Date: 20130325

Files: 566-02-4645 to 4648

Citation: 2013 PSLRB 30

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

KAREN GRIERSON-HEFFERNAN

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Grierson-Heffernan v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Douglas Hill, grievance and adjudication officer, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel, Treasury Board

Heard at Fredericton, New Brunswick,
January 29 to 31, 2013.

I. Introduction

[1] The four files with which I am concerned essentially turn on questions of law rather than of fact. They also raise difficult issues of remedy.

[2] The parties agreed that the applicable collective agreement (despite its expiry date) under which these four grievances were filed is the one between the Treasury Board and the Public Service Alliance of Canada (Program and Administrative Services Group) with an expiry date of June 20, 2007 ("the collective agreement": Exhibit U2).

[3] In 2007, the grievor, Karen Grierson-Heffernan was a border services officer ("BSO"), working at the FB-03 group and level. She had started with the Canada Border Services Agency (CBSA) in 2004 and had worked as a customs inspector and then as a BSO. Throughout that period, she was employed under a series of fixed-term appointments. Her employment status as a BSO was conditional because a requirement of her appointment to that position was the successful completion of the Border Services Officer Assessment Program at Rigaud, Quebec ("the Rigaud program"; see Exhibit E1, Tab 20.

[4] The grievor attended the program at Rigaud in the summer of 2007. She failed. As a result, her employment with the CBSA was terminated as of August 28, 2007; see Exhibit E1, Tab 20.

[5] At the time of her termination, the grievor had 1081 days of cumulative service. Had she instead had 1095 or more days, her status would have been indeterminate. Had she been indeterminate as of August 28, 2007, CBSA would have been obligated to offer her any available position for which she was qualified as an alternative to working as a BSO.

[6] It was not disputed by the parties that the reason the grievor lacked 1095 days of cumulative service as of August 28, 2007 was that in July 2005 she had gone on maternity leave. At that time, the Treasury Board's "Term Employment Policy" ("the Policy") (Exhibit E1, Tab 7), stated that for the purposes of calculating cumulative days of service, any break in service longer than 60 consecutive calendar days would not be counted. Because the CBSA did not count the grievor's maternity date, the date she would have become indeterminate (her "roll over date") was September 11, 2007. Had those maternity days counted, her roll over date would have been June 15, 2007; see Exhibit E19. Had that happened, she would have been indeterminate on

August 28, 2007, and the CBSA would have had to try to find her another position rather than simply terminate her employment.

[7] Against that background, the grievor filed these four grievances, which grieve as follows:

a. that her termination was arbitrary, unreasonable and wrongful by reason of alleged inadequacies in the Rigaud program (PSLRB File No. 566-02-4645);

b. that the CBSA's failure to count her time on maternity leave towards her cumulative years of service was discriminatory and a violation of article 19 of the collective agreement (PSLRB File No. 566-02-4646);

c. that the CBSA discriminated against her and violated article 19 of the collective agreement when it terminated her (PSLRB File No. 566-02-4647); and

d. that the CBSA discriminated against her and violated article 19 and other relevant provisions of the collective agreement when it terminated her (PSLRB File No. 566-02-4648).

[8] At a teleconference with representatives of the parties on January 3, 2013, my decision in *Baranyi v. Deputy Head (Canada Border Services Agency),* 2012 PSLRB 55, was drawn to their attention. *Baranyi* dealt with allegations that had been made about the Rigaud program similar to those in PSLRB File No. 566-02-4645. Since I was familiar with the operation of the Rigaud program, it was hoped that the parties might not have to call as many witnesses. Discussed were the similarity of the complaints in the other three files and that they appeared to revolve around questions of law rather than of fact. The parties were encouraged to attempt to agree upon the facts and issues before the hearing.

[9] When the hearing commenced, the grievor's representative advised that the grievance respecting the Rigaud program (PSLRB File No. 566-02-4645) was being withdrawn. The parties had not been able to come up with a formal statement of facts. However, in recognition that the issues were primarily legal, they were able to limit the amount of evidence required.

[10] On behalf of the grievor, I heard the testimonies of the following:

a. herself;

b. Jennifer Campbell, currently the CBSA superintendent at the Port of Andover, New Brunswick, and at all material times, the grievor's immediate supervisor;

c. Matthew Demerchant, a BSO currently working at the Port of Centreville, NB;

d. Steve Brawn, a BSO at the Port of Woodstock, NB; and

e. Darren Scott, currently the CBSA superintendent of commercial operations at the Port of Woodstock.

[11] On behalf of the CBSA, I heard the evidence of the following:

a. John Dolimount, District Director of the North-West New Brunswick District of the CBSA; and

b. Sylvia Gunn, currently a compensation advisor for the Atlantic Region of the CBSA.

[12] I should note that all the witnesses gave their evidence in a straightforward fashion. The facts were not in any real dispute. Some of the evidence, particularly that of Messrs. Brawn and Scott, was not particularly relevant, since it consisted primarily of what they thought of the CBSA's maternity leave Policy or the grievor's case. As I explained at the hearing, such opinion evidence was not relevant.

