T.D.-4/82
DECISION RENDERED FEBRUARY 22, 1982

THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BEFORE: Lucie Dion
BETWEEN:
Loraine Tellier-Cohen
Complainant,
and
Treasury Board
Respondent.
and
The Canadian Human Rights Commission
Intervenor.

DECISION OF THE TRIBUNAL
APPEARED:
Yvon Tarte Counsel for the Canadian Human Rights Commission and L. Tellier-Cohen

Robert Counsineau Counsel for Treasury Board
DATE OF HEARING: July 20, 1981

Translation - Original: French
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- 1 FACTS:

Loraine Tellier-Cohen was denied permission to use her accumulated sick leave and annual leave from May 14 to June 8, 1979 for the purpose of childbirth.

Loraine Tellier-Cohen was employed by the Government of Canada, represented by Treasury Board, from June 1, 1977 to July 16, 1979 as a town

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planner for the National Capital Commission. When she applied for leave, she had accumulated 17 1/4 days of sick leave and 15 working days of annual leave in accordance with the collective agreement signed between Treasury Board and the Professional Institute of the Public Service of Canada (Group: Architecture and Town Planning) which expired on July 22, 1979.

The complainant alleges that by this refusal she is a victim of a discriminatory practice based on sex in matters relating to employment and claims a reimbursement of $1,912.21 for salary lost at the time of termination of her pregnancy and $3,000.00 for moral injury.

Do the provisions in the collective agreement relating to the use of leave credits themselves discriminate on the basis of sex or has the employer
discriminated against the complainant in its interpretation of those provisions to the extent that it has contravened the Canadian Human Rights
Act, hereinafter referred to as the "Act"?

Jurisdication and amendment of complaint
Appointment of the tribunal was authorized by resolution of the Canadian
Human Rights Commission, hereinafter referred to as the "Commission", which
stated:

- that the complaint of Loraine Tellier-Cohen...against Treasury Board Canada, alleging discrimination in matters relating to employment on the basis of sex, has been substantiated;

- that the Chief Commissioner...would be charged with appointing a tribunal consisting of one member.(1)

Subsequently, the Chief Commissioner appointed this tribunal under s 39(1) of the Act to "inquire into the complaint and determine whether the
practices as described in the complaint constitute discriminatory practices
under section 10 of the Act."(2)

(1) Resolution of January 22, 1981
(2) Document of March 23, 1981.
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However, the Commission, through its counsel who also represents the complainant, requested that the practices at issue be considered in light of
s 7 of the Act, not s 10 as stated in the tribunal’s document of appointment.

The tribunal was in fact established under s 39(1) of the Act, which reads as follows:

The Commission may, at any time after the filing of a complaint, appoint
a Human Rights Tribunal to inquire into the complaint.

The wording of this section places no constraints on the authority of the tribunal. This was brought out in a recent decision concerning the Commission’s authority regarding the appointment of a tribunal.

With regard to the authority to appoint a tribunal, establishing the justification of a complaint is superfluous as it is not a prerequisite

to appointment.(3)
Furthermore, counsel for the respondent made no objection to the request
for amendment of the complaint. There is no need to go into the natter further and I agree to amend the complaint as requested.

Sexual Discrimination
Do the practices described in the complaint constitute discriminatory practices within the meaning of s 7 of the Act, as claimed by the Commission
and the complainant? Have they "directly or indirectly differentiated adversely in relation to the employee on a prohibited ground of discrimination", that is, her sex (s 3)?

a) Adverse differentiation
The employee has been a victim of adverse differential treatment in that
she received no income (except for $280 from the Unemployment Insurance Commission) during her entire absence - a total loss of $1,912.21. She has
been prevented from receiving the benefits to which she was entitled.

b) Discrimination on the basis of sex
Does discrimination because of pregnancy constitute discrimination on the basis of sex within the meaning of s 3 of the Act?

On two occasions the Supreme Court of Canada has been called upon to deal with the issue of equal rights for women (4). It should be noted, however, that in both cases the complaint has been lodged under the Canadian
Bill of Rights, 1960.

(3) Michael Ward v Canadian National Express and the Commission, decision of
March 4, 1981, p. 12.

(4) Attorney General of Canada v Lavell, (1974) SCR 1349
Bliss v The Attorney General of Canada, (1979) SGR 183

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On both occasions the Court confined itself to a literal interpretation of s 1(b) of the Canadian Bill of Rights: "the right of the individual to
equality before the law".

In Lavell (5), dealing with the charge of discrimination brought against
the Indian Act, which stipulates that an Indian woman who marries a person
who is not an Indian loses her rights while the same does not apply to an
Indian man, the Court stated:

"in my opinion the phrase "equality before the law" as employed in s. 1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This construction is, in my view supported by the provisions of paras (a) to (g) of s. 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before
the law".

In the other case, Stella Bliss was pregnant and was denied the usual unemployment insurance benefits to which she was entitled and which she requested (she was not entitled to special maternity benefits because she had
not worked long enough). Here again, the Supreme Court avoided dealing with
the discrimination question and stated that the issue concerned the administration of justice.

