Date: 20120315

File: 569-02-98

Citation: 2012 PSLRB 32

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Bargaining Agent: Craig Stehr, counsel

For the Employer: Martin Desmeules, counsel

Heard at Ottawa, Ontario, January 30, 2012.
Written submissions filed January 30, February 10 and 13, 2012.

I. Policy grievance referred to adjudication

[1] On December 23, 2010, the Association of Justice Counsel ("the bargaining agent") presented a policy grievance to the Treasury Board ("the employer"), alleging that the employer contravened the performance pay provisions of the collective agreement between them for the Law Group (LA) bargaining unit (expiry date: May 9, 2011) ("the collective agreement").

[2] Specifically, the bargaining agent grieved the fact that, in certain departments or agencies, employees on maternity leave or parental leave were required to work a minimum number of months in any given fiscal year to be eligible for performance pay. The bargaining agent asked that that pratice be changed and that the employer advise all departments and agencies of the need to comply with the collective agreement for paying performance pay to employees on maternity or parental leave. The bargaining agent also proposed a method of calculating performance pay for those employees.

[3] In its reply to the grievance, the employer admitted that the collective agreement was not applied uniformly across departments or agencies. It stated that the collective agreement calls for the prorating of the performance pay entitlement for those absent during part of the review period, including maternity and parental leaves. The employer also stated that employees are eligible for a prorated performance increase only if they have been performing their duties long enough to permit a meaningful evaluation of performance in the year being evaluated.

[4] Shortly after responding, the employer issued a directive to all departments and agencies to provide guidance for administering performance pay. In July 2011, the Department of Justice, which employs a large part of the members of the bargaining unit, also issued a directive which changed the way it was administering performance pay, moving it in line with the Treasury Board's directive. From that point on, performance pay has been administered uniformly across all departments and agencies. These directives are described later in paragraphs 13 and 14.

[5] Following the issuance of the grievance reply, the employer directive to all departments and the Department of Justice directive, the employer had a uniform way to calculate performance pay for LAs returning from maternity and parental leave, and it is this policy that the bargaining agent grieved. For the employer, performance pay

for those LAs should be prorated to the time worked. For the bargaining agent, it should be fully paid because a mother or a parent should not be penalized for having taken maternity or parental leave.

[6] The bargaining agent gave notice to the Canadian Human Rights Commission (CHRC) that it would raise an issue involving the interpretation or application of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (*CHRA*). On January 31, 2012, the CHRC made written submissions and the parties were asked to respond to those submissions by February 13, 2012, which they did on February 10, and 13, 2012.

II. Summary of the evidence

[7] The evidence adduced at the hearing was not contradicted. The bargaining agent presented the Department of Justice's "Bulletin 536" and "Bulletin 545" on the administration of performance pay. It also presented a policy from Veterans Affairs Canada and an information bulletin from the employer on the same topic. The bargaining agent called Rick Swoffer as a witness. Since July 2010, Mr. Swoffer has been working as a full–time labour relations officer for the bargaining agent.

[8] Part of the LAs' pay is related to performance. For example, effective May 10, 2010, the LA-2A pay scale is from $82 917 to $118 995. That scale does not include pay increments every six months or every year, as for most occupational groups in the public service. In-range movement is instead governed by the performance pay plan described in Appendix "B" of the collective agreement. Each year, an LA's performance is evaluated and, depending on the rating, the LA becomes eligible for performance pay. The amount of that pay varies according to the rating.

[9] Before the LAs reach the maximum range of their pay scale, a performance increase can be awarded and this award allows the LAs to progress within the scale. In-range increases are integrated into an LA's salary until the maximum of the pay scale is reached. After that point, performance pay becomes a non-permanent bonus that needs to be earned every year. For example, if an LA-2A averages performance pay of $5 000 a year, he or she would take approximately 7 years to go from the minimum ($82 917) to the maximum ($118 995) of the pay scale. After attaining the maximum, the performance pay is no longer integrated into the salary but rather is paid as a bonus added to the maximum range value.

[10] Once a year, the employer evaluates the LAs' performance. Employees whose performance is evaluated as "satisfactory", "unsatisfactory" or "unable to assess", do not receive a performance pay increase. Employees whose performance is assessed as "fully satisfactory" may be granted an increase of up to 5%. That increase may be up to 7% for employees with superior performance and up to 10% for an outstanding performance. A department's performance pay budget is limited to 5% of the departmental group payroll.