II. The facts

[13] The grievor is 41. She is married. The evidence was not particularly clear as to when exactly she first started working with the CBSA. There was some reference to her working summers as a student. In any event, the first formal employment letter put into evidence was for November 23, 2004 to December 31, 2004. She worked as a customs inspector (classified PM-02) as a casual; see Exhibit E1, Tab 9. Over time, she received a number of term appointments. Each appointment was for a specified term; see Exhibit E1, Tabs 10 - 19.

[14] The grievor became pregnant sometime in late 2004. Ms. Campbell, her supervisor at that time, testified that, by about March 2005, the grievor's pregnancy had advanced to the state that it was becoming difficult if not impossible for her to wear the equipment belt that was a standard part of a BSO's uniform. She discussed options with the grievor and with CBSA's Human Resources. She testified that the grievor made no request for an accommodation. In any event, there were no desk or office positions in her district. The only positions were as BSOs, who had to be able to wear the equipment belt. In the end, she decided, with the concurrence of CBSA's Human Resources, to put the grievor on sick leave for as long as she could. That ran out on July 6, 2005, at which point the grievor went on maternity leave under employment insurance; see Exhibit U7.

[15] The grievor's daughter, her first child, was born on July 19, 2005. Immediately before that, the grievor had been working in a flower shop that she had purchased and managed. (There was no evidence as to when exactly she purchased the shop, how many days a week she worked there or for how many hours, and whether she had any employees that could work when she was not there.) She testified that she sold the shop a few months after her daughter was born.

[16] The grievor was on maternity leave for 88 days. She returned to work at the CBSA at that time because by then she was able to wear the uniform belt. Her term appointment was still in effect, and she wanted to make a good impression.

[17] The grievor continued to receive term appointments after her return from maternity leave. The last such letter was for April 1, 2007 to March 29, 2008; see Exhibit E1, Tab 19. In it, the CBSA extended her specified period appointment, which had originally been made by a letter dated March 29, 2006; see Exhibit E1, Tab 16.

[18] In early 2007, it became apparent that there might be a place for the grievor at the Rigaud program that summer. The grievor knew that her roll over date would occur sometime in 2007. She, Ms. Campbell and Human Resources communicated over the issue. By late February 2007, I am satisfied that, based on the evidence of Ms. Campbell as well as the exhibits, the grievor understood that the CBSA's position was that her roll over date was September 12, 2007; see Exhibit U8.

[19] As noted, it was and had been a condition of the grievor's employment as a BSO that she pass the Rigaud program. During the mid-2000s, a significant backlog built-up

at Rigaud. Employees working as BSOs frequently had to wait years before they could take the course. Its successful completion was and remained a condition of their employment with the CBSA.

[20] On July 5, 2007, the grievor was formally advised that she was being offered a place in the Rigaud program. She was advised that, upon its completion, she would be appointed to a BSO position at the FB-03 group and level. She was also advised that, if she did not pass, the offer became ". . . null and void and [she] will not be able to continue work as a Border Services Officer"; see Exhibit U9.

[21] Evidence was adduced at the hearing that it might not have been absolutely necessary for the grievor to take the Rigaud program when she did. She could have waited, and had she waited, she would have hit her roll over date in September. However, Mr. Dolimount's evidence was that there was strong competition for seats at the Rigaud program. In addition, many of the ports in his district (for example, the port at Four Falls, NB, where the grievor worked) were small and seasonal. It was not easy to juggle staff loads to ensure coverage for an employee who went to Rigaud. And finally, the grievor had worked as a BSO for some time. She already had a lot of practical experience. Taking everything together, I was satisfied that the grievor did not think that she would fail the Rigaud program. She did not want to risk having to wait another year or more to get into the Rigaud program, for as long as she remained a term employee, her employment status was less than secure. In reaching that decision, I was satisfied that she was not misled in any way by the CBSA.

[22] From that, I must conclude that, when the grievor entered the Rigaud program, she knew that her roll over date would not occur until after she completed it. She also knew that, if she failed, her employment would be terminated. She just did not believe that she would fail. But she did.

[23] The grievor was advised by Rigaud staff on August 28, 2007 that she had failed. She had to leave immediately.

[24] On August 31, 2007, Mr. Dolimount, then director of the North-West New Brunswick District, wrote to the grievor. He reminded her that successfully completing the Rigaud program was a condition of her employment. Her failure meant that he could no longer offer her employment with the CBSA. Her employment was terminated. He added that she could ". . . compete again for Border Services Officers

positions . . . [but she would] not be eligible for the required Rigaud training again until August 28, 2009, as this is departmental policy"; see Exhibit U10.

[25] At the hearing, Mr. Dolimount testified that, had the grievor been an indeterminate rather than a term employee, he would have written a different letter. He explained in cross-examination that, "our obligation as an employer would be different [to someone who had passed the roll over date] . . . the letter would have referred to our obligation to provide what further employment we could offer her." He testified in cross-examination that, "if she had gone past three years, my obligation was to find alternative employment for her. . . that was my understanding of my obligation."