The question to be determined in this case is therefore, not whether the
respondent had been the victim of discrimination by reason of sex but whether she has been deprived of "the right to equality before the law" declared by s 1(b) of the Canadian Bill of Rights.(6)

In the Bliss decision, however, there was an obiter dictum - an opinion expressed by a judge in passing which is unnecessary for his decision (7) which
reads as follows:

Assuming the respondent to have been "discriminated against", it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application,
of course, to men. If s 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.(8)

(5) Mr. Justice Ritchie, p. 1366.
(6) Mr. Justice Ritchie, p. 190.
(7) Pigeon, Louis-Philippe, Rédaction et interprétation des lois, p. 46.
(8) Bliss v AGC, (1979) SCR 190.
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I cannot subscribe to this obiter dictum, for it creates a separate sexual category for pregnant women and avoids dealing with the real problem
of sexual discrimination. Only women can become pregnant and this is the
major difference between men and women.

Judging the equality of the sexes on the basis of strict equality (which
the Americans call "gender-based discrimination") constitutes a substantive
defect for there are no decision except in situations where men and women are
in exactly identical positions. Pregnant women provide a good illustration of
the illogical nature of that criteria. Only women can become pregnant; must
we accept for that reason that they must be deprived of the benefits which
would otherwise be granted?

In the United States, where a charter of long standing safeguards equal rights, the development of related legislation confirms this opinion. Following a lively debate on the decisions (9) dealing with sexual discrimination in matters relating to employment in the case of pregnancy,
Congress proposed the Equal Rights Amendment, which states clearly that discrimination because of pregnancy in matters relating to employment constitutes discrimination on the basis of sex.

The Supreme Court of the United States, in refusing to recognize discrimination because of pregnancy as sexual discrimination, used as its

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main argument the one put forward by Mr. Justice Ritchie in his obiter dictum
in Bliss (see note 6), that is, "gender-based discrimination".

In order to clarify the situation and avoid the spread of that theory, the Commission, charged with opposing discriminatory policies and practices
through information, education and research (10), recommended to Parliament
an amendment to the Act

specifying that discriminatory practices based on pregnancy or childbirth...are included in the prohibition of discriminatory practices
based on sex.(11)

The amendment has not yet been passed, but in the absence of Canadian ratio decidendi in the matter and in light of s 11 of the Interpretation Act,
which specifies that "every enactment (...) shall be given such fair, large
and liberal construction and interpretation as best ensures the attainment of
its objects", I conclude that discrimination because of pregnancy constitutes
discrimination on the basis of sex within the meaning of s 3 of the Act.

(9) K.T. Bartlett, "Pregnancy and the Constitution: The Uniqueness Trap",
California Law Review, May 1974, pp 1532-1566.

(10) Section 22 of the Act.
(11) 1979 Annual Report.
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Loraine Tellier-Cohen was denied the right to use the sick leave she had
accumulated before she became pregnant. Is pregnancy an illness within the
meaning of a collective agreement? Canadian case law in matters of
arbitration is dominated by the ruling made by arbitrator H.T. Brown in Re
Canadian Union of Public Employees and Corp of the Borough of York, (1971) 22
LAC 389:

"The period of pregnancy from and after the date on which the employee leaves the employment on leave of absence for this purpose is an entire period of disability. As a result of this disability, the physical and mental health of the employee is affected in various ways, and even in the absence of any complications, there is pain, discomfort, and physical sickness, making it impossible for her to perform her usual work. (...) In our view, the word "illness" should be given a broad interpretation and not restricted to exclude cases of pregnancy." p. 395

This finding, in which I concur, was reiterated in Re Central Newfoundland Hospital and Canadian Union of Public Employees, (1975) 9 LAC
264 and Melfort Union Hospital and Service Employees Int Unions, (1978) 1
WLAC 192 and is in accordance with American case law in the matter.(12)

By virtue of this case law, the complainant was entitled to use her sick
leave during the period of disability due to her pregnancy. Loraine Tellier-Cohen gave birth on May 17, 1979 - three days after the beginning of
her leave - and she returned to work the following June 8. No one will disagree that during that period Loraine Tellier-Cohen was totally unable to
perform her duties.

What does the collective agreement say about this matter and regarding

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the use of annual leave in cases of pregnancy? Article 21.04 deals with "maternity leave":

Every employee who becomes pregnant shall notify the Employer of her pregnancy...shall eleven weeks before the expected date of termination of her pregnancy be granted leave of absence without pay for a period

ending not later than twenty-six weeks after the date of the termination
of her pregnancy.

(12) Washington Publishers Ass & Columbia Typographical Unions No. 101 (1962), 39 LA 159.
K.T. Bartlett, (1974) California Law Review p. 1561.

