DECISION RENDERED SEPTEMBER 16, 1982
TD-10-82

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS REVIEW TRIBUNAL

BEFORE: André Lacroix, QC, Chairman
Nicole Duval Hesler
Marie-Claire Lefebvre

BETWEEN: TREASURY BOARD
Appellant
and
LORAINE TELLIER-COHEN
Respondent
and
THE CANADIAN HUMAN RIGHTS COMMISSION
Intervenor
DECISION OF THE TRIBUNAL

Appearances: Harvey A. Newman, Counsel for Treasury Board,
Yvon Tarte, Counsel for the Canadian Human Rights
Commission and Loraine Tellier-Cohen.

HEARING HELD June 29, 1982
Translation
Original in French
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Treasury Board has appealed the decision rendered on February 22, 1982 by the Human Rights Tribunal in Loraine Tellier-Cohen.

The appeal is based on the following grounds:
1. The Tribunal erred in determining that pregnancy constitutes a prohibited ground of discrimination whithin the meaning of the Human Rights
Act;

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2. The Tribunal erred in determining that clause 20.04 of the collective
agreement is discriminatory;

3. The Tribunal erred in its interpretation regarding the accumulation of
leave credits provided for in the collective agreement;

4. The Tribunal grossly erred in awarding the complainant the sum of $2,000.00 (two thousand dollars) as compensation for an injury which the
Tribunal did not identify.

In the interest of understanding this case, the facts will be summarized.

FACTS
Loraine Tellier-Cohen was employed by the Government of Canada as a town
planner and was denied permission to use her sick leave and annual

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- 3 leave
during her absence for the purpose of childbirth from May 14 to June 8, 1979.

The complainant alleged that by this refusal she was a victim of a discriminatory practice based on sex in matters relating to employment, contrary to sections 7(b) and 3 of the Canadian Human Rights Act.

A. DOES DISCRIMINATION BECAUSE OF PREGNANCY CONSTITUTE DISCRIMINATION ON
THE BASIS OF SEX IN THE EMPLOYER'S INTERPRETATION OF THE COLLECTIVE AGREEMENT WITH RESPECT TO THE USE OF LEAVE?

In support of its argument, the appellant relied on the Supreme Court decision in Bliss (1) and cited an obiter dictum (2) by Pratte J of the Federal Court of Appeal, 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.

(1) Stella Bliss v Attorney General of Canada, [1979] 1 SCR 183.
(2) Page 190.
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This is an interesting opinion, we agree, but we cannot accept it for the purposes of our judgment because the Bliss decision refers to the Bill of
Rights and to the principle of "equality before the law" and not to the Act
which governs us and under which the complaint by Loraine Tellier-Cohen was
filed.

Before going further in our judgment, we would hike to point out, incidentally, that the Human Rights Commission stated in its 1977-1978 Annual
Report that it dealt extensively with discrimination in the workplace "since
the fulfillment of aspirations is inextricably tied to the opportunity to
earn a livelihood and, thereby, security, self-respect and independence".
(3)

We believe that we are satisfying Parliament's aspirations and complying with section 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", when we state that discrimination on the basis of pregnancy constitutes discrimination on the basis of sex.

(3) 1977-78 Annual Report, Canadian Human Rights Commission.

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Obviously several definitions of the word "sex" are or seem to be possible, depending on the training one has received, one's level of education and personal opinions and whether one is a layman or a scientist.

It is generally recognized that for the purposes of statutory interpretation, "words" should be given their ordinary meaning. The word "sexe" in French is defined in the Robert dictionary (4) as being "une conformation particulière qui distingue l'homme de la femme en leur assignant un rôle déterminé dans la génération et en leur conférant certains caractères distinctifs". We can therefore reasonably conclude that sex exists "primarily" only for the purposes of reproduction.

However, we are aware that many arguments have been made in support of the opposing view and that a lively debate continues in both the United States and Canada. One point of contention is the "voluntary" nature of pregnancy. In General Electric v Gilbert, Brennan and Marshall JJ of the United States Supreme Court (5), in dissent, considered this "voluntary" nature:

"The characterization of pregnancy as 'voluntary' is not a persuasive factor, for as the Court of Appeals correctly noted 'other than for child-birth disability,

(4) Robert dictionary, page 1645.

(5) General Electric v Gilbert, United States Supreme Court DKT, December 7, 1976.

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(General Electric) has never construed its plan as eliminating all so called 'voluntary disabilities', including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery."

"...all other disabilities are insured irrespective of gender - The Court's analysis proves to be simplistic and misleading. For although all mutually contractible risks are covered irrespective of gender....the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproduction system of men and for which there exist no female counterparts covered by the plan. Again, pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage.

Further on, Stevens J, also in dissent, gave his opinion on the provision excluding pregnancy and pregnancy-related illnesses from the health
insurance plan concerned (6):

(6) Page 5747.
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"The rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition such a rule discriminates on account of sex for it is the capacity to become pregnant which primarily differentiates the female from the male."

At page 25 of his argument at trial, counsel for the Commission cited an
article published in the California Law Review (7). The author expressed the
problem in these terms:

"Pregnancy is a unique condition, but it is one which, in part, defines the female sex. Its uniqueness explains why sex discrimination is in many respects different from other form of discrimination, but it does not settle the question of whether pregnancy classifications discriminate on the basis of sex".