[26] An example of such a situation was provided at the hearing by Mr. Demerchant. He was working as a BSO when he became indeterminate in the spring of 2007. He went to Rigaud in May 2007. He also failed the course. However, because he was indeterminate, he was not terminated from all employment. For the next few months, he did odd jobs at the CBSA Woodstock office. He was then offered one of three positions, all in Halifax. He took one that was in the Training and Learning Unit of the CBSA in Halifax in August 2007. After two years, he reapplied for the BSO position, was accepted and was sent to Rigaud. He passed. He has worked as a BSO ever since.

[27] Returning to Mr. Dolimount's testimony, he stated that, based on the information he received from CBSA Human Resources, he understood that the grievor had not yet reached the roll over date. Hence, he did not include in the termination letter an offer of employment in a different position. He simply terminated the appointment, although he did say (as he did in all such letters) that she was free to reapply to the Rigaud program in two years' time.

[28] After her termination in August 2007, the grievor went on employment insurance benefits for roughly a year. She supply-taught at some point, but did not like it. She testified that her first "real job" after August 2007 was working as the general manager at the Castle Inn in Perth-Andover, NB. She thought that she might have started that job about two-and-a-half years before the hearing, which would have put it in the vicinity of the fall of 2010. However, in cross-examination, she admitted that it might have been in 2011.

[29] I conclude that the grievor did not work in any material way between August 2007 and 2011, when she started at the Castle Inn. She looked for work during that period, but as she said, "There aren't a lot of jobs where I live in Perth-Andover." From that statement, I conclude that she did not look for employment beyond easy commuting distance from Perth-Andover.

[30] The grievor testified that she went back to university in 2011.

[31] Her second child, a daughter, was born on April 24, 2012.

III. The central issue and the *Lavoie* decision

[32] The central issue in all three grievances is the version of the Policy that was in effect between April 1, 2003 and June 20, 2008. It provided as follows:

a. employees could be hired under term contracts;

b. term employment was not to be used as a substitute for indeterminate staffing; and

c. a term employee who had accumulated three years of service (or 1095 days) without a break of longer than 60 consecutive calendar days had to be appointed ". . . indeterminately at the level of his/her substantive position"; see Exhibit E1, Tab 7, clause 7.1.

[33] When applying the Policy, departments were required to consider that "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 . . ."; see Exhibit E1, Tab 7, clause 7.2(a). The parties agreed that that meant in practice that anyone on maternity leave for longer than 60 days would not be able to count those days (that is, the days of absence) as part of their cumulative total of service days.

[34] In the grievor's case, the effect of the Policy was that her roll over date would have been September 11, 2007. On the other hand, had she been able to count her maternity leave days, her roll over date would have been June 15, 2007.

[35] The CBSA's Policy was not without its critics. On January 19, 2004, Brigitte Lavoie filed a complaint with the Canadian Human Rights Tribunal (CHRT), alleging that the Policy, and in particular the fact that it did not count maternity leave days, constituted discrimination on the basis of sex. Hearings were held on September 24, 25, 27 and 28, 2007, and on January 21 to 25, 2008. The CHRT issued a decision on June 20, 2008 (*Lavoie v. Treasury Board of Canada*, 2008 CHRT 27). It allowed Ms. Lavoie's complaint. It held at para 6 that, by not counting maternity or parental leave, the Policy ". . . differentiates adversely in the course of employment (section 7 of the [Canadian Human Rights] *Act*) female term employees who take maternity and/or parental leave and deprives or tends to deprive these employees of employment opportunities on the basis of their sex (section 10 of the *Act*)."

[36] By way of remedy, Ms. Lavoie and the Canadian Human Rights Commission (CHRC) had sought the following:

a. an order that the Treasury Board amend its Policy to eliminate the discriminatory aspects;

b. an order compensating Ms. Lavoie for loss of wages and benefits caused by the Policy;

c. special compensation; and

d. interest.

[37] The CHRT awarded all four remedies. The compensatory benefits covered losses back to 2002 and 2003; see *Lavoie*, at para. 185 - 197.

[38] The Treasury Board did not appeal that decision or seek judicial review. It changed the Policy to comply with the direction in the *Lavoie* decision. As a first step, in an email dated January 9, 2009, the Treasury Board notified its departments and agencies that, as a result of the *Lavoie* decision, they were to ". . . start counting, as of June 20, 2008 [the date of the *Lavoie* decision] the period of maternity/parental leave for female term employees in the calculation of the cumulative three year period"; see Exhibit E1, Tab 5.

[39] The second step was a formal revision of the Policy. On November 25, 2011, the Treasury Board advised the CHRT that it ". . . has amended the Term Employment

Policy as per the order of the Canadian Human Rights Tribunal" in the *Lavoie* decision; see Exhibit E3. The wording of the revised policy (released November 15, 2011) provided that a period of leave without pay longer than 60 consecutive calendar days would not be included in the calculation of the cumulative working period for appointment to indeterminate status unless

a. the employee was on such leave on or after June 20, 2008; and

b. the failure to include it would result in discrimination on a prohibited ground set out in the *Canadian Human Rights Act (CHRA),* R.S.C. 1986, c. H - 6*;* see Exhibit E1, Tab 6, section 7.2(a).

