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File: 566-02-907

Citation: 2009 PSLRB 43

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CLÉMENT DELAGE

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Delage v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: France Saint-Laurent, counsel

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Ottawa, Ontario,
March 11, 2009.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On February 27, 2006, Clément Delage, the grievor, filed a grievance against the Department of Fisheries and Oceans ("the employer") alleging a violation of clause 18.07 of the collective agreement. In an agreed statement of facts, the parties indicate to me that the collective agreement between the Treasury Board and the International Brotherhood of Electrical Workers, Local 2228, for the Electronics Group, which expired on August 31, 2004, applies ("the collective agreement").

[2] Mr. Delage is an electronics engineering systems technologist. Following a review of the classification of electronics (EL) positions, the employer decided to reclassify Mr. Delage's position from EL-04 to EL-05. On October 13, 2005, the employer notified Mr. Delage of its decision, informing him that he was "[translation] promoted to the EL-05 group and level, effective January 7, 2002."

[3] From November 5, 2001 to July 22, 2002, Mr. Delage was on parental leave without pay under clause 18.06 of the collective agreement. During that period, he received the parental benefits provided in clause 18.07(c)(i). During his parental leave, Mr. Delage was to receive the equivalent of 93 percent of his pay including Employment Insurance benefits and parental benefits.

[4] On October 11, 2005, Mr. Delage received back pay following the reclassification of his position. The pay included the period from July 23, 2002 to November 2005. It did not include the period during which Mr. Delage was on parental leave. In Mr. Delage's opinion, the retroactivity should also have applied to the parental benefits. That dispute has given rise to this grievance.

[5] The employer rendered its decision at the final level of the grievance process on February 5, 2007. The bargaining agent referred the grievance to adjudication on February 19, 2007. The adjudication hearing of the grievance was to have been held from June 4 to 6, 2008. On May 29, 2008, the parties asked the Public Service Labour Relations Board ("the Board") to postpone the hearing because the employer had informed counsel for Mr. Delage that it intended to object to a human rights argument being invoked at the hearing. On May 28, 2008, counsel for Mr. Delage had given notice under subsection 210(1) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, that she intended to raise an issue related to the interpretation or the application of the *Canadian Human*

Rights Act ("the *CHRA*"), R.S.C. 1985, c. H-6. On June 23, 2008, the Canadian Human Rights Commission informed the Board that it did not intend to make any submissions in this case.

[6] The parties suggested that the Board rule on the objection based on written submissions. The Board agreed. In *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56, the adjudicator hearing the case dismissed the employer's objection and ruled that, even though the human rights argument had not been invoked in the parties' previous discussions of the grievance, Mr. Delage was fully entitled to invoke that argument at the adjudication of his grievance since doing so did not have the effect of changing the nature of his grievance.

II. Summary of the evidence

[7] The parties adduced an agreed statement of facts with the following documents attached: the collective agreement; a memo from the employer to all employees occupying EL positions in the equipment and systems maintenance program; the October 13, 2005 letter that the employer sent to Mr. Delage informing him that his position was reclassified to the EL-05 group and level; emails that Mr. Delage and the employer exchanged on the pay revision applicable to his parental benefits; the grievance filed by Mr. Delage on February 27, 2006; the employer's *Guide to Maternity and Parental Benefits*; and the glossary of the employer's *Pay Administration Guide*. Mr. Delage also testified.

[8] In a 2005 memo entitled: "[translation] Review of the classification of EL positions in the equipment and systems maintenance program," the employer notified employees of the results of the classification review begun in 2003. In the memo, the employer explains that the staffing process will be completed by May 2005 and that the employer would then begin the compensation process, preparing back pay for "[translation] active" employees and employees "[translation] that have left their positions for retirement, transfer or other reasons." The memo reads in part as follows:

> [Translation]
>
> . . .
>
> *4. The electronics engineering system technologist*

> *positions, currently classified at the EL-04 level, will be reclassified to the EL-05 level. Incumbents of those positions will be reclassified to the EL-05 level if they meet the criteria set out in the national statements of qualifications. Appointments by competition will be necessary where employee reclassification is not possible.*
>
> . . .
>
> *The staffing process should be completed by May 2005.*
>
> *We shall then begin the compensation process, preparing files, tools and calculations for active employees and for those employees that have left their positions for retirement, transfer or other reasons.*
>
> . . .