To demonstrate the inconsistency in excluding pregnancy as a ground of discrimination on the basis of sex, the same author offered the following
analogy:

"Similarly, a law which excluded sickle cell anemia from California's disability program would be strictly

(7) "Pregnancy and the Constitution: The Uniqueness Trap", Kathryn T Bartlett, May 1977, Volume 62, No 3, page 1551.

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scrutinized as discriminatory on the basis of race. The character of the
law as economic and social welfare legislation would not exempt it from special constitutional scrutiny because virtually the only persons discriminated against by the law are members of the black race".

Lastly, in the Schwabenbauer decision (8), the judge found that discrimination on the grounds of pregnancy was based on sex and ordered the employer to cease the discriminatory practice.

We answer the first question in the affirmative.

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(8) United states District Court, Western Division of New York October 1st, 1980.

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- 9 B.
CAN PREGNANCY BE REGARDED AS AN ILLNESS WITHIN THE MEANING OF THE COLLECTIVE AGREEMENT?

Can it be held that discrimination on the grounds of pregnancy constitutes discrimination on the basis of sex without pregnancy being defined as an illness? We believe it can, and we are not prepared to conclude, as did the minority in Gilbert, cited above, that pregnancy is an illness that could not, on that basis, be excluded from an employer's health insurance plan or, as in the case we are concerned with, from the provisions of the collective agreement relating to sick leave.

It seemed to us that at the appeal hearing, the Commission no longer attached the same importance to its key argument at trial. We gathered that the Commission had more or less abandoned it. In any event, we shall not dwell excessively on this argument, but we do wish to repeat that we do not regard pregnancy as an illness in the strict sense of the word. We concede, however, that for some women, pregnancy is a source of varying degrees of discomfort and can even lead to a pathological condition. But that is the exception rather than the rule.

In most collective agreements and in federal statutes, pregnancy and the period after childbirth receive special treatment independent of sickness benefits.

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In the light of the above, we disagree with the trial decision on this question since the reimbursement of the complainant's salary was made because

of the employer’s refusal to allow her to use her accumulated sick leave.

WAS THE EMPLOYER RIGHT IN DENYING THE RESPONDENT PERMISSION TO USE HER ANNUAL VACATION FOR CHILDBIRTH?

In this regard, we regret the attitude of the employer, which should have shown greater understanding and been more accommodating in view of the fact that the complainant demonstrated considerable flexibility and common sense in her request. The employer should have seen that the employee did not want to take maternity leave since she worked until two days before she gave birth.

What explanation is there for the employer not even thinking of consulting the appropriate persons to assist in interpreting the clauses of the collective agreement before giving a reply? As far as we are concerned, this attitude touches on contempt for the respondent’s rights and we are surprised that this complaint was brought before the tribunals.

Moreover, from a reading of clause 18.04 of the collective agreement governing the parties concerned, we note that the employer must make reasonable effort "to grant an employee’s vacation leave in an amount and at

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such time as the employee may request". It should be pointed out here that Mrs. Loraine Tellier-Cohen eventually received her annual leave pay, and for that reason alone, this judgment does not award it to her.

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- 11 C.
DOES SECTION 41(3) OF THE CANADIAN HUMAN RIGHTS ACT APPLY IN THIS CASE?
In our opinion, the Foreman decision (9) correctly held that compensation should "be available as a matter of course where the circumstances to which it refers exist, unless it can be shown that there are good reasons for denying such relief". Further on, it was stated: "This does not indicate to us, however, that it is an extraordinary remedy calling for unusual circumstances to justify its award."

Substantial evidence of suffering "in respect of feelings or self-respect" was adduced before us. The employer’s discriminatory interpretation denied the respondent her right to opt for her paid annual

leave rather than for unpaid maternity leave and, consequently, temporarily deprived her of income which she was entitled to expect, and this created financial difficulties for her. The employer's attitude forced the respondent to take legal action.

Furthermore, it is clear from the testimony of Loraine Tellier-Cohen that she suffered in a number of ways in addition to her financial worries.

She described for us her frustration, her anxiety and her feelings of being excluded from the working world, of having suffered an injustice and of being treated differently. She cited the case of a male colleague of hers who obtained leave with pay when his wife had a difficult childbirth. The situation is ironic.

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It is obviously not easy to set a dollar value on this type of injury, but the sum of $2,000.00 awarded at trial does not appear excessive to us.

D. DOES THE COLLECTIVE AGREEMENT DEFEAT THE RESPONDENT'S COMPLAINT?
It is true that the collective agreement is the result of negotiations between the employer and the union to which Mrs. Tellier-Cohen belonged and that it is binding on them. However, the employer cannot take refuge behind a collective agreement to circumvent the Canadian Human Rights Act. We therefore answer this last question in the negative.

In conclusion, for the reasons set out above, the Tribunal, in rendering the decision that the Tribunal should have rendered at trial:

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- 13 A.
DECLARES that the appellant contravened sections 3 and 7(b) of Canadian Human Rights Act;

B. DECLARES that the appellant should have allowed the respondent to take

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her annual leave with pay at the time of the termination of her pregnancy;

C. Pursuant to section 41(2)(a), ORDERS the appellant to cease the discriminary application of the clauses of the collective agreement;

D. Pursuant to section 41(3)(b), AWARDS the respondent compensation in the
amount of $2,000.00.

(sgd.)
André Lacroix, Chairman

(sgd.)
Nicole Duval Hesler

(sgd.)
Marie-Claire Lefebvre