal shares the opinion of the Commission: the respondent's intention is not pertinent to the case at bar; what is to be determined "is whether a refusal of employment occurred based on sex discrimination, yes or no".

To counter the representations of the complainants and of the Commission, the Department of National Defence argued that the complainants, who claimed they attempted to limit the extent of their absence from work, have been unable to dismiss what they indicated in writing: in their response of April 30, 1985, all three cited article 15.06 of the collective agreement, which clearly mentions the maternity leave and its duration: 26 weeks after childbirth!

Like the Department, the Tribunal considers that the complainants had the firm intention of not working for a long period of time;

31/... >... 31/ on rereading the minutes of the joint committee meeting of September 13, 1984, a meeting frequently referred to in the hearings, we note the generality of the terms used by Mrs Labelle with respect to the subjects of her questions. There is no reference in this document to maternity leave. Item 16 mentions the collective agreement, which applies to term employees with over six months' service, but that is all.

We were told that the union reserved the right to interpret this agreement. Mr Champagne knew something about this, having been called to order by a grievance on this very subject, which subsequently led him to avoid overstepping certain boundaries thereby imposed on him.

And we know, because they told us, that the three complainants' source of information was the union, which unfortunately did not satisfactorily assess or explain the stakes involved - so much so that at least two of the complainants, Mmes Labelle and Poliquin, alluded to this problem in their testimony.

Was the right to leave truly regarded as a principle to be respected at all costs, as counsel for the Department maintains? This indeed seems to be the case. Mmes Poliquin, Mongrain and Labelle did not take into account in their thinking the Public Service Employment Act, to which every offer of employment they received over the years refers. "This position is offered to you for a specified period from . . . to . . . . This must in no way be interpreted as an offer of permanent employment or as necessarily leading to an offer of permanent employment. Notwithstanding the preceding, your period of employment could be reduced depending on our personnel requirements."

32/... >... 32/

"This offer is subject to the Public Service Employment Act and to the employment conditions of employees hired on a casual basis for a specified term."

Section 25 of that Act clearly specifies what is involved:

"An employee who is appointed for a specified period ceases to be an employee at the expiration of that period" (1966- 67, c 71, s 25).

Like counsel for the Department, the Tribunal does not believe that this legislative provision is contrary to the purpose of the Canadian Human Rights Act. Mireille Dansereau v NFB and Pierre- Andre Lachapelle, a case cited by the Department, rules on the type of engagement entered into by the complainants who, like Mrs Dansereau, had been hired for a specified term. "Her employment would normally have come to an end upon expiry of the agreed time," as the Court pointed out in that case.

Similarly, in Catherine Le Borgne v NFB, the court of first instance recognized the existence of term employment contracts, as did the appeal court which dismissed Ms Le Borgne's claim.

The Headley case, cited by the Department, is pertinent in so far as it establishes management's jurisdiction in proceeding in a particular way. The Tribunal deems this jurisdiction to be well founded, and does not feel it necessary to insist further on this point with respect to the complaints of Mmes Poliquin, Mongrain and Labelle.

To better define the characteristics of term positions, the Department also cited the Trait& de droit administratif by Rene Dussault and Louis Borgeat, 2nd edition, volume 2, Presses de l'Universite Laval,

33/ ... >... 33/ 1986. The Department takes from it, correctly, we feel, elements that allow it to define the legal bond between the government- employer and its employees. The unilateral offer from the employer may contain a condition, and when the person solicited is asked to respond to

an offer, he or she cannot ignore the condition, any more than he or she can make a counter-proposal. Accept or refuse the offer submitted: that is the choice.

In the case before us, once the three complainants had accepted the last offer made before the one that gave rise to the dispute, and once they had begun their service, they decided to take maternity leave. They would have liked to ignore their conditions of employment and continue that leave beyond the prescribed period. But that, as we have seen, was not possible.

In their particular situation, which was also the situation of other people who wanted to take leave to pursue studies, for example, or for other equally valid reasons, the complainants could not act differently from these other people when faced with an offer of employment. Knowing that they would not be present to teach, these people simply refused the offer made by the Department, which was notified beforehand in any case, since such applications have to be made in advance.

The nature of the employment therefore presumes one's presence to perform the work. Can this be called a normal occupational requirement? Yes, according to the Department of National Defence,

which in order to persuade us refers to the Bhinder case, a judgment rendered by the Supreme Court of Canada

34/... >... 34/ which returns to the criterion accepted in the Etobicoke decision: an occupational qualification . . . imposed honestly . . . in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons that could defeat the Code's purpose

The Court's conclusion that there was no duty to accommodate must be linked to another also cited by the Department. "The purpose of s 14(a) seems to me to be to make the requirement of the job prevail over the requirement of the employee. It negates any duty to accommodate by stating that the imposition of a genuine job- related requirement is not a discriminatory practice . . . . The legislature, by narrowing the scope of what constitutes 'a discriminatory practice', has permitted genuine jobrelated requirements to stand even if they have the effect of disqualifying some persons from those jobs. Section 14(a) does not conflict with the avowed purpose of the Act, which is to prevent 'discriminatory practices'." The Department concludes: "I think that the requirement to be available, if it needs justification, the requirement to be there to stop the gap - for what is required is, precisely, a stop- gap - is completely reasonable, and completely in keeping with what the Supreme Court indicated."

To complete this line of reasoning, the Department cites a decision by the Court of Queen's Bench in Alberta: [English follows]

... 35/ >... 35/ [English: continued]

The Department also cited the Quinlan case, which saw the dismissal of the action by the complainant who, after being absent from her job because she was afflicted with cancer of the mouth, none the less claimed a bonus traditionally granted to full- time employees.