[9] On October 26, 2005, Mr. Delage accepted the employer's October 13, 2005 offer of promotion to the EL-05 group and level following the reclassification of his position, retroactive to January 7, 2002.

[10] Between October and December 2005, Mr. Delage and the employer exchanged emails about applying the EL-05 group and level rate of pay to parental benefits. In one email, the employer explains that the expression "[translation] pay revision" in the collective agreement only includes pay revisions provided for in that collective agreement and does not include retroactive reclassifications. The employer's *Guide to Maternity and Parental Benefits* confirms that interpretation, indicating that parental benefits are adjusted when a pay increase or an economic increase becomes effective while an employee is receiving those benefits.

[11] The employer adduced in evidence the glossary of its *Pay Administration Guide*. The following definitions from the guide (in English and in French) were brought to my attention:

> . . .
>
> ***promotion*** (promotion) - *means the appointment where the maximum pay rate for the new position exceeds that for the substantive position by:*
>
> *(a) an amount equal to the lowest pay increment for the new position where there is a scale of rates; or*

(b) an amount equal to four per cent (4%) of the maximum rate of the new position (where there is only one rate);

. . .

promotion (promotion) - *désigne une nomination à un nouveau poste dont le taux maximum de rémunération dépasse celui du poste d'attache de l'employée:*

a) d'un montant égal à la plus faible augmentation prévue pour le nouveau poste (lorsqu'il a une échelle de taux); ou

b) d'un montant égal à quatre pour cent (4%) du taux maximal du nouveau poste lorsqu'il n'y a qu'un seul taux;

. . .

Equalization adjustment (rajustement paritaire) - *means an annual allowance forming part of salary that is paid to persons of an occupational group to increase their rate of pay. It recognizes that these positions require comparable skill, effort, responsibility and working conditions in comparison to their counterparts of another occupational group found under the same employer whose rate of pay is higher;*

. . .

rajustement paritaire (equalization adjustment) - *désigne une indemnité comprise dans le traitement qui est versée aux personnes faisant partie d'un groupe professionnel donné pour augmenter leur taux de rémunération. Les postes qu'occupent ces personnes exigent des compétences, un niveau d'effort et un degré de responsabilité et sont assortis de conditions de travail qui sont comparables à ce qui s'applique à leurs homologues d'un autre groupe professionnel du même employer qui ont un taux de rémunération plus élevé;*

. . .

Revision (révision) - *means a change in the rate or rates of pay applicable to an occupational group and level;*

. . .

Révision (revision) - *désigne le changement du (des) taux de rémunération s'appliquant à un groupe et à un niveau professionnels;*

. . .

[12] Mr. Delage explained in his testimony that, following the birth of his daughter

on October 27, 2001, he took parental leave from November 5, 2001 to July 22, 2002. Before taking parental leave, he was in an electronics engineering systems technologist position, specifically as a naval maintenance technician. At that time, he occupied position number 22336. When he returned from leave, he still occupied the same position, the number of which had not changed. Before his leave, after his leave and on the date of the 2005 decision to reclassify his position, Mr. Delage's work remained unchanged — he had exactly the same duties, responsibilities and working conditions. Those factors did not change from November 2001 to 2005. The employer did not contest Mr. Delage's testimony.

III. Summary of the arguments

A. For the grievor

[13] The employer limits the meaning of the expression "pay revision" to the revisions set out in the collective agreement, thus excluding any other situation. That interpretation is excessively restrictive and is not supported the wording of the collective agreement. Since the expression "pay revision" is not defined either in the collective agreement or in the legislation, its ordinary meaning must be used, providing a broader interpretation than that of the employer. Indeed, pay revision includes retroactive economic increases, but it may also include changes in the rate of pay related to the employee or to the position. If the parties had wanted to limit the scope of the expression to economic increases, they would have done so in the collective agreement. However, they chose to use the expression "pay revision" and not "[translation] economic increase."

