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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

DANIELA GIANNINI

Grievor

and

STATISTICAL SURVEY OPERATIONS

Employer

Indexed as

Giannini v. Treasury Board (Statistical Survey Operations)

In the matter of an individual grievance referred to adjudication

Before: Guy Giguère, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Kieran Dyer, counsel

Heard via videoconference,
June 20 and 21, 2022.

REASONS FOR DECISION

Introduction

[1] Daniela Giannini (“the grievor”) was a part-time term interviewer for Statistical Survey Operations (“the employer”) from 2011 to 2016. She alleges that the employer discriminated against her based on her disability or sex and family status (her pregnancy) when it failed to renew her term appointment in 2016.

[2] The employer does not contest that the grievor was disabled and pregnant at the time. However, it submits that her term contract was not renewed as no work was available that could be assigned to her.

[3] To resolve this grievance, I must determine if the grievor presented sufficient evidence to prove at first view (also known as *prima facie*) that her term contract was not renewed due to discrimination.

[4] If I find so, then I must determine if the employer provided a reasonable explanation for not renewing her term. If I find that it did not provide one, then I must conclude that it discriminated against the grievor because of her disability or pregnancy.

[5] For the following reasons, I find that the grievor established *prima facie* that discrimination was the reason that her term was not renewed.

[6] However, I also find that the employer provided evidence which has convinced me that the reason for not renewing her term was a lack of work with the end of specialized surveys in 2015. I conclude therefore that the grievor was not discriminated when her term was not renewed.

Background

[7] The grievor began working with the employer in 2011 as a part-time term telephone survey interviewer - computer assisted telephone interview (CATI) in the Sturgeon Falls, Ontario, regional office. The term appointment was from December 9, 2011, to March 8, 2012, and it was renewed for the next few years until September 10, 2014.

[8] The grievor was on maternity and parental leave from November 3, 2013, to October 15, 2014. Upon her return on October 16, 2014, she began a term position as a field interviewer - computer-assisted personal interview (CAPI) in Guelph, Ontario ending May 31, 2015. This term appointment was extended to September 30, 2015.

[9] During this period, she worked on two specialized surveys, the Ontario Child Health Survey (OCHS) and the Nutrition Survey. She also started to work on the Labour Force Survey (LFS) an ongoing core survey, which is to determine unemployment levels.

[10] On May 18, 2015, the grievor took medical leave to undergo emergency back surgery. On September 15, 2015, while on disability leave, her term was extended effective October 1, 2015, to March 31, 2016.

[11] On January 15, 2016, the grievor went to her medical clinic to inquire as to her ability to return to work. As her physician was on leave, the nurse practitioner provided her with a note stating that the grievor's neurosurgeon assessed that she could return to work, to modified duties. She could work from home and do home visits as long that she carried nothing heavier than a laptop.

[12] On February 15, 2016, Gabrielle Meilleur, Abilities Case Manager, Sun Life, called Natalie Dokis, Regional Program Manager (RPM) for the Toronto, Ontario, area, about the grievor's long-term disability benefits. Ms. Meilleur indicated that she had received new medical information that the grievor was now fit to work, with some limitations, and that her disability benefits would end on February 28, 2016. Ms. Meilleur confirmed it in an email on February 19, 2016.

[13] On February 23, 2016, Ms. Meilleur called again Ms. Dokis to discuss the grievor's job duties and limitations. Ms. Dokis advised Ms. Meilleur that she would gather more information and then provide details.

[14] On February 26, 2016, Ms. Dokis advised the grievor that she did not anticipate being able to renew her term employment due to the availability of work in her current area. This was later confirmed in an email dated February 29, 2016.

[15] Also on February 29, 2016, Ms. Meilleur and Ms. Dokis had a further telephone conversation. Ms. Dokis informed her that the grievor was a term worker assigned to special projects and that presently there were no special assignments, and therefore, no work for the grievor. Ms. Meilleur confirmed that it would not change Sun Life's

decision not to extend long-term disability benefits to the grievor beyond February 28, 2016.

[16] The grievor filed a grievance on March 14, 2016, alleging discrimination based on disability or sex, and family status (her pregnancy), in violation of article 16 of the relevant collective agreement. The grievance was denied at all levels of the grievance process, with the fourth-level decision being rendered on December 22, 2016.

[17] On March 8, 2017, the grievance was referred to adjudication.

[18] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (“the Act”).

Issues to be determined

[19] Issue 1: Did the grievor establish by *prima facie* evidence that her term was not renewed due to discrimination?

[20] Issue 2: Did the employer provide a reasonable explanation for not renewing her term?

Grievor’s evidence and arguments

[21] In November 2015, while on disability leave, the grievor received a call from Ms. Thompson, Senior Interviewer who she reported to. The grievor testified that she was asked when she could return to work, as Ms. Thompson was swamped with work. She did not know if she could return and told Ms. Thompson that she had an appointment later in November with her neurosurgeon, who would reassess her then.