[11] If an LA goes on leave without pay for part of a year, he or she may become eligible for a performance increase, prorated for the time that he or she is back on the payroll. This includes the LAs on maternity or parental leave. On that point, clause 8.2 of Part 2 of Appendix B of the collective agreement reads as follows:

> ***8.2*** *Employees who have been on leave without pay for a part of the fiscal year may be eligible for a performance increase if they have been on strength for long enough to permit a meaningful evaluation of performance. Any performance pay should be prorated for the time they have been back on payroll.*

[12] When the grievance was filed, some departments and agencies required the LAs benefiting from maternity or parental leave to work four or six months in a fiscal year to be eligible for performance pay, which would then be prorated to the number of months worked. At that time, the Department of Justice's interpretation of those provisions of the collective agreement was different. That interpretation is stated in section 4.3.1 of its "Bulletin 536", which reads as follows:

> …
>
> *An employee who occupies an eligible position, but who was on maternity leave or parental leave without pay on April 1st, 2010, is deemed to be eligible for a performance award.*
>
> *If a manager is unable to assess performance for the review period, the employee's rating from his or her previous PREA, contiguous to the review period, will be deemed to be the rating (to a maximum of Fully Meets") for this exercise.*
>
> …

[13] In June 2011, the employer issued an information bulletin to all departments and agencies regarding the administration of performance pay for LAs. In that bulletin,

the employer stated that LAs on maternity or parental leave were deemed to be on strength on March 31 or on April 1 and were deemed eligible for performance pay. The employer then stated that, for the LAs who took leave without pay, performance pay was to be prorated based on the time the LAs had been performing their duties, assuming that they met the minimum period to qualify for performance pay. That minimum period was left to be established by the respective departments or agencies. According to Mr. Swoffer, that period seems to average four months.

[14] In July 2011, the Department of Justice changed its interpretation of the performance pay provisions of the collective agreement. It issued "Bulletin 545", of which section 4.7.1 reads as follows:

…

> *An employee who occupies an eligible position, but who was on maternity leave or parental leave without pay on April 1st, 2011, is deemed to be eligible for a performance award.*
>
> *On June 6th, 2011, TBS issued a* Treasury Board Information *bulletin entitled* ***Maternity and Parental Leave and Performance Pay****. The bulletin directs that, beginning with review period 2011/2012, performance pay is in recognition of assessed levels of performance within the same review period. An employee whose rating is "Unable to Assess" will not receive performance pay.*

…

[15] In his testimony, Mr. Swoffer emphasized that the LAs progress within their pay range solely on the basis of performance. For Mr. Swoffer, in-range performance pay equates to pay increments as they exist for the rest of the public service.

III. Summary of the arguments and submissions

A. For the CHRC

[16] The CHRC referred first to the purpose of the *CHRA* and to its sections 3, 7 and 10. On pregnancy or childbirth as a ground of discrimination, it referred to the following cases: *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219; *Lavoie v. Treasury Board of Canada*, 2008 CHRT 27; and *Tomasson v. Canada (Attorney General),* 2007 FCA 265. On family status as a ground of discrimination, it referred to the following cases: *Hoyt v. Canadian National Railway*, 2006 CHRT 33; *Johnstone v.*

Canada Border Services, 2010 CHRT 20; *Whyte v. Canadian National Railway*, 2010 CHRT 22; *Richards v. Canadian National Railway,* 2010 CHRT 24; and *Seeley v. Canadian National Railway*, 2010 CHRT 23.

[17] The CHRC submitted that, in human rights law, the complainant has the initial onus of establishing a *prima facie* case of discrimination. That test was set out by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] 2 S.C.R. 536. Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a reasonable explanation for the alleged conduct. If the respondent provides that reasonable explanation, the complainant then has the burden of demonstrating that the explanation was pretext and that the true motivation behind the respondent's action was discriminatory. The CHRC also submitted that, to evaluate whether discrimination occurred on a prohibited ground in an employment context, the applicable test was set out by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[18] The CHRC submitted that many parents face the challenge of balancing work and family responsibilities. Given that women are the exclusive beneficiaries of maternity leave and that they remain the primary childcare providers in our society, the employer's policy and practice could affect women disproportionately. The provisions under the performance pay plan clearly set out how performance pay is to be applied. Clause 4.4 ensures that the rights of those members not on strength for the period required, as a result of maternity or parental leave, are not adversely affected when compared to other members, on the basis of their family status. An employer has a duty to accommodate an employee who has parental responsibilities, to the point of undue hardship. The evaluation of what is undue hardship will vary with every case. The use of the term "undue" infers that some hardship is acceptable.

[19] The CHRC takes the position that, if the bargaining agent were to establish a *prima facie* case of adverse differential treatment based on sex and family status, it would trigger a duty for the employer to accommodate affected employees to the point of undue hardship, pursuant to sections 7 and 10 of the *CHRA*. It would fall on the employer to show that it has taken all reasonable steps open to it to accommodate the affected employees to the point of undue hardship.