[14] Clause 18.07(c)(vii) of the collective agreement provides that parental benefits are to be adjusted if an employee becomes eligible for a pay revision. Thus, the condition of eligibility is related to the employee. The employer's interpretation is completely different. In its opinion, the employee need not qualify to be eligible. Analyzing that clause shows that that was not the parties' intention. In addition, Mr. Delage was not appointed to another position during his parental leave. Rather, his pay was adjusted following a reclassification. Starting at that time, his parental benefits should have been adjusted because he was eligible.

[15] The purpose of parental benefits is to provide the employee with the equivalent of 93 percent of the pay that he or she would have received had he or she not been on leave, including Employment Insurance benefits and parental benefits. The employer's

interpretation of clause 18.07(c)(vii) of the collective agreement means that Mr. Delage did not receive 93 percent of the pay that he would have received had he not been on parental leave, counter to the intentions of the other clauses on parental leave.

[16] In addition, the employer's interpretation of clause 18.07(c)(vii) of the collective agreement infringes on the right not to be subjected to discrimination on the grounds of family status. The evidence establishes that all the employees that were reclassified at the same time as Mr. Delage, regardless of whether they were active employees, were retired or had left their positions, were eligible for the back pay effective on the reclassification date. Every one of them was eligible, except Mr. Delage, because he was on parental leave. That exclusion was necessarily related to his parental leave, i.e., to his family status.

[17] Although the *CHRA* does not define family status, the case law establishes that the parent-child relationship is clearly one element of family status. The case law also demonstrates that an employer may not treat an employee differently because of that person's family status. Had it not been for his parental leave, Mr. Delage would have been eligible for the pay related to his new classification effective January 7, 2002. He became eligible for that pay only at the end of his parental leave; thus, he was treated differently than the other employees.

[18] In support of his arguments, Mr. Delage referred me to the following decisions: *Thériault v. Treasury Board (Employment and Immigration)*, PSSRB File Nos. 166-02-14508 and 14509 (19840528); *Harrison v. Canada Customs and Revenue Agency*, 2004 PSSRB 178; *Lang v. Canada (Employment and Immigration Commission)*, T.D. 8/90; *Brown v. Canada (Department of National Revenue, Customs and Excise)*, T.D. 7/93; *Woiden v. Lynn*, T.D. 9/02; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Commission des droits de la personne et des droits de la jeunesse c. Ville de Montréal*, [1998] R.J.Q. 305; *Gobeil c. Commission des écoles catholiques du Québec*, [1999] R.J.Q. 1883; *Lavoie v. Canada (Treasury Board)*, 2008 CHRT 27; and *Commission des droits de la personne and des droits de la jeunesse c. Centre hospitalier Hôtel-Dieu de Sorel*, [2001] R.J.Q. 1669.

B. <u>For the employer</u>

[19] In a grievance involving interpretation of the collective agreement, the grievor must establish on a balance of evidence that the employer breached one of its duties under the collective agreement. That has not been established.

[20] The day before he began parental leave, November 4, 2001, Mr. Delage occupied a position at the EL-04 group and level. After his position was reclassified, he was promoted to the EL-05 level retroactively to January 7, 2002. The collective agreement is clear: parental benefits are calculated based on the employee's rate of pay on the day before that person begins leave.

[21] The adjustment provided for in clause 18.07(c)(vii) of the collective agreement does not include promotion. If the parties had wanted to provide otherwise, they would explicitly have stated so in the collective agreement.

[22] The revision referred to in clause 18.07(c)(vii) of the collective agreement does not include promotion obtained during leave, which the case law also confirms. The expression "[translation] adjusted" is also used in clause 54.07 to mean a pay revision. Clause 54.07 reads as follows:

> ***54.07 Rates of Pay on Appointment Where the Effective Date of Appointment Coincides With a Pay Increment Date and/or a Pay Revision Date***
>
> *Where there is a coincidence of dates of appointment, pay increment and/or pay revision, the employee's rate shall be adjusted in the following sequence as applicable:*
>
> *(a) the employee shall receive his/her pay increment;*
>
> *(b) his/her rate of pay shall be revised;*
>
> *(c) his/her rate of pay on appointment shall be established in the revised scale of rates in the new classification level in accordance with the provisions of clause 54.04, 54.05 or 54.06.*