[40] While that was going on, the grievor's grievances wound their way slowly through the grievance process. In the first-level response to her grievances (dated November 1, 2007), the CBSA simply pointed to the existing policy and denied that it violated ". . . Article 19 or any other relevant Articles" of the collective agreement; see Exhibit E1, Tab 4. The second-level response (dated December 4, 2007) and the third-level response (dated January 11, 2008) repeated the first-level response; see Exhibit E1, Tab 4.

[41] However, by the time the final level response was issued on March 19, 2010, the *Lavoie* decision had been released, and the Treasury Board had already changed the Policy to remove the discriminatory aspects that had been identified in *Lavoie*.

[42] The final-level response repeated the background to the grievances and the fact that the Policy had at the relevant time not counted leaves of longer than 60 consecutive calendar days. It then went on as follows:

. . .

> *You allege that this action affected your employment status. I have been advised that even if the maternity leave without pay could be counted, you would only have reached three (3) years cumulative working period in November 2007, as such your employment status was not affected by the* Term Employment Policy*.*
>
> *It should be noted that a decision of the Canadian Human Rights Tribunal found the TBS* Term Employment Policy *was discriminatory on the basis of sex. As such, the TBS modified the Policy effective June 20, 2008, to include the counting of*

> *maternity/parental leave without pay towards the cumulative working period. As your maternity leave without pay was from July 7, 2005 to October 3, 2005, the modified* Term Employment Policy *is not applicable to your case.*
>
> *In light of the above, your grievances are denied and your requested corrective actions will not be forthcoming.*

[43] I pause to note that, based on the CBSA's evidence, accepted by the grievor, there was an error in the final-level response. In point of fact, had the maternity leave been counted, the grievor's roll over date would have been June 15, 2007, not November 2007; see Exhibit E19.

[44] It is clear that, and I so find, if the *Lavoie* modifications had been effective as of July 2005, when the grievor went on maternity leave, she would have reached indeterminate status as of June 15, 2007. That being the case, it is equally clear on the evidence that the CBSA would have handled her failure at Rigaud in August 2007 differently. Instead of terminating her, it would have found her alternative employment within the CBSA.

IV. Preliminary objection on behalf of the employer

[45] Both at the beginning of the hearing and in her submissions at the end, counsel for the CBSA objected to any reliance by the grievor's representative on clause 38.01 (Maternity Leave Without Pay) of the collective agreement, in particular subclause (g), which provides as follows:

> *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.*

[46] The CBSA's representative submitted that there was no express reference to article 38, of the collective agreement in the grievances. They refer only to ". . . article 19 [No Discrimination] and other relevant articles." The words, "other relevant articles," were not enough to establish that the grievances had ever been considered filed under clause 38.01. If the maternity leave provision was not part of the discussions during the grievance process, then no adjudicator has jurisdiction to consider it; see *Shneidman v. Attorney General of Canada,* 2007 FCA 192;

Burchill v. Canada (Attorney General), [1981] 1 F.C. 109 (C.A.); and *Baranyi*, at para. 100 and 122.

[47] In her opening statement, the CBSA's representative conceded that, in this case, I would have to hear all the evidence before I could make that determination. She repeated her objection in her closing submissions. I will discuss that objection as part of my reasons.

V. Submissions on behalf of the grievor

[48] The grievor's representative submitted that the CBSA violated its Policy because it failed to notify the grievor in writing that she might be terminated.

[49] The grievor's representative also submitted that the CBSA failed to accommodate the grievor during her pregnancy. It did not offer her a desk job or some other position that did not require her to wear the equipment belt that is part of a BSO's uniform. He submitted that, had she been accommodated, she would have worked right up to her due date and would have returned to work after her delivery within the 60-day limit imposed by the Policy.

[50] The grievor's representative then turned to clause 38.01 (g) (Maternity Leave without Pay) of the collective agreement, which provides as follows:

> *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.*

[51] The grievor's representative submitted that the parties to the collective agreement were presumed to have not intended to discriminate. That being the case, the word "service" in clause 38.01 (g) must be interpreted to include maternity leave. There was no reference to a 60-day limit – or indeed any limit – to the days of maternity leave that could qualify for the purposes of calculating "service." That in turn meant that maternity leave had to be counted under all circumstances. Clause 38.01(g), being a provision of the collective agreement, could not be unilaterally cut down, limited or amended by the CBSA. The CBSA's Policy was such an attempt. It could not stand, at least to the extent that it had the effect of limiting the rights otherwise conferred under clause 38.01(g). While the CBSA is entitled to develop

policies to govern its operations, that entitlement does not extend to creating policies that are discriminatory in their impact and contrary to a clause in the collective agreement.