[20] The CHRC's position is that, if a *prima facie* case of discrimination on the basis of family status is established, the employer must demonstrate that its practice is a

bona fide occupational requirement by showing (1) that the practice was adopted for a purpose rationally connected to the performance of the job; (2) that the employer adopted the particular practice in an honest and good faith belief that it was necessary to the fulfillment of that work-related purpose; and (3) that the practice is reasonably necessary to the accomplishment of that work-related purpose. To show that the practice is reasonably necessary, it must be demonstrated that it is impossible to apply clause 4.4 of Appendix "B" of the collective agreement to individual employees who have benefited or are benefiting from their rights to maternity and parental leave, by ensuring that they receive the benefits of the performance pay provisions.

[21] The CHRC submitted that, to ensure that each individual is protected by the broad principles of Canadian human rights principles, it is vitally important that all bargaining agent member employees benefiting from maternity or parental leave rights are legally entitled to consistent treatment from all departments and agencies.

B. <u>For the bargaining agent</u>

[22] The bargaining agent argued that the LAs who benefit from maternity or parental leave should not be penalized and that they should receive their regular pay increments, based on performance. The employer's interpretation of the collective agreement discriminates against women who use maternity leave and against women or men who use parental leave.

[23] The collective agreement should be interpreted as a whole. Its entire contents should help interpret its specific provisions. Clause 19.03(a) provides mothers with 18 weeks of maternity leave to give birth and to recover. Clause 19.03(g) states that time spent on maternity leave shall be counted for pay increment purposes. Clause 19.04(i) states that the paid maternity allowance shall be adjusted if the mother becomes eligible for a pay increment or revision. Clause 19.06(a) provides the mother or the father with 37 weeks of parental leave to take care of the newborn child. Clauses 19.06(g) and 19.07(i) provide the same benefits to parents as clauses 19.03(g) and 19.04(i) provide to mothers. In general, the collective agreement treats maternity and parental leave differently than other types of leave without pay.

[24] The bargaining agent also referred to the no–discrimination clause of the collective agreement and to the employer's *Directive on Terms and Conditions of Employment*, specifically to the sections dealing with pay increments. The bargaining

agent also referred to Appendix "A" of the collective agreement, which states that the only way to progress within a pay scale is by performance pay.

[25] For the bargaining agent, section 8.2 of Appendix "B" is at odds with clauses 19.03(g) and 19.06(g) of the collective agreement. According to those clauses, time spent on maternity or parental leave is counted for pay increments, but according to clause 8.2 of Appendix "B", it is not. Furthermore, clause 4.4 of Appendix "B" makes a distinction between maternity or parental leave and other types of leave without pay, while clause 8.2 does not.

[26] When analyzing the collective agreement as a whole, it becomes apparent that the LAs who take maternity or parental leave are entitled to their full pay increments. Clause 8.2 of Appendix "B" cannot overwrite the body of the collective agreement. Furthermore, the *Directive on Terms and Conditions of Employment* and clauses 19.03(g) and 19.06(g) need to have some use.

[27] The employer's interpretation of Appendix B of the collective agreement leads to discrimination and to a violation of the *CHRA* and of the no-discrimination clause of the collective agreement. The LAs who take maternity or parental leave should not be penalized with a lower or no pay increment. To eliminate discrimination, pay increments should not be prorated to the time worked during the year but rather should be based on the previous year's performance.

[28] The bargaining agent referred me to the following decisions: *Canada (Attorney General) v. Jones*, [1978] 2 F.C. 39 (C.A.); *Delage v. Treasury Board (Department of Fisheries and Oceans),* 2009 PSLRB 43; *Hoyt*; *Brouse v. Treasury Board (Citizenship and Immigration Canada),* 2003 PSSRB 14; and *United Steelworkers, Local 1-207 v. West Fraser Mills Ltd. (Hinton Wood Products),* 2008 ABQB 263. The bargaining agent also referred me to Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 4th ed.

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

[29] At issue in this grievance is the interpretation of clause 8.2 of Appendix "B" of the collective agreement. That clause is crystal clear as to how performance pay should be calculated for employees who take leave without pay. If the parties' intent was to have a different method of calculating performance pay for employees who took maternity or parental leave, they would have specified so in clause 8.2, but they did

not. The adjudicator does not have the power to amend the collective agreement and, in this case, to grant benefits to the LAs different from those specified in their collective agreement.

[30] Clauses 19.03(g) and 19.06(g) of the collective agreement do not apply to this case but to pay increments at set dates not based on performance. Those clauses applied when there was a pay increment system, which no longer exists.

[31] The LAs who take maternity or parental leave are not treated differently than other employees on leave without pay for whom performance pay must be prorated to the time worked during the year. There is no *prima facie* case of discrimination because the LAs who take maternity or parental leave do not receive less pay than their comparator group, namely, other employees who take leave without pay.