[23] The *Petit Robert* dictionary defines the expression "[translation] pay adjustment" as the action or decision "[translation] to raise [pay] so that it remains proportional to the cost of living." Such a definition cannot include promotion following reclassification. The *Pay Administration Guide* glossary does not define the expression "adjustment" but uses the expression "revision" instead, to mean the change in the

rate of pay applicable to an occupational group. That expression does not include employee promotion or reclassification, particularly since it is the position and not the employee that is reclassified.

[24] Mr. Delage was required to adduce *prima facie* evidence that discrimination occurred. He did not. The employer's interpretation is the same for everyone. Parental leave is leave without pay and, under the circumstances, Mr. Delage's situation must be compared with those of employees taking leave without pay. Mr. Delage was not treated differently than any other employee on leave without pay; thus, he was not subjected to discrimination.

[25] In support of its arguments, the employer referred me to the following decisions: *Lagacé v. Treasury Board (Environment Canada),* 2002 PSSRB 92; *Harrison v. Canada Customs and Revenue Agency*, 2004 PSSRB 178; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202; *Bernatchez v. Innue of Unamen Shipu*, 2006 CHRT 37; and *Dumont-Ferlatte v. Canada (Employment and Immigration Commission)*, T.D. 9/96.

IV. Reasons

[26] The issue in this grievance is relatively simple: Was Mr. Delage eligible for an increase in parental benefits following the reclassification of his position that came into effect during his parental leave? Subsidiarily, does the employer's refusal to grant the increase constitute discrimination on family status grounds?

[27] The facts of this grievance are not contested. Mr. Delage took parental leave and received the parental benefits provided in clause 18.07 of the collective agreement. The day before his leave, he occupied a position at the EL-04 group and level, which formed the basis for calculating his parental benefits. That point is not at issue, since the parties have agreed that the parental benefits were correctly calculated between the beginning of the parental leave on November 5, 2001 and January 6, 2002. At issue, instead, is the calculation of the benefits paid between January 7, 2002, when the reclassification of the position occupied by Mr. Delage came into effect, and July 22, 2002, when the parental leave ended. The benefits during that period were calculated based on the EL-04 rate of pay. Mr. Delage claims that they should have been calculated based on the rate of pay for the EL-05 group and level.

[28] Clauses 18.07(c)(i), 18.07(c)(iv)(A), 18.07(c)(v) and 18.07(c)(vii) of the collective agreement deal with the rate of pay based on the parental benefits that are calculated. Those clauses read as follows:

> ***ARTICLE 18***
>
> ***OTHER LEAVE WITH OR WITHOUT PAY***
>
> . . .
>
> ***18.07 Parental Allowance***
>
> . . .
>
> *(c) Parental Allowance payments made in accordance with the SUB Plan will consist of the following:*
>
> *(i)*
>
> *(A) where an employee is subject to a waiting period of two (2) weeks before receiving Employment Insurance parental benefits, ninety-three per cent (93%) of his/her weekly rate of pay for each week of the waiting period, less any other monies earned during this period.*
>
> *(B) For each week in respect of which the employee receives EI parental benefits pursuant to Section 23 of the* Employment Insurance Act, *the difference between the gross amount of the Employment Insurance parental benefits he or she is initially eligible to receive and ninety-three per cent (93%) of his or her weekly rate of pay, less any other monies earned during this period which may result in a decrease in* Employment Insurance *benefits to which he or she would have been eligible if no extra monies had been earned during this period.*
>
> . . .
>
> *(iv) The weekly rate of pay referred to in sub-clause 18.07(c)(i) shall be:*
>
> *(A) for a full-time employee, the employee's weekly rate of pay on the day immediately preceding the*

> *commencement of maternity or parental leave without pay;*
>
> . . .
>
> *(v) The weekly rate of pay referred to in sub-clause (iv) shall be the rate to which the employee is entitled for the substantive level to which she or he is appointed.*
>
> . . .
>
> *(vii) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*
>
> . . .