[52] The grievor's representative relied heavily on the *Lavoie* decision. He submitted that the Policy had been found discriminatory. The grievor's rights had to be interpreted in light of that decision. He submitted that I should follow it.

[53] With respect to the CBSA's preliminary objection that the grievances do not refer to or relate to the maternity leave provisions in clause 38.01 of the collective agreement, the grievor's representative submitted that it was clear throughout the history of the grievances that the impact of maternity leave and how it was dealt with by the CBSA was a central issue. Both the grievances and the replies referred to "any other term" in the collective agreement, and that phrase, in the circumstances, was broad enough to encompass clause 38.01, even if it had not been expressly referenced.

[54] The grievor's representative submitted that I ought to allow the grievances and order the following remedial actions:

a. order the grievor's maternity leave days to be counted and thus declare that she was indeterminate as of June 15, 2007;

b. order the CBSA to cease its discriminatory practice and to find the grievor employment within the federal public service, including the CBSA, at a minimum group and level of PM-03;

c. order compensation for the loss of income and benefits at the PM-03 group and level from the date of her termination on August 28, 2007 to the date of my decision, minus any income she earned during the intervening period;

d. order the reimbursement of any benefits otherwise owing to her under the collective agreement, including vacation, pension and lost overtime opportunities, for the intervening period;

e. order damages under the *Canadian Human Rights Act*, in the amounts of

   i. $20 000.00 for general damages, and

   ii. $20 000.00 for wilful breach of the *Act*;

f. order interest on all monetary amounts at the Bank of Canada interest rate from August 28, 2007 to the date of the award;

g. any other remedy that I find fit to ensure that the grievor is made whole; and

h. that I remain seized of the matter.

VI. Submissions on behalf of the employer

[55] The CBSA's counsel submitted that I was not bound by the *Lavoie* decision or that, if I were, or if I chose to follow it, I should conclude that it was reasonable to limit the effect of the decision to June 20, 2008. In that submission, she relied upon the decision of the Supreme Court of Canada in *Attorney General of Canada v. Hislop et al.,* 2007 SCC 10.

[56] Were I to find that the Policy was discriminatory as of June 15, 2007 or as of August 28, 2007, the CBSA's counsel submitted that I had no jurisdiction to order that a position be provided to the grievor at the PM-03 level anywhere within the federal public service. If it exists, my jurisdiction extends only to positions within the purview and responsibility of the deputy head of the CBSA. I also lack jurisdiction to appoint the grievor to any particular position within the CBSA. That decision remains within the exclusive jurisdiction of the deputy head.

[57] The CBSA's counsel also submitted that, even assuming that the grievor had become indeterminate as of June 2007, she was still working under a fixed-term appointment that was to end on March 31, 2008. Had the CBSA not been able to find her a position by then, it could have terminated her. That being the case, any remedy I order should have effect only for the number of days between August 28, 2007 and March 31, 2008.

[58] In considering the issue of damages, the CBSA's counsel submitted that the slight evidence of available positions came from Mr. Demerchant's testimony. The best that could be said was that it was possible that, as of August 28, 2007, there might have been three lower-level positions available in Halifax. He took one of them, which left only two. But there was no evidence that the grievor would have been willing or able to move to Halifax. There was no evidence that the grievor would have moved to Halifax had she been an indeterminate employee in August 2007.

[59] With respect to whether I should award damages or in what degree, the CBSA's counsel referred me to the decisions in *Montreuil v. Canadian Forces Grievance Board,* 2007 CHRT 53, *Germain v. Groupe Major Express Inc.,* 2008 CHRT 33, and *Cole v. Bell Canada,* 2007 CHRT 7, for the proposition that, just because I could award damages, it

did not mean that I had to. There had to be evidence of loss or hurt stemming from a discriminatory action. In the absence of such evidence, no or minimal damages should be awarded.

VII. Analysis and decision

[60] I will deal with the preliminary objection first.

[61] I agree that I do not have jurisdiction to consider that aspect of the grievor's case that is based upon clause 38.01 of the collective agreement. The boilerplate reference in her grievance to "all other relevant provisions" was not enough on the facts of this case to establish that clause 38.01 (g) was ever discussed during the grievance process. No evidence was presented to me to suggest that it had been discussed. While I agree that, in a general sense, this case concerns maternity leave, it does not mean that it was "maternity leave" in the sense dealt with in that clause. The real issue was whether the CBSA's Policy contravened the *Canadian Charter of Rights and Freedoms* ("the *Charter")*. In other words, it was about whether the CBSA's exercise of its right to manage the workplace contravened the *Charter* and, if so, whether retroactive effect to the *Lavoie* decision could be given to the grievor.

[62] Even if I have jurisdiction, I was not persuaded that clause 38.01(g) of the collective agreement had any application to the grievor's case. Clause 38.01(g) by its very words is concerned with calculations made for the purpose of determining severance pay, vacation leave and pay increments. It says nothing about the accumulation of days of service for the purpose of converting an employee from a term employee to one with indeterminate status.

