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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

GENEVIÈVE BRACONNIER

Grievor

and

**TREASURY BOARD
(Department of National Defence)**

Employer

Indexed as

Braconnier v. Treasury Board (Department of National Defence)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Jean-Pierre Tessier, adjudicator

For the Grievor: Pierrette Gosselin, Professional Institute of the Public Service of
Canada

For the Employer: Simon Kamel, counsel

Heard at Québec City, Quebec,
January 11, 2006.
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] Geneviève Braconnier began working for the Department of National Defence as a physiotherapist at the Valcartier Health Centre (VHC) on April 17, 2001. Since then, she has obtained several fixed-term contracts.

[2] From May 12, 2003, to May 7, 2004, the grievor used her maternity leave and parental leave. In October 2004 she asked to be given indeterminate-employee status under the Treasury Board's *Term Employment Policy* ("Treasury Board policy") (Exhibit F-1, Schedule 13), since she had been working at the VHC as a term employee for three years. The employer refused to grant her request because, under the Treasury Board policy, periods of leave of absence without pay longer than 60 consecutive calendar days are not included in the calculation of the cumulative working period for appointment to indeterminate status.

[3] On December 3, 2004, the grievor filed a grievance. The grievance was referred to adjudication on June 7, 2005, and the hearing was held on January 11, 2006.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

Summary of the evidence

[5] When the hearing began, the employer challenged the adjudicator's jurisdiction on the following grounds:

- a) This grievance challenges one of the employer's policies on staffing (appointment to a position), which is a matter removed from the adjudicator's jurisdiction.
- b) The policy is not an integral part of the collective agreement, and is within the employer's discretion.

[6] That objection was taken under advisement and will be examined after full consideration of the facts and the parties' arguments.

[7] For her part, the grievor referred to articles 6 and 43 of the applicable collective agreement: *Treasury Board and Professional Institute of the Public Service of Canada, 2001-2003 (Health Services)* (Exhibit F-3). These articles read as follows:

**ARTICLE 6
RIGHTS OF EMPLOYEES**

6.01 *Nothing in this Agreement shall be construed as an abridgement or restriction of an employee's constitutional rights or of any right expressly conferred in an Act of the Parliament of Canada.*

**ARTICLE 43
NO DISCRIMINATION**

43.01 *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, a conviction for which a pardon has been granted, mental or physical disability, or membership or activity in the Institute.*

43.02

(a) *Any level in the grievance procedure shall be waived if a person hearing the grievance is the subject of a complaint.*

(b) *If by reason of paragraph 43.02(a) a level in the grievance procedure is waived, no other level shall be waived except by mutual agreement.*

**

43.03 *By mutual agreement, the parties may use a mediator in an attempt to settle a grievance dealing with discrimination. The selection of the mediator will be by mutual agreement.*

[8] She filed various documents already submitted to the Canadian Human Rights Commission (exhibits F-1 and F-2), including a statement of facts that reads as follows:

[Translation]

...

1. *I was hired as a physiotherapist on April 17, 2001, to work as a temporary employee of the VHC. I signed a part-time contract from April 17 to May 4, 2001.*
2. *For the period of May 5 to July 4, 2001, I signed a full-time contract as a temporary employee of the VHC.*
3. *For the period of July 5 to September 7, 2001, I signed a full-time contract as a temporary employee of the VHC.*
4. *For the period of September 8 to October 19, 2001, I signed a full-time contract as a temporary employee of the VHC.*
5. *On October 17, 2001, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of October 20, 2001, to February 4, 2002.*
6. *On January 24, 2001, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of February 5 to March 28, 2002.*
7. *On March 26, 2002, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of March 29 to May 15, 2002.*
8. *On May 22, 2002, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of May 15 to July 5, 2002.*
9. *On July 9, 2002, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of July 5 to November 1, 2002.*
10. *On October 4, 2002, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of November 1, 2002, to January 24, 2003.*
11. *On October 31, 2002, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of January 24 to March 28, 2003.*
12. *On February 27, 2003, I signed a fixed-term contract of employment as a physiotherapist at the VHC for the period of March 28, 2003, to June 30, 2005.*

13. *On April 1, 2003, the Term Employment Policy came into effect, replacing the Long Term Specified Period Employment Policy (1999).*

Section 7 of that policy provides that a period of leave of absence without pay longer than 60 consecutive days is not included in the calculation of the cumulative working period for appointment to indeterminate status (which is three years).