[32] The employer referred me to the following decisions: *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital et al.* (1999), 42 O.R. (3rd) 692 (C.A.); *Association of Justice Counsel v. Treasury Board,* PSLRB File No. 585-02-25 (20091023); *Power v. Canada (Attorney General)*, 2003 NLCA 17; *Canada (CHRC) v. Canada (CHRT)*, [1997] F.C.J. No. 1734 (T.D.) (QL); *Patterson v. Canada (Canada Revenue Agency)*, 2011 FC 1398; *Lavoie*; *Delage*; *Bertrand v. Treasury Board*, 2011 PSLRB 92; *Complex Services Inc. v. Ontario Public Service Employees Union*, *Local 278*, 2011 CanLII 26530; *New Brunswick Public Employees Association v. Region 6 Hospital Corporation* (2002), 109 L.A.C. (4th) 150; and *Canada Post Corporation v. Canadian Union of Postal Workers*, 2002 C.L.A.D. No. 470 (QL).

IV. Reasons

[33] The scope of this grievance has evolved from the filing to the hearing. When the grievance was filed, the bargaining agent was satisfied that the Department of Justice was correctly interpreting Appendix "B" of the collective agreement. The bargaining agent then claimed that the other departments or agencies who applied a different interpretation should adopt the same interpretation. After hearing the grievance at the final level, the employer decided to take a uniform and unique interpretation of Appendix "B". Rather than applying the Department of Justice's approach to all

departments and agencies, it applied the interpretation that had been adopted by those departments and agencies. Before me is a uniform approach by the employer to prorate the performance pay adjustments paid to the LAs who return from maternity or parental leave, and who are considered to have been on strength long enough to permit a meaningful evaluation of performance. The bargaining agent does not agree with that approach.

[34] To decide the grievance, I need to examine the following provisions of the collective agreement, which are directly or indirectly involved:

> ***19.03 Maternity Leave Without Pay***
>
> …
>
> *(g) Leave granted under this clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall be counted for pay increment purposes.*
>
> [Emphasis added]
>
> …
>
> ***19.04 Maternity Allowance***
>
> …
>
> *(i) Where a lawyer becomes eligible for a pay increment or pay revision while in receipt of the maternity allowance, the allowance shall be adjusted accordingly.*
>
> [Emphasis added]
>
> …
>
> ***19.06 Parental Leave Without Pay***
>
> …
>
> *(g) Leave granted under this clause shall count for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall count for pay increment purposes.*

[Emphasis added]

…

19.07 Parental Allowance

…

(i) Where a lawyer becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.

[Emphasis added]

…

***21.06** Except as otherwise specified in this Agreement, where leave without pay for a period in excess of three (3) months is granted to a lawyer, the total period of leave granted shall be deducted from "continuous employment" for the purpose of calculating severance pay and from "service" for the purpose of calculating vacation leave; time spent on such leave which is for a period of more than three (3) months shall not be counted for* pay increment *purposes.*

[Emphasis added]

…

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

…

APPENDIX "A"

LA – LAW GROUP (BUD 21402)

ANNUAL RATES OF PAY

(in dollars)

X) Effective May 10, 2006 - Pay Restructure

A) Effective May 10, 2006

B) Effective May 10, 2007

C) Effective May 10, 2008

D) Effective May 10, 2009

Y) Arbitral Award Effective November 1, 2009 – Pay Restructure

E) Effective May 10, 2010

LA-1

From:	*$*	*54585*	*57087*	*59586*	*62087*	*64587*	*68828*	*71581*
To:	*X*	*54580*	*57087*	*59586*	*62087*	*64587*	*68828*	*71581*
	A	*55945*	*58514*	*61076*	*63639*	*66202*	*70549*	*73371*
	B	*57232*	*59860*	*62481*	*65103*	*67725*	*72172*	*75059*
	C	*58090*	*60758*	*63418*	*66080*	*68741*	*73255*	*76185*
	D	*58961*	*61669*	*64369*	*67071*	*69772*	*74354*	*77328*
	Y	*58961*	*to*	*84119*				
	E	*59845*	*to*	*85381*				

From:	*$*	*74443*	*77868*
To:	*X*	*74443*	*77868*
	A	*76304*	*79815*
	B	*78059*	*81651*
	C	*79230*	*82876*
	D	*80418*	*84119*

…

Lock Step Structure (BUD 21402)

PAY INCREMENT ADMINISTRATION

(1) The pay increment shall be to the next higher rate in the scale of rates.

(2) Until October 31, 2009, the pay increment period for all lawyers paid in the LA-1 scale is six (6) months.

(3) Until October 31, 2009, the pay increment period is twelve (12) months for all lawyers paid in the LA-2(I) and LA-2(II) scales. Thereafter, the in range movement will be governed by the relevant performance pay regime.