[63] Turning to the substantive arguments made by the grievor's representative, I was not satisfied that this was a case of a failure to accommodate or that, even if it was, it had any relevance to the issues in this case. First, there was no evidence that the grievor requested any accommodation in 2005, when she became unable to wear the BSO equipment belt. Second, even had one been made, putting the grievor in a desk job, for example, would not have changed her situation insofar as the cumulative days of service were concerned. She still would have been short the required number of days required under the Policy, even had she requested and been granted accommodation.

[64] I turn now to the merits of the three grievances.

[65] This case gives rise to the following three basic issues:

a. Does the finding in *Lavoie* that the Policy had discriminatory aspects apply to the facts and grievances in this case?

b. If so, does it have or should it be considered to have retroactive effect before the date of its release (that is, June 20, 2008)?

c. If so, what remedy if any should be available to the grievor?

[66] I will deal with those issues in sequence.

A. Is the *Lavoie* decision binding on me?

[67] I do not consider the *Lavoie* decision binding on me in the strict legal sense. The CHRT has been granted no jurisdiction or appellate review power over the Public Service Labour Relations Board (PSLRB) or its adjudicators. There is nothing in the *Public Service Labour Relations Act* that binds adjudicators to the decisions of another tribunal, no matter how experienced that tribunal.

[68] However, I am satisfied that the *Lavoie* decision should be considered determinative of the question of whether the Policy should be considered discriminatory. I reached that conclusion for two reasons.

[69] First, in my opinion, this is a situation where the principle of non-mutual issue estoppel would apply. It would be an abuse of process in the circumstances of this case to permit the re-litigation by CBSA of the very issue that had been decided against it in the *Lavoie* case. The CBSA had vigorously fought the allegation that the 60-day rule, insofar as it applied to female employees who went on maternity leave, was discriminatory in its effect. That is the precise issue before me. The CBSA lost its fight, chose not to contest it, and implemented the decision. While the grievor may not have been a party to *Lavoie*, her interest and status are, for all intents and purposes, identical to those of Ms. Lavoie: see, generally, *Stevenson v Bomac Construction,* [1986] S.J. No. 89 (CA) and *Toronto v. CUPE,* 2003 SCC 63.

[70] Second, if I am wrong, I am satisfied for the same reasons that the reasoning of the *Lavoie* decision ought to be followed on the facts before me. It would serve no useful purpose to go over the same ground and the same arguments, particularly when the CBSA, by its actions, accepted the result in *Lavoie*.

[71] Accordingly, I find that the Policy as applied to the grievor, was discriminatory in its effect. Thus, it violated both the *Canadian Human Rights Act* (for the reasons set out in *Lavoie*) and, as well, clause 19.01 of the collective agreement, which, insofar as is relevant, provides as follows:

> *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 . . . sex . . . .*

[72] I will turn now to the more contentious issue, which is whether in my ruling should have retroactive effect and, in particular, whether it should apply to a claim in respect of events that happened before June 20, 2008.

B. <u>Retroactivity</u>

[73] In my opinion, and on the specific facts of this case, I am satisfied that my finding that the Policy was discriminatory should have retroactive effect, resulting in a ruling that the grievor ought to have become indeterminate as of June 20, 2007.

[74] There are several reasons for that conclusion.

[75] First, as a practical matter, it is exactly what happened in the *Lavoie* case. Ms. Lavoie's complaint involved discrimination that occurred in 2002 and 2003. The CHRT decision, released on June 20, 2008, granted her relief in respect of a compensatory loss that occurred long before June 2008. The relief went back to 2002.

[76] I see no reason why the same result should not apply in this case. The fact that my decision is rendered in 2013 does not mean that relief must be denied in respect of discrimination that occurred in 2005 or 2007. The discriminatory policy was in effect during that period. It had an adverse impact on the grievor (in that it delayed her transition to indeterminate status). But for that impact, she would have remained an employee on August 28, 2007, despite failing the Rigaud program.

[77] Nor would such a conclusion be unfair to the CBSA. The grievor filed her grievances within the prescribed time. Moreover, she filed them just days before the hearings in *Lavoie* commenced. While there was no direct evidence on that point, I cannot believe that the CBSA would not have known at some level of its organizational structure that her grievances were virtually identical to that of Ms. Lavoie. Indeed, it acknowledged that close fit between the two cases in its final-level response.

[78] I was not persuaded that the decision in *Hislop* required a ruling that my decision could not have retroactive effect before June 20, 2008. *Hislop* did not deny the general principle that judgments or adjudicative rulings are normally considered to have retroactive effect. *Hislop* recognized and affirmed that a declaration of constitutional invalidity pursuant to subsections 24(1) and 52(1) and (2) of the *Charter* could have both prospective and retroactive effect; see *Hislop*, at para 81 and 82. While the general rule is that judgments can have retroactive effect, in *Charter* cases involving the declaration of a statute's invalidity, it has sometimes been necessary for a court to limit the impact of its decision to only prospective effect. As I read the decision, the court in *Hislop* suggested that factors that might weigh in favour of denying retroactivity to a *Charter*-based remedy were the following:

a. whether the declaration of constitutional invalidity represented a substantial change in the law;

b. whether there had been reasonable reliance upon the law until that point;

c. whether those applying the law until that point had acted in good faith;

d. fairness to the litigants; and

e. the need to respect the role of Parliament in developing and balancing the needs of individuals in society.