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An employee who becomes pregnant shall be granted leave of absence without pay. The collective agreement in question mentions a number of other
cases where paid and unpaid leave will be granted; they should be listed here
so that we have a clear idea of the staff relations context and so that we
may assess the nature and length of such leave:

- Paid leave for stewards (article 7.01)
- Paid leave for staff relations matters (articles 11.01, 11.02, 11.03, 11.04 and 11.07

- Unpaid leave for staff relations matters (articles 11.05, 11.06, 11.08 and 11.09)

- Paid leave on eleven designated holidays (article 17)
- Paid vacation leave (article 18)
- Paid sick leave (article 19)
- Special paid leave (article 20)
.02 - marriage, up to five days
.03 - bereavement leave, up to four days
.04 - birth of child, one day for father only
.04 - adoption of child, one day for both parents
.05 - at the discretion of the Employer

- Other types of leave (article 21)
.01 - paid court leave
.02 - paid injury-on-duty leave subject to reimbursement of amount received from the Workmen’s Compensation Board
.03 - paid personnel selection leave
.04 - unpaid maternity leave
.05 - paid leave at the employer’s discretion for

- military training
- civil defence training
- emergencies

.06 - unpaid leave at the employer’s discretion for

- enrolment in the Canadian Armed Forces
- election to a full-time municipal office
- other

- Career development leave (article 22)
.01 - unpaid education leave with an allowance of 50 per cent of salary

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.02 - paid leave for attendance at conferences and conventions
.03 - paid leave to attend seminars, workshops or short courses for professional development

.04 - paid examination leave.
Leaves of absence, judging by the high number of provisions in this regard, constitute major benefits for employees and are in no way exceptions
to the rule.

Historically, each and every reason for absence - illness, pregnancy, education, and union, political, military and social activities - was, at one
time or another, a reason for dismissal.

Unions first, and legislation subsequently, obtained and upheld the right to be absent without the risk of dismissal. With time, not only was the
list of authorized types of absence lengthened, but unions obtained paid
leave for a number of reasons. Both federal and provincial legislation in
this regard imposed minimal standards for employment and fringe benefits and
protected the employee from unjustified dismissal.

In the same way, authorized maternity leave appears in both federal and provincial legislation setting out minimal employment standards. Provisions
relating to maternity leave, like all other provisions regarding employment,
are designed to protect the jobs of women who, before these provisions existed, were generally forced to leave their jobs if they became pregnant.

Collective agreements not only respect all the minimal standards but in general grant more than the minimal standards. For instance, the provisions
in article 21.04 of the collective agreement regarding maternity leave conform to the legislative standard by authorizing unpaid maternity leave,
and go further by authorizing unpaid leave for a period of up to twenty-six
weeks.

Nonetheless, it should be noted that the wording of article 21.04, "shall be granted leave of absence without pay", is not exclusive and contains no term which might be understood to mean that it is prohibited to

use leave other than leave without pay in the case of pregnancy. The other types of authorized unpaid leave are not exclusive either. I find it difficult to see how an employee can be forced to take leave without pay in order to write an examination, for example, if he wishes to use a day of annual leave instead.

In the language of collective agreements, unpaid leave is a benefit which allows the employee to be absent from his work when he can or when he

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so desires without having to deplete or use up his annual leave or other leave which could be used for one of those purposes.

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In conclusion, the employer has interpreted the provisions in the collective agreement in a discriminatory fashion by denying Loraine Tellier-Cohen the right to use her accumulated leave during the termination of her pregnancy and in this way has contravened s 7 of the Act.

Moreover, as mentioned in the complaint of Loraine Tellier-Cohen, I consider that article 20.04 of the collective agreement is discriminatory within the meaning of s 7 of the Act, which stipulates that:

A male employee may be granted special leave with pay up to a maximum of one day on the occasion of the birth of his son or daughter.

This discriminatory provision becomes almost an insult to maternity when seen in conjunction with the second part of the article which stipulates that "an employee of either sex may be granted special leave with pay up to a maximum of one day on the occasion of the adoption of a child". By virtue of the authority conferred by s 41.2(b), I ask that the article be changed to read "an employee" instead of "a male employee".

Consequently, I accept the complainant’s claim with regard to reimbursement of salary for the twenty days of her absence for the termination of her pregnancy.

At the time of the termination of her pregnancy, Loraine Tellier-Cohen had accumulated 17 1/4 days of sick leave and under article 19.05b of the collective agreement she was entitled to borrow up to fifteen

additional
days. Therefore, she should have received her full salary throughout her
twenty-day absence.

At the time of her departure on July 16, 1979, she should not have had to make a reimbursement in light of the additional days of sick leave accumulated since her return to work on June 8, 1979, and by virtue of article 23 of the collective agreement, which freed her from reimbursing the
additional sick leave used.

Loraine Tellier-Cohen is therefore entitled to be paid for the twenty days she took at the time of the termination of her pregnancy, that is, the
amount claimed:

$2,125.94 gross salary
+ $ 66.24 bilingual bonus
- $280.00 amount received from Unemployment Insurance

Total $1,912.21
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Moreover, by virtue of the authority conferred by s 41.3 of the Act, I award the amount of $2,000.00 (two thousand dollars) to Loraine Tellier-Cohen, to be paid to her by the Employer as compensation for the

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discrimination to which the Employer subjected her by refusing her permission
to use her sick leave or annual leave during the period of total incapacity
from May 14 to June 18, 1979.

(sgd) Lucie Dion