[Emphasis added]

…

LA-2A

From:	*$*	*75630*	*to*	*108525*
To:	*X*	*75622*	*to*	*108525*
	A	*77513*	*to*	*111238*
	B	*79296*	*to*	*113796*
	C	*80485*	*to*	*115503*
	D	*81692*	*to*	*117236*
	E	*82917*	*to*	*118995*

…

APPENDIX "B"

PERFORMANCE PAY PLAN FOR LAWYERS AT THE LA-1, LA-2A AND LA-2B LEVELS

The following performance pay plan in effect on May 9, 2006 applies to lawyers at the LA-1, LA-2A and LA-2B levels, for the duration of the Law group arbitral award, as issued on October 23, 2009 (Arbitral award dated October 23, 2009, provision effective November 1, 2009)

PART 1

…

2.1 *It is government policy to pay certain senior excluded non-Management Category employees according to their assessed level of performance. This policy provides the means to achieve this. Its chief provisions are the following:*

2.1.1 *individuals may progress through the salary range by a series of variable increases related to the employee's assessed level of performance;*

2.1.2 *performance awards may be awarded to those whose salaries have reached the job rate and whose performance is fully satisfactory, superior or outstanding in a given year;*

…

4.1 *Employees affected by the Regulations respecting pay on reclassification or conversion whose salary is protected at a group and level not mentioned above are not subject to this plan. The relevant terms and conditions of employment apply to determine their appropriate salaries.*

4.2 *Employees absent on leave without pay are eligible for in-range performance increases or performance awards under this plan.*

[Emphasis added]

…

PART 2

…

2.2 ***"In-range increase"*** *(augmentation à l'intérieur de l'échelle) means an increase in salary based on assessed level of performance, that results in an upward positioning in the range (not exceeding the job rate).*

…

2.5 ***"performance award"*** *(prime de rendement) means a bonus payable to an employee whose salary has reached the job rate of the applicable salary range and whose assessed level of performance is fully satisfactory, superior or outstanding. It is payable in a lump sum and must be re-earned each year.*

…

3.1 *In-range increases and performance awards are to be administered on April 1 of each year or on a date prescribed by the Treasury Board.*

3.2 *Expenditures on in-range increases and performance awards are controlled by a departmental budget, which may not be exceeded.*

…

4.0 In-range increases

4.1 *As a general guide, in-range increases up to the job rate, as a percentage of the employee's salary, may be granted annually for assessed performance as follows:*

Outstanding	*up to 10%*
Superior	*up to 7%*
Fully Satisfactory	*up to 5%*
Satisfactory	*0%*
Unsatisfactory	*0%*
Unable to assess	*0%*

…

4.4 *The Departmental performance pay budget is limited to five per cent (5%) of the departmental group payroll as at March 31. Only members of the group on strength March 31* ***and*** *on April 1 in a position listed in paragraph 3.1 of this policy are eligible for the purposes of this exercise. Members of the group on leave without pay or on a maternity leave / paternal leave who would not normally be considered to be*

> *on strength, are, for purposes of this policy, deemed to be eligible.*
>
> [Emphasis added]
>
> …
>
> ***8.1*** *Employees who have been absent on leave without pay for the full fiscal year and have not returned to work by March 31 of that fiscal year are not eligible for any performance increase. They are not to be included in the calculation of the budget.*
>
> ***8.2*** *Employees who have been on leave without pay for a part of the fiscal year may be eligible for a performance increase if they have been on strength for long enough to permit a meaningful evaluation of performance. Any performance pay should be prorated for the time they have been back on payroll.*
>
> [Emphasis added]

[35] I agree with the bargaining agent that the collective agreement must be interpreted as a whole and that its entire content helps one understand its specific provisions. However, I do not necessarily conclude, as did the bargaining agent, that clause 8.2 of Part 2 of Appendix "B" contradicts the rest of the collective agreement as interpreted and applied by the employer.

[36] First, I shall address the bargaining agent's argument to the effect that references in the collective agreement to pay increments were to be read as references to in-range movement. Appendix "A" of the collective agreement includes lock-step pay increments for the LA-1s for the period preceding November 1, 2009. Appendix "A" also specifies that, before that date, pay increment periods were 6 or 12 months and that, after that date, in-range movement was to be governed by performance pay. The bargaining agent argued that references to pay increments were synonymous with other references to in-range movement. Even though the parties abandoned the lock-step system effective November 1, 2009, they decided, for reasons that were not explored at the hearing, to refer to that system in the collective agreement signed on July 27, 2010. In the same manner, they decided to refer to the pay increment system in clauses 19.03(g), 19.04(i), 19.06(g) and 19.07(i) even though pay increments were no longer in place when the collective agreement was signed. By then, they were an anachronism.