[79] In my opinion, those factors do not apply in this case. At issue is not a statute of general application that represents a delicate balancing of social needs and interests. It is rather a freely negotiated agreement between two parties. It is, in short, a contract. And a finding that, albeit in good faith, a party breached a contract, or did so via a reasonable mistake as to its meaning, does not in ordinary course deny the

innocent party retroactive relief. Doing so would grant the breaching party something that the parties had agreed by definition that it was not entitled to. Such a result would not uphold the principles of contract law–it would deny them.

[80] In this case, the CBSA's Policy was an exercise of its rights under the collective agreement; it was a contract. The parties had agreed in clause 6.01 (Managerial Responsibilities) that, "[e]xcept to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the public service." But, in this case a provision restricts management rights regarding the matter in issue. It is clause 19.01, in which the CBSA agreed that there would be "no discrimination" on the grounds of, amongst other things, sex. The CBSA breached that provision when it formulated a policy that discriminated on the basis of sex. It had no right under the collective agreement to do that. That being the case, it would not be fair or reasonable to deny to the grievor the relief she seeks simply because it is retroactive.

[81] Nor do I accept the submission of the CBSA's counsel that such a ruling would open the gates to a flood of claimants. The only potential claimants whose cases might be affected by this ruling are those who filed their claims within the appropriate time limits for grievances under the collective agreement. If those claims are already in the pipeline, then this decision does not change their number. If they are not, meaning if they are outside the appropriate time limits for filing, then this decision does not give them license to file new claims.

[82] Accordingly, I am satisfied that the grievor is entitled to a declaration that she became an indeterminate employee as of June 15, 2007 and that, by failing to offer her available alternative employment on or after August 28, 2007, the CBSA breached its obligations under the collective agreement.

[83] That declaration brings us to the third and perhaps most difficult issue, which is determining the remedial order that I should award as a result of my declaration.

C. What remedy ought to be awarded?

[84] I will deal first with the issue of monetary damages in respect of any lost employment as a result of the CBSA's conduct.

[85] Mr. Dolimount's evidence was clear. Had the grievor been an indeterminate employee on August 28, 2007, he would have found her another job within his division. He considered it his obligation. The question, then, is how I determine what would have happened and how it contrasts with what did happen.

[86] The onus was on the grievor to establish her loss. At a minimum, she had to establish that there were or would have been alternative positions that she could have been moved into after August 28, 2007. Any loss that she could establish would have to be offset by any earnings she made or could have made after August 28, 2007 through the discharge of her duty to mitigate her loss. In this case, I was not satisfied that the grievor established her loss, on a balance of probabilities. I was also satisfied that the CBSA established that she had not made reasonable attempts to mitigate at least part of her loss.

[87] Dealing with the question of loss, there was no evidence as to what positions if any were available within the CBSA's Atlantic Region in or after August 2007. All that is known is that, about the same time as the grievor was terminated, three positions were available in Halifax. Mr. Demerchant took one of them. However, even if it is assumed that the positions were still open as of August 28, 2007, there was no evidence from the grievor to the effect that she would have taken either one. Taking one would have meant her moving to Halifax. She had a young child and was married. There was no evidence that she would or could have uprooted her family to take one of the positions or even that she would have gone without them. I also note that, when asked about her job search after her termination, she said that there were not many jobs in Perth-Andover, which suggests that she was not prepared to look further afield, at least not if the distance was so great that she would have had to move. But, if she would not have been prepared to move, the CBSA would not have been obligated to pay her while she waited for some other position to open up.

[88] Turning to the issue of the grievor's duty to mitigate, the evidence of what she did after August 28, 2007 was skimpy. She was uncertain as to when she started working at the Castle Inn. There was no evidence of any attempt on her part to reapply for the BSO position after August 27, 2009, although she was free to. That is significant in my view, given that Mr. Demerchant applied and, on that occasion, successfully passed the Rigaud program and secured a BSO position. That all points to a conclusion that the grievor was not persistent and consistent in her efforts to

mitigate. Any losses attributable to her failure to mitigate cannot be laid at the CBSA's doorstep.

[89] Finally, there is the undoubted fact that any monetary loss the grievor sustained would have to be offset by income she earned from September 2007 to the date of my decision.

[90] All of this leads me to conclude that it would not be appropriate to make a monetary award for a loss of compensation and benefits for the period from August 27, 2007 to the date of my decision. The grievor did not prove the amount of any loss. And, even if she had, part if not all of any loss she sustained was the result of a failure to mitigate on her part or would of necessity be reduced by the income that, on the evidence, she earned before the hearing.