As it mentioned earlier, the Tribunal feels that, apart from any legal bond between the parties, since the employer/ employee relationship had not been established, despite the acceptance, itself conditional, of the conditional offer made by the employer, the complainants cannot create obligations for the employer, any more than they themselves had any obligations after having refused to work. So much is this to the point that in its final argument the Commission itself mentions the condition underlying the entire dispute: "What we are saying is that, when an offer was made to them, they should have been treated like the others, that is, with no availability clause, and without cornering them into asking themselves, 'What should I say? What should I not say? ' In the end, they were denied a period of employment because something was imposed on them that had never been imposed on

anyone else; in the end, they were deprived of the exercise of rights which the collective agreement would have recognized if they had been employees, and which others have been able and would have been able to enjoy if they did not have this notorious clause in their contract." (our emphasis)

Had the Tribunal judged differently in the present case, the question of damage would have arisen. This being said, the Tribunal feels it necessary at this time to recall its decision of December 1987, when the

... 36/ >... 36/ parties were to appear before it, as did not happen at that time. The Tribunal then designated December 15, 1987 as the end of the period for calculating wages not collected by the complainants 'by reason of the commission of a discriminatory practice", as the Commission put it in its argument. Regarding the "compensation" for moral injury suffered by the complainants' claimed by the Commission, the Tribunal has decided that there was no discrimination on prohibited grounds and is therefore not required to rule on the two claims submitted by the Comission on behalf of the complainants.

SIGNED IN MONTREAL, THIS 30TH DAY OF JUNE 1988 [signed] NIQUETTE DELAGE, chairperson

> CASE LAW CITED BY COUNSEL FOR THE CANADIAN HUMAN RIGHTS COMMISSION

AND THE DEPARTMENT OF NATIONAL DEFENCE Ontario Human Rights Commission and Bruce Dunlop and Harold E Hall and Vincent Gray (Respondents), Appellants, and the Borough of Etobicoke (Appellant), Respondent, (1982) 1 SCR 202.

K S Bhinder and The Canadian Human Rights Commission, Appellants, and the Canadian National Railway Company, Respondent, and Attorney General of Canada, Saskatchewan Human Rights Commission, Alberta Human Rights Commission and Canadian Association for the Mentally Retarded, Interveners, (1985) 2 SCR 561.

Normand Latif (Applicant) v The Canadian Human Rights Commission and R G L Fairweather (Respondents), (1980) 1 FC 687.

The Winnipeg School Division No 1, Appellant (Respondent) and Doreen Maud Craton, Respondent (Applicant) and The Winnipeg Teachers' Association No 1 of the Manitoba Teachers' Society (Respondent), (1985) 2 SCR 150.

Erickson v Canadian Pacific Express and Transport Ltd, Canadian Human Rights Reporter, volume 8. decision 628, paragraphs 31242- 31375, May 1987.

Ontario Human Rights Commission and Theresa O'Malley (Vincent), Appellants, and Simpsons-Sears Limited, Respondent, and Canadian Human Rights Commission, Saskatchewan Human Rights Commission, Manitoba Human Rights Commission, Alberta Human Rights Commission, Canadian Association for the Mentally Retarded, Coalition of Provincial Organizations of the Handicapped and Canadian Jewish Congress, Interveners, (1985) 2 SCR 536.

Bonnie Robichaud and Canadian Human Rights Commission, Appellants, v Her Majesty the Queen, as represented by the Treasury Board, Respondent, (1987) 2 SCR 84.

Christine Marie Davies v Century Oils (Canada) Inc, Canadian Human Rights Reporter, volume 8. decision 602, paragraphs 29817- 29837.

Mireille Dansereau (Applicant) v National Film Board and Pierre- Andre Lachapelle (Respondents), (1979) 1 FC 100.

Catherine Le Borgne and Claudine Bujold (Applicants) v National Film Board and Mr Falardeau- Ramsay (Respondents), (1980) 1 FC 96.

Denise Headley and Local 613 of the Canada Employment and Immigration Union (of the Public Service Alliance of Canada) (Applicants) v Public Service Commission Appeal Board (Respondent), (1987) 2 FC 235.

Ethel Quinlan v Marina Restaurant Ltd, Canadian Human Rights Reporter, volume 7, decision 538, paragraphs 27054- 27096.

... 2/ >... 2/ Action Travail des Femmes, Appellant, v Canadian National Railway Company, Respondent, and Canadian Human Rights Commission, Mis en cause, and the Attorney General of Canada, Intervener, and between the Canadian Human Rights Commission, Appellant, v Canadian National Railway Company, Respondent, and Action Travail des Femmes, Denis Lemieux, Nicole DuvalHesler, Joan Wallace and the Attorney General of Canada, Mis en cause, (1987) 1 SCR 1114.

Paul S Carson, Ramon Sanz, William Nash, Barry James and Arie Tail, Complainants (Respondents) and Air Canada, Respondent (Appellant), Human Rights Appeal Tribunal, October 26, 1983.

Unnamed decision of the Court of Queen's Bench in Alberta. Other precedents with respect to human rights were mentioned during the arguments, but the Tribunal has ascertained that it has available none of these judgments, namely: Rodgers v CN, Granger, Andrews, Big M Drugmart, Huck v Odeon Cinemas, and Tyson. The Tribunal regrets that it cannot cite the nomenclature of these judgments.