[37] I do not agree with the bargaining agent's argument that in–range progression by performance pay is a pay increment as per the collective agreement. A pay increment, as per the collective agreement, is a quasi-automatic progression that occurs at a set date, by a pre-set amount. Instead, in-range performance increases and performance awards outside that range are compensation to reward performance and not pay increments based on time of service. They are two separate and distinct schemes, one of which ended as the other began. On that point, it is appropriate to cite again section (3) of the pay increment administration section of Appendix "A" of the collective agreement. It reads as follows:

…

> *(3) Until October 31, 2009, the pay increment period is twelve (12) months for all lawyers paid in the LA-2(I) and LA-2(II) scales. Thereafter, the in range movement will be governed by the relevant performance pay regime.* [emphasis added]

[38] Clause 4.4 of Part 2 of Appendix "B" of the collective agreement limits the budget for performance pay to 5% of the LA group payroll in a department as of March 31. For the purpose of calculating the 5%, the LAs on maternity or parental leave are considered on strength on March 31. If a department's entire budget is spent, the LAs receive an average of 5% in performance pay. The LAs with less than fully satisfactory performance receive no performance increase or awards, but all the others are likely to receive an increase or an award that can reach 10% of salary for outstanding LAs.

[39] In May 2010, LA-2A pay ranged from $82 917 to $118 995, for a scope of $36 078. At 5% per year for performance pay, an LA would take approximately 7 to 8 years to reach the range maximum. That time would be longer were an LA to go on maternity or parental leave, because the pay increase would be prorated and necessarily lower than an LA who did not take such leave. As a result, it is clear that an LA who takes maternity or parental leave is paid less when he or she returns. No evidence was adduced at the hearing on that loss, but it could be fairly substantial if the leave were taken at an early stage of an LA's progression in the pay scale, since pay for the next year would be calculated from a lower value. However, unless that is the result of discrimination as defined in the *CHRA*, it is of no consequence to this policy grievance. The fact that LA's who take maternity or parental leave will take

longer to reach their salary maximum is only an incidental effect of the performance pay plan and not some sort of penalty.

[40] I agree with the employer that at issue is clause 8.2 of Part 2 of Appendix "B" of the collective agreement. I also agree with the employer's argument that this clause is clear on its face; only those LAs who went on leave without pay and who worked long enough during the fiscal year to permit an evaluation of their performance are eligible to be paid performance pay on a prorated basis. According to the evidence, "long enough" seems to average four months. The LAs on maternity and parental leave are considered on leave without pay, since they do not receive a salary while on leave but rather an allowance.

[41] In my opinion, on a reading of the collective agreement that does not take into account the requirements of the *CHRA*, there is no incongruity between the collective agreement as a whole and its Appendix "B". Furthermore, the employer's interpretation of clause 8.2 of Part 2 of Appendix "B" is correct. According to the wording of that clause, performance pay should be prorated for the LAs in issue whose performance can be evaluated in the particular fiscal year. However, one question remains. Does clause 8.2 discriminate on a prohibited ground against the LAs who take such leave?

[42] The Supreme Court of Canada provided the legal definition of discrimination in its 1989 decision in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at para 37:

> *…discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*

In order to meet the definition of discrimination above, the performance pay plan must be found to base its distinctions on personal characteristics rather than individual merits. It is clear to me that this is not the case in the present grievance. The performance pay plan is structured such that performance pay is paid to individuals

who have, in the course of a fiscal year, demonstrated merit and capacities that entitle them to a specific percentage of their salary. There is no distinction that is based solely on the fact that the employee has been on leave without pay. Rather, the distinction focuses on the quality of the work accomplished by that individual.

[43] The employer's interpretation of the collective agreement deprives the LAs who go on maternity or parental leave of part or all of the performance pay that they could have otherwise received because the employer only pays performance pay to those whose performance in the year is capable of evaluation. For example, an LA-2A who goes on parental leave for 8 months in a year could receive only 4/12 of the full yearly amount of performance pay, which would, on average, be 5% of salary, and would total approximately $4 200 for a full fiscal year for an LA-2A at the bottom of the pay scale. The LA-2A who took the leave would then be paid $2 800 less on his or her return to work than if he or she had not gone on parental leave. That loss would carry forward every year, until the LA reaches the top of the pay scale. However, that does not suffice for a finding that the employer's interpretation of the collective agreement constitutes a discriminatory practice within the meaning of section 7 of the *CHRA*. As stated above, not all differences constitute a discriminatory practice.

[44] According to past decisions of the courts and of human rights tribunals, it is appropriate, in order to decide whether discrimination exists, to identify a comparison group. The employer argued that in this grievance a comparison must be made with employees on leave without pay. That approach was used in several cases, including *Dumont-Ferlatte*, *Ontario Nurses Association* and *New Brunswick Public Employees Association*.

[45] According to past decisions of courts and human rights tribunals, including *O'Malley* v. *Simpson Sears Ltd.,* [1985] 2 S.C.R. 536, in discerning whether discrimination exists and whether a complainant was disadvantaged on a prohibited ground, a comparative analysis is required in order to ascertain whether the rule "affects a person or group of persons differently from others to whom it may apply."