[29] Those clauses establish that an employee's parental benefits are based on the rate of pay that the employee was receiving on the day before the leave began. They also establish that the benefits are adjusted if the employee becomes eligible for a pay revision while receiving benefits. According to Mr. Delage, the reclassification of his position to the EL-05 level is a pay revision, and his parental benefits should therefore be adjusted from that date. According to the employer, the pay revision set out in clause 18.07(c)(vii) of the collective agreement does not include the reclassification of a position.

[30] The parties' arguments mainly dealt with the meaning to be given to the expression "pay revision," which is not defined in the collective agreement. According to the employer, a pay revision does not include a reclassification; according to Mr. Delage, a reclassification is a pay revision. The various definitions submitted by the parties are not particularly helpful in ruling on that point. In fact, those definitions apply in contexts different from that of this case or are not helpful in establishing the meaning to be given to the expression "pay revision." However, that is not necessarily the issue.

[31] Clause 18.07(c) of the collective agreement deals with the calculation of parental benefits, and it must be interpreted in its entirety. Clause 18.07(c)(i) first provides that an employee is to receive 93 percent of his or her weekly rate of pay including Employment Insurance benefits and parental benefits. Clause 18.07(c)(iv) specifies that the weekly rate of pay is the rate that the employee received on the day before the

leave started. Clause 18.07(c)(v) adds that the rate referred to in (iv) is the rate to which the employee is entitled for the substantive position level to which the employee is appointed. Clause 18.07(c)(vii) deals with pay revision.

[32] Taken together, the clauses provide a guarantee that the employee will receive the equivalent of 93 percent of the rate of pay that he or she would have received if he or she had not been on parental leave. The amount of the parental benefits is calculated based on the rate of pay of the employee's substantive position. Adjustments are then made if the employee rises in the pay scale or if, during the leave, the rate of pay of the position is revised following a renewal of the collective agreement. It appears to me that, following that reasoning and respecting the clauses, it is appropriate to adjust the parental benefits when the change in the rate of pay of the substantive position results from a reclassification, the general idea of the clauses being that the employee is to receive 93 percent of the rate of pay that the employee would have received if he or she had not been on leave. It is of little importance whether the rate of pay is increased following collective bargaining or following reclassification; the position's rate of pay was adjusted, and at that point, the employee became eligible for a benefit adjustment.

[33] Mr. Delage's situation is different from that in *Harrison*, where the employer had refused to adjust the employee's parental benefits after he obtained a promotion during his parental leave. In that case, the employer had argued that the employee had obtained his promotion after beginning his parental leave and had begun performing the duties of the new position only after returning from leave. In that context, the adjudicator ruled that the pay revisions to be considered in adjusting the parental benefits did not include promotions.

[34] Unlike the evidence in *Harrison*, the evidence in this case establishes that Mr. Delage's duties and responsibilities were exactly the same before he began his leave and after he returned from leave. They were still the same when the employer decided to reclassify his position. Throughout that period, Mr. Delage continued to occupy the same position with the same number. The employer alleges that when Mr. Delage was appointed to the EL-05 level, even though it was an appointment to the same position, he was promoted. However, by its very nature, reclassification is a very different sort of "promotion" than obtaining a new position. In my opinion, that distinction is of capital importance in determining whether Mr. Delage's parental

benefits should have been adjusted on the effective reclassification date of his position. A reclassification is primarily an adjustment of the rate of pay of a position, while a promotion, as it is usually understood, implies movement from one position to another.

[35] Mr. Delage also alleges that the employer's refusal to adjust his parental benefits following the reclassification of his position is discriminatory. Section 7 of the *CHRA* defines a discriminatory practice and subsection 3(1) sets out the prohibited grounds of discrimination, as follows:

. . .

> ***3.****(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.*
>
> . . .
>
> *Employment*
>
> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(*a*) to refuse to employ or continue to employ any individual, or*
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

. . .

[36] The decisions in *Lang*, *Brown* and *Woiden* confirm that the parent-child relationship forms part of family status, which is one of the prohibited grounds of discrimination set out in subsection 3(1) of the *CHRA*. Thus, with respect to employment, an employer may not treat an individual unfairly based on the parent-child relationship.