14. *From May 12, 2003, to May 7, 2004 (52 weeks), I took the maternity and parental leave provided for in my collective agreement.*
15. *On October 20, 2004, I officially asked my immediate supervisor, Marc Perron, for recognition of my right to indeterminate status in accordance with that policy, since I had been working as a term employee at the VHC for three years without a break in service or a break in my contracts (Schedules 1 to 12).*
16. *On November 3, 2004, Marc Perron, the head of physical rehabilitation at the VHC (418-844-5000, ext. 6458), denied my request because the period of maternity and parental leave was a leave of absence without pay (according to my collective agreement), and thus could not be included in the period of continuous employment needed for appointment to indeterminate status.*
17. *On December 2, 2004, I filed a grievance challenging that decision. It reads as follows: I challenge the employer's decision to refuse to appoint me to an indeterminate position in accordance with the Term Employment Policy.*
18. *That decision is discriminatory and contrary to articles 6 and 43 of the collective agreement.*
19. *On December 15, 2004, the grievance was heard at the first level, and I made my arguments to Major Charpentier, the commanding officer of the VHC Company (418-844-5000, ext. 6947).*
20. *On December 23, the grievance was dismissed at the first level by Major Charpentier, who claimed, in paragraph 7 of his reply, that he did not have the power to change or interpret the Term Employment Policy.*
21. *The grievance was referred to the third level on January 6, 2005. It will be heard by the manager at the final level on March 30, 2005.*

...

[9] The grievor, thus, obtained successive fixed-term contracts from April 2001 to June 2005. However, she used her maternity and parental leave from May 12, 2003, to May 7, 2004.

[10] On October 20, 2004, the grievor asked to be given indeterminate-employee status under section 7.1 of the Treasury Board policy.

7. Policy Requirements

*1. Subject to section 7.2, where a person who has been employed in the same department/agency as a term employee for a cumulative working period (see definition in Appendix A) of **three (3) years** without a break in service longer than sixty (60) consecutive calendar days, the department/agency must appoint the employee indeterminate at the level of his/her substantive position. This appointment must be made in accordance with merit as provided for in the Public Service Employment Regulations established by the Public Service Commission. The "same department" includes functions that have been transferred from another department/agency by an act of Parliament or order-in-council.*

[Emphasis in the original]

[11] The employer denied the grievor's request, arguing that she did not have three years of employment because, under clause 7.2a. of the policy, a period of leave of absence without pay longer than 60 days is not included in the calculation of the cumulative working period for appointment to indeterminate status. That clause reads as follows:

2. Departments/agencies, in determining whether a period of term employment in the same department/agency will count as part of the cumulative working period, must take the following into consideration:

- a. a period of leave of absence without pay longer than 60 consecutive calendar days does not constitute a break in service and will not be included in the calculation of the cumulative working period for appointment to indeterminate status under this policy;*

[12] While not disputing the facts as presented, the employer argued that it had not violated the provisions of the collective agreement. In its opinion, the very essence of

the grievor's complaint has to do with her appointment as an indeterminate employee. According to the employer, this is a staffing and appointment question over which the adjudicator has no jurisdiction under section 7 of the former Act.

[13] Section 7 of the former Act reads as follows:

7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.

[14] In the new Act, this definition is found in section 7, which reads as follows:

7. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.

Summary of the arguments

[15] The parties reiterated the arguments made during their statement of the facts. The grievor added that section 7.2 of the Treasury Board policy discriminates against women, and that this is contrary to the concept of non-discrimination found in article 43 of the collective agreement.

[16] The employer noted that the grievor's goal is to obtain an appointment, and that this is a question over which the adjudicator has no jurisdiction. Moreover, the Treasury Board policy referred to by the grievor is not part of the collective agreement.

Reasons

[17] The wording of the grievance filed by the grievor indicates that she is asking for an indeterminate appointment to her position:

[Translation]

I am asking to be appointed indeterminately to an OP-1 position at the Department of National Defence as of October 20, 2004, since I will have been a term employee of the federal public service for three years.

[18] In addition, the grievor argued that the employer had acted in a discriminatory manner, thus violating article 43 of the collective agreement.

[19] The evidence showed that, in its grievance replies, the employer referred to the fact that the grievor did not have three cumulative years of work, since periods of leave of absence without pay longer than 60 consecutive calendar days are not included in the calculation of the cumulative working period for appointment to indeterminate status. The employer maintained that it had confined itself to the strict application of the Treasury Board policy.

[20] In fact, the grievor did not argue that the employer had violated the Treasury Board policy in a way that discriminated against one of its employees. She argued that the method of calculating the cumulative three-year period is discriminatory because it excludes periods of maternity and parental leave without pay.

[21] The grievor could not demonstrate that the Treasury Board policy is an integral part of the collective agreement. I therefore cannot interfere in the employer's discretion to establish policies for assigning positions.

[22] The employer's refusal was based on a policy for assigning and making an appointment to a position, and on a time-calculation rule that it applied uniformly, without including any period of leave of absence without pay longer than 60 consecutive calendar days. The employer cannot be accused of acting in bad faith or in a discriminatory manner in violation of article 43 of the collective agreement. The calculation rule for the three cumulative years of employment is incidental to the classification and staffing rules.

[23] In light of the foregoing, I conclude that the grievance cannot be based on non-compliance with the collective agreement and that, basically, it relates to a decision of the employer concerning the assignment of duties to and classification of positions and persons employed in that portion of the federal public administration. This field is excluded from the adjudicator's jurisdiction under section 7 of the former Act.

[24] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[25] The grievance is dismissed.

October 6, 2006.

**Jean-Pierre Tessier,
adjudicator**