[46] A more recent case on this point from the CHRT is that of *Bernatchez v. Innue of Unamen Shipu,* 2006 CHRT 37, in which the complainant was on maternity leave, followed by parental leave. The issue in this case was whether the respondent had discriminated against the complainant in the manner in which it had calculated her maternity leave benefits. In making its determination on the issue, the Tribunal

affirmed that it was necessary to determine whether, when the complainant received the benefit, she was considered as an employee on paid or unpaid leave. Only if she was on paid leave was the complainant's referral to the regular employees who are not pregnant and who receive remuneration as a comparison group, correct. On this point, the Tribunal found that the complainant was to be considered as an employee on unpaid leave and so the complainant's comparison of herself with regular employees who were not pregnant and not on paid leave was incorrect. I am in agreement with the employer and in the present case, and find that the comparator group is employees on leave without pay.

[47] There is no dispute that the performance pay of employees on leave without pay is affected in precisely the same manner as the performance pay of LAs who take maternity and parental leave. LAs who take maternity or parental leave do not receive less pay than their comparator group. Those employees who have, for example, taken care and nurturing leave, leave for relocation of spouse, personal leave, military leave, education leave, union leave or leave to participate in an election, are in the same position as those who are the focus of the present policy grievance. The evidence before me does not identify any difference in the treatment of these two groups on the issue of performance pay. The performance pay of all employees on leave without pay is prorated to the time worked during the year, without distinction as to the type of leave without pay taken.

[48] Finally, I note that courts and tribunals alike have drawn a distinction in the evaluation, for the purposes of discrimination, between plans or benefits that are compensatory and non-compensatory in nature. In *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital,* the issue was that disabled nurses who were absent from work did not receive various benefits such as employer contributions to benefit plans, seniority, accumulation, and service accrual. The Ontario Court of Appeal held that, "providing different levels of compensation to different groups of employees is not itself discriminatory with the meaning of the *Code.*" The key distinction made by the court, at page 703, was between compensation provided in exchange for work, and compensation provided for other purposes:

> *Disabled nurses do not receive this compensation [employer contributions to benefit plans] because they are not providing services to their employer. It is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing services to the employer and those who are not…*

Therefore, in applying the same logic to the present case, employees who are on maternity or parental leave are not eligible to receive the performance bonus as they are not providing services to the employer while on leave.

[49] Similarly, in *Fernandes v. IKEA Canada*, [2007] BCHRT 259, the British Columbia Human Rights Tribunal held that the employer had not discriminated against the complainant in failing to pay her a bonus under its "Win Win" program when she was on leave as a result of having re-injured her knee at work. The bonus program was established by IKEA and was based on a store meeting a particular sales target. If the store met or exceeded the target, and if the employee met the individual eligibility criteria, he or she was eligible to receive the bonus. The employer described the "Win Win" program as meant, "to provide an incentive for employees to contribute to the store's success." Ms. Fernandes did not meet the threshold test of being actively at work for the period required and as a result, did not receive a bonus.

[50] Compensation in exchange for work and compensation provided for other purposes was examined by the Tribunal. It held that the purpose of the "Win Win" program was to provide "financial compensation, in effect a reward," in recognition of a worker's participation in the store's success in meeting its sales targets. The program was labeled as an "incentive program." Similarly, an LA's performance award is also termed as a "bonus" and is payable to an employee whose "assessed level of performance" is deemed fully satisfactory, superior or outstanding. Just as the "Win Win" program bonus was only paid to "coworkers who were actively at work," the LA's performance pay award can only be payable to an employee whose performance "permit[s] a meaningful evaluation of performance."

[51] The same tribunal also considered the question of whether a complainant was entitled to have stock options vest during a period when the complainant was on long term disability benefits in *Toivanen v. Electronic Arts (Canada),* 2006 BCHRT 396. It held that a benefit which accrued to an employee while they were at work could be discontinued while they were on an unpaid leave of absence due to a disability because the accumulation of the benefit related to the fact they were working. While they were on an unpaid leave of absence due to a disability, they were not working and therefore not entitled to the benefit accumulation.