[37] At the time of Mr. Delage's parental leave, according to the collective agreement, from September 1, 2001 to August 31, 2002 the weekly pay at the top of the EL-04 group and level was $1038.16 and the weekly pay of the EL-05 group and level was $1151.41. When Mr. Delage was on parental leave, he would have received 93 percent of the total of those amounts plus Employment Insurance benefits and

parental benefits, that is, $965.89 as an EL-04 and $1070.81 as an EL-05. Therefore, from January 7, 2002 to July 22, 2002, the employer's decision not to calculate Mr. Delage's benefits based on the rate of pay of his position created a shortfall for him of a little over $100 each week. It also means that, during that period, Mr. Delage received 83.9 percent ($965.89/$1151.41) of the pay of his substantive position.

[38] The employer's decision clearly treated Mr. Delage unfairly. Had it not been for his parental leave, he would have benefited from the pay revision related to the reclassification of his position starting on January 7, 2002. Does that fact suffice for finding that the employer's decision constitutes a discriminatory practice within the meaning of section 7 of the *CHRA*? *Gobeil* and *Lavoie* emphasize that it is not always necessary to identify a comparison group to establish that there has been discrimination on prohibited grounds. On the other hand, in *Bernatchez* and *Dumont-Ferlatte*, the Canadian Human Rights Tribunal adopted a comparative approach in establishing whether there had been discrimination. In my opinion, where possible and where comparison groups exist, the second approach seems appropriate.

[39] According to the employer, a comparison must be made with employees on leave without pay, since parental leave is leave without pay even though an employee on parental leave is receiving Employment Insurance benefits and parental benefits. The Canadian Human Rights Tribunal's analysis in *Dumont-Ferlatte* also supports that approach. If an employee whose position was reclassified from the EL-04 to the EL-05 group and level were on leave without pay in January 2002, then he or she would not have received a pay adjustment retroactively to January 2002. As with Mr. Delage's parental benefits, the employee's pay would have been adjusted only at the end of the leave. According to the employer, then, it did not treat Mr. Delage unfairly in comparison with other employees with the same status and in comparable situations.

[40] I do not share the employer's view that adjusting Mr. Delage's parental benefits must be compared to the situation of employees on leave without pay for a very simple reason: most employees on leave without pay receive no pay, financial compensation or benefits during their leave. Since they receive nothing, there is nothing to adjust. It is somewhat odd to apply that reasoning to Mr. Delage.

[41] Under the collective agreement, the only employees who receive benefits while on leave without pay are employees on parental leave or maternity leave. For employees on maternity leave, maternity benefits are calculated based on the same

rules as those used to calculate parental benefits; the relevant clauses of the collective agreement are identical. That said, employees on maternity leave cannot be used as a comparison group because in a way they are the same group, or at least a group that could also be treated unfairly following discrimination on a prohibited ground. In fact, once maternity leave ends, the employee may take parental leave, since the two types of leave may be taken consecutively.

[42] In *Bernatchez*, the Canadian Human Rights Tribunal compared maternity leave with leave without pay in establishing the basis for calculating maternity benefits and determining whether the employee was entitled to payment of her sick leave while she was on maternity leave. The issue of the basis for calculation in *Bernatchez* has nothing to do with this case. That case involved the situation of a teacher who teaches during the academic year and is on vacation during the summer, but whose pay is paid 26 times per year instead of being paid only 20 times per year during the academic year. At issue in that case was whether the basis for calculating maternity benefits was the biweekly pay received 20 times per year or that received 26 times per year. In *Dumont-Ferlatte*, the Canadian Human Rights Tribunal also compared maternity leave to leave without pay, in that case to determine whether the employer should have credited annual leave and sick leave to the employee while she was on maternity leave.

[43] Those two cases establish that maternity leave must be compared with leave without pay to analyze the question of granting other forms of leave. Not surprisingly, those cases concluded that employees on maternity leave may not accumulate additional forms of leave. The same rule would apply to parental leave. On the other hand, the issue in this case is quite different: it is the calculation of benefits directly related to the rate of pay of Mr. Delage's substantive position. In ruling on this issue, comparison with employees receiving no benefits, meaning other employees on leave without pay, is pointless and of no help.