[91] To be clear, I have not decided that it is too difficult to assess the grievor's loss. The difficulty of assessing a proven loss is never a ground to avoid arriving at a figure. My decision is based on the fact that the grievor failed to prove a loss, as was her onus. The situation might have been different had she established that in August or September 2007 an alternate position existed that she would have taken. Then I would have had evidence of the income that she would have been able to make but for her termination. But, as I said, there was no such evidence.

[92] With respect to an award for general damages pursuant to s.53(2)(*e*) of the *Canadian Human Rights Act*, in *Lavoie,* the claimant was awarded $5000.00. In arriving at that figure, the CHRT noted at paragraph 195 that, ". . . while the evidence was not substantial as to the moral repercussions that the respondent's practices had on the complainant, it is clear from her testimony that these events undeniably affected Ms. Lavoie and caused her loss of dignity." There was no such evidence in this case. Whatever stress or financial insecurity was caused to the grievor was more directly caused by her termination as a result of her failure at the Rigaud program. That was undeniably upsetting to her, and there was evidence from her to that effect. However, the stress was only the indirect result of the CBSA's discriminatory practice. In my opinion, a certain amount of fortitude must be expected of individuals, at least when the discriminatory practice at issue – a policy with respect to the accumulation of days for the purpose of converting employment status – is not a direct personal assault on the individual's feelings and dignity. In this case, I conclude that the grievor did not establish an entitlement to an award for damages under s.53(2)(*e*).

[93] All the more so, the grievor failed to establish an entitlement to damages pursuant to s.53(3) of the *Canadian Human Rights Act* for conduct on the part of the CBSA that was wilful or reckless. The CBSA's Policy, although found to have been discriminatory in its impact, was not applied in bad faith and was not concluded in bad faith. The employer's opinion that it was justified in using *Lavoie* to establish the 'cut off' date was not wilful or reckless in the sense contemplated by the *Canadian Human Rights Act*.

[94] I turn now to the question of whether or how my declaration that the grievor be considered an indeterminate employee as of June 15, 2007 should be limited or applied. This is a difficult question for me to answer.

[95] I will consider that question in the following context:

a. had it not been for the CBSA's breach of article 19 of the collective agreement, the grievor would have been indeterminate as of June 15, 2007;

b. the CBSA terminated the grievor on August 28, 2007 rather than offer her alternate positions, as it had done in the case of Mr. Demerchant;

c. the evidence of Mr. Dolimount was that, had the grievor been indeterminate, he would have considered it his obligation to find her a position within his district;

d. Mr. Demerchant took the alternate but lesser position in Halifax and worked until two years had passed, at which time he reapplied to Rigaud, passed the program and became an indeterminate BSO;

e. there was no evidence that the grievor would have taken any position in Halifax after August 2007;

f. there was no evidence of what would happen to an employee who, while under a fixed-term contract (as the grievor was in June 2007), becomes indeterminate; it could be that his or her employment would cease at the end of that term, even though he or she was indeterminate, or another position

could be found or could open to him or her in the event that the fixed-term position ceases to exist on the termination date; and

g. there were no submissions made or evidence adduced with respect to the substantive differences, if any, between the *Public Service Employment Act,* R.S.C. 2002, c.22, ss. 12, 13, as of August 2007 and its current form.

[96] It cannot be fair or appropriate to deny the grievor the possibility of alternate employment that she would have had on August 28, 2007 because of a discriminatory exercise on the CBSA's part of its managerial powers. On the other hand, it would not be right for me to place her in a better position than she would have been in had she in fact been indeterminate as of June 15, 2007 or indeed, if the CBSA had granted her grievance at the final level after the *Lavoie* decision was released. Neither party chose to call evidence on what would have happened as of June 2007 had the grievor become an indeterminate employee while working under a fixed term appointment. It is true that the CBSA's representative submitted that there would have been a difference, but there was no evidence to that effect.

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

(The Order appears on the next page)

VIII. Order

[98] The grievance in PSLRB File No. 566-02-4645 is withdrawn and I order the file closed.

[99] The grievances in PSLRB File Nos. 566-02-4646, 4647 and 4648 are allowed in part.

[100] It is ordered that

a. the grievor is declared to have been an indeterminate employee within the jurisdiction of the deputy head of the CBSA as of June 15, 2007;

b. it is declared that the grievor's termination on August 28, 2007 was a breach of the CBSA's powers under the collective agreement and is set aside;

c. it is declared that the CBSA should have designated and treated the grievor as an indeterminate employee within the North West New Brunswick Division of the CBSA effective June 15, 2007;

d. the parties are directed to investigate and determine the situation the grievor would have been in had her status become that of an indeterminate employee effective June 15, 2007, subject to the findings made in this decision, within 60 days of the date of this decision;

e. the parties are directed to implement the results of such determination, or to arrive at a suitable alternative to such implementation, within 90 days of the date of this decision; and

f. I will remain seized of the matter for 90 days to permit the parties time to agree to and to implement the steps necessary to give effect to this order. In the event the parties cannot arrive at an implementation suitable to them both within that time, I will hear the parties as to the appropriate implementations of this order.

March 25, 2013

Augustus Richardson,
adjudicator