[52] This same distinction has also been noted again by the Canadian Human Rights Tribunal in *Lavoie v. Treasury Board of Canada,* 2008 CHRT 27, cited by both the

employer and the Canadian Human Rights Commission. In it, the Tribunal affirms the following:

> *[139] This "conversion entitlement" is the issue in this matter. In matters of discrimination, a distinction must be made between the rights resulting from compensatory benefits and non-compensatory benefits, i.e. those relating to the employee's status. And so, a bilingualism bonus conditional on the performance of work falls under the first category. Performance of the work is required to obtain the bonus. Accrual of seniority, the right to employment, the right to keep one's employment, the right to tenure are described as non-compensatory benefits and relate to the status of the employee. Underlying this second category is the notion that performance of the work is not required to acquire or maintain the right. We are therefore referring to a benefit or a right that results from employee status (see primarily:* Ontario Nurses Association v. Orillia Soldiers Memorial Hospital*, (1999), 42 O.R. (3d) 692, paragraphs 63, 70 and 71, applying the same criteria: Fernandes v. IKEA Canada, (2007) BCHRTD. No. 259, paragraphs 24, 25, 26, 27 and 31)*

The Tribunal stated that, as well, a bilingualism bonus conditional on the performance of work, would fall under the category of "compensatory benefits" as **"[p]erformance of the work is required to obtain the bonus."** Those items under the "non-compensatory benefits" heading would include accrual of seniority, the right to employment, the right to keep one's employment, and the right to tenure. Underlying the category of non-compensatory benefits, affirms *Lavoie*, is "the notion that performance of the work is not required to acquire or maintain the right." Therefore, in this case, the in-range increase, to be granted annually for assessed performance, refers to a benefit or a right that results from employee status.

[53] The issue has also been considered by the Federal Court in *Canadian Human Rights Commission v. Canadian National Railway Co. (re Cramm)* [2000] F.C. J. No. 881. Mr. Cramm had filed a complaint against both his union and the employer, alleging that the calculation of cumulative compensated service was discriminatory. Mr. Cramm was shy of the minimum number of months he needed in order to qualify for employment security as he had been off work for three years following a work-related absence. The Tribunal, relying on *Dumont-Ferlatte*, had compared his situation with that of employees who had been absent from work for other reasons, such as maternity leave, and he contested its choice of comparator group before the Federal Court. The Court rejected his argument at paragraph 25. In the following

paragraph, it also rejected his second argument, which was to the effect that the Tribunal had erred in considering the nature of the employment contract:

> *26 The Commission urged that the Review Tribunal erred by considering the nature of the employment contract in coming to the conclusion that there was no prima facie case of discrimination. That was done in assessing the purposes of ESIMA, an assessment essential in considering the purpose of employment related rules, in accord with the process established in Gibbs. In my opinion, the nature of the rule in question, based on the underlying principle of an employment contract that one is paid for service performed, is an essential element in assessing the purpose of the rule in question. I conclude that the Review Tribunal did not err by considering the nature of an employment contract in its determination that the rule in this case, clause G(iii) did not have a discriminatory adverse effect upon those absent from work by reason of injury, and consequent disability in that sense. The Review Tribunal was correct in concluding that a prima facie case of discrimination on grounds of disability was not here established.*

In arriving at this determination, the Court referred to a decision of the Supreme Court of Canada, *Battlefords and District Co-operative Ltd. V. Gibbs,* [1996] 3 S.C.R. 566, in which it held that it was no surprise that differing benefits would be allocated to employees under insurance plans and that this fact was not, in and of itself, an indication of discrimination. Discrimination could, however, arise where benefits were allocated for the same purpose, but differed in their allocation as a result of characteristics that were not relevant to its purpose. As I have stated above, such is not the case here. In this case, employees on maternity and paternity leave are awarded performance pay in the same way that other employees who take leave without pay are accorded (or do not qualify for) such pay.

[54] I should add that a distinction could also be made, as in *Canadian Union of Public Employees, Local 2554 v. Melfort School Division No. 100*, (2000), 87 L.A.C. (4th) 116, between seniority-driven benefits and work-driven benefits. It would be discriminatory not to accrue seniority or years of service as a result of maternity or parental leave, but it is not discriminatory to exclude time spent on maternity or parental leave for performance pay purposes. In the present case, an employee must work to earn the benefit, the same way that he or she must work to earn sick leave or vacation leave credits.

[55] During the first few years of their careers, the LAs progress within their pay scales on the basis of performance pay. When they reach the pay scale maximum, they receive performance pay as a performance bonus. There is no doubt that performance pay is a compensatory and work-driven benefit. It provides pay increases to the LAs in accordance with their work performance. Because they are not working while on maternity or parental leave, they must be compared to other employees who do not work, in other words, to employees on leave without pay. Performance pay must be earned while at work. It cannot be considered as a form of compensation linked to years of service.

[56] Clause 8.2 of Appendix "B" of the collective agreement clearly states that, for employees who took leave without pay, performance pay should be prorated for the time they are back on the payroll. In that respect, employees who take maternity or parental leave are not treated differently. Thus, the employer did not discriminate against the LAs on the basis of sex or family status by prorating performance pay for those who went on maternity or parental leave. Considering everything, the bargaining agent did not establish a *prima facie* case of discrimination.

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

(The Order appears on the next page)

V. Order

[58] The grievance is denied.

March 15, 2012.

Renaud Paquet,
adjudicator