[44] Instead, in establishing whether Mr. Delage was treated unfairly because of his family status, his situation must be compared with those of the other employees whose positions were reclassified from the EL-04 to the EL-05 group and level at the same time as Mr. Delage's position. On that issue, the parties jointly adduced a 2005 memo from the employer, from which I reiterate an excerpt already quoted:

> [Translation]

. . .

> *We shall then begin the compensation process, preparing files, tools and calculations for active employees and for those employees that have left their positions for retirement, transfer or other reasons.*

. . .

That excerpt explains the employer's policy on retroactively applying the pay for employees whose positions were reclassified. Employees who had left their positions, for whatever reason, were eligible for the back pay related to the reclassification of their positions. Active employees, i.e., those on staff, were also eligible for the back pay. An employee on parental leave is certainly a member of one of the two groups and logically a member of the active employee group since that employee is on staff.

[45] The employer refused to adjust Mr. Delage's parental benefits based on the new rate of pay of his substantive position retroactively to January 7, 2002. The other active employees whose positions were reclassified and who were appointed to their positions were declared eligible for retroactive back pay. Mr. Delage was treated differently because the rate of pay used to calculate his parental benefits was not adjusted. By acting in that manner and depriving Mr. Delage of part of the benefits to which he was entitled, the employer treated him unfairly in the course of employment. The employer's decision constitutes a discriminatory practice within the meaning of section 7 of the *CHRA*.

[46] In *Brooks*, the Supreme Court of Canada notes that everyone in society benefits from procreation, that one of its major costs should not be placed on a single group in society and that exclusions from employee benefit packages cannot be made in a discriminatory fashion. That logic is reiterated by Quebec's *Tribunal des droits de la personne* in *Ville de Montréal.* Mr. Delage was not excluded from an employee benefit, but he received less from it than he should have. He was penalized because of his parental situation.

[47] Even had I compared employees on parental leave with the other employees who were eligible for the back pay resulting from the reclassification of their positions, I could have reached the same conclusion by limiting my analysis solely to the repercussions of the employer's interpretation of the collective agreement. In *Commission des écoles catholiques de Québec*, the Quebec Court of Appeal rules that

comparative analysis is not always essential. In that Court's view, a rule, even though apparently neutral, may not have the effect of infringing on the right to full equality. In that case, the employer's rule deprived women on maternity leave of the possibility of obtaining employment contracts. It was erroneous to compare them with other employees unavailable for employment contracts. The same reasoning applies to Mr. Delage. I do not believe that it is essential to compare his situation to those of other employee groups to conclude that the employer's decision constitutes a discriminatory practice. The interpretation that the employer gives to the collective agreement suffices for reaching that conclusion.

[48] The parties' arguments mainly dealt with the meaning to be given to the expression "pay revision" in clause 18.07(c)(vii) of the collective agreement. That expression is open to interpretation and, in case of doubt, I can only endorse the meaning given to this expression by Mr. Delage, since sharing the employer's view would give the collective agreement a meaning that runs counter to the right to equality. Neither a clause in a collective agreement nor the meaning given to such a clause may contradict the *CHRA*.

[49] The corrective action requested by Mr. Delage is that the employer increase his parental benefits effective January 7, 2002. The employer did not establish, either in adducing its evidence or in presenting its arguments, that such a corrective action was excessive. The employer need only make the necessary calculations and pay the requested adjustment to Mr. Delage. Consequently, I conclude that the corrective action requested must be granted.

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

(The Order appears on the next page)

V. Order

[51] The grievance is allowed.

[52] Within 60 days of this decision, the employer shall pay Mr. Delage the difference between the amount of the parental benefits to which he was entitled from January 6 to July 22, 2002 and the amount that he received.

[53] I remain seized of this case for a period of 90 days from the date of this decision so that I may rule on any matter arising from its implementation.

April 7, 2009.

PSLRB Translation

Renaud Paquet,
adjudicator