[22] Ms. Thompson testified that she called the grievor in November 2015 to find out how she was doing and whether she would return to work soon. She did not remember their conversation in detail, but she certainly did not beg the grievor to return. She

anticipated being short-staffed as she expected the departures of two or three interviewers from her team.

[23] On November 19, 2015, the grievor's neurosurgeon reassessed her and found that she could return to work, with some limitations. She concluded that the grievor should not carry the same equipment for home visits as she had before the surgery.

[24] On February 23, 2016, Ms. Dokis called the grievor to discuss her return to work and her limitations. The grievor explained that her neurosurgeon had limited her to carrying a total of 8 pounds to home interviews. They talked about the books and the two laptops she used to carry for the OCHS. She testified that she informed Ms. Dokis that she was pregnant and that she inquired if she would be entitled to maternity leave as 600 hours of work was required.

[25] On Friday, February 26, 2016, the grievor called Ms. Dokis as she had not heard back from her. Ms. Dokis told her that she was terminating her employment. The grievor asked for a written confirmation. The following Monday, February 29, 2016, she received an email from Ms. Dokis, stating that due to the availability of work in her area, she did not anticipate renewing the grievor's term.

[26] At the same time, on February 29, 2016, Ms. Thompson sent a text message to the grievor asking for her home address, Ms. Thompson explained that she was figuring out which files she could assign to the grievor. She also sent her some files as she was not aware of the grievor's conversation with Ms. Dokis.

[27] Ms. Thompson was surprised when later, she was informed that the grievor's term was not extended. She had found the grievor to be a good addition to the team. The Data Collection Manager (DCM) or Ms. Dokis asked her to recall the files that had been sent to the grievor.

[28] The grievor described the financial and emotional difficulties she faced after learning that her term had not been renewed. She found herself without any income at the end of February 2016. She was pregnant but not eligible for maternity and parental benefits as she had not worked since her back surgery in May 2015. Fortunately, she had applied for Canada Pension Plan Disability benefits in October 2015. Following an initial denial and a reconsideration request, she was approved for them retroactively to September 2015. She received them until May 2019.

[29] The grievor argues that Ms. Thompson had the best knowledge of the interviewers' productivity and the future requirements. Both Ms. Dokis and the DCM had been in their positions for less than six months. Ms. Thompson contacted the grievor in November 2015 as she knew that some interviewers would be leaving.

[30] The grievor submits the employer's attitude changed once it was informed of her need for accommodation for her disability and pregnancy. Two days after discussing with Ms. Dokis her need for accommodation and the pregnancy, Ms. Dokis informed her that there was no work for her. However, there was work for her as Ms. Thompson sent her some files in February 2016.

[31] The grievor concludes that the evidence establishes *prima facie* discrimination as a clear nexus with her term not being renewed has been demonstrated. The employer made no real effort to accommodate her.

Employer's evidence and arguments

[32] Ms. Dokis explained that she started working as an RPM in the Toronto area in September 2015. She had under her responsibility 6 or 7 DCMs, 17 senior interviewers, and 150 interviewers. When assigning fieldwork to the interviewers, she looked at the work to be done and ensured that it would be balanced and located within a reasonable distance from their homes. The indeterminate employees were assigned work first.

[33] Ms. Dokis testified that in fall 2015, two big special surveys were ending, the OCHS and the Nutrition Survey. There was a considerable slowdown in the fall as all the special surveys were ending.

[34] Ms. Dokis explained that the grievor's term was renewed in October 2015, in accordance with the policy to renew the terms of employees on medical or maternity leave. However, at the same time, another term interviewer in the same area was not renewed, because of a lack of work.

[35] After her discussion with Ms. Meilleur on February 23, 2016, Ms. Dokis called the grievor, who confirmed that she was now cleared to return to work after her disability leave. Ms. Dokis did not recall discussing the grievor's pregnancy or whether she was entitled to maternity leave. The grievor told her that she had been working on the Canadian Community Health Survey (CCHS) and LFS before her leave, which

initially left Ms. Dokis under the impression that the grievor was a core survey interviewer.

[36] After that phone call, Ms. Dokis contacted the DCM and asked him to verify what work was available for the grievor. Later, the DCM reported back that Ms. Thompson had found a few CCHS cases, an ongoing core survey, but nothing else. Then Ms. Thompson indicated that she had found some work and was supposed to send it in writing. However, the DCM never received anything. The DCM also reported that Ms. Thompson expressed some concerns about slim workloads in summer 2016.

[37] Ms. Dokis received a call on Friday, February 26, 2016, from the grievor, who was following up on their earlier conversation. She informed the grievor that she did not think that she could find work for her. She sent an email the following Monday to confirm it.

[38] In cross-examination, Ms. Thompson testified that at the end of a survey, she would discuss with the DCM the term interviewers' performance. However, she could not recall a conversation with the DCM about the grievor's performance. She would also prepare a plan with assignments, for the DCM's consideration. The DCM would then consult with Ms. Dokis, who in the end would decide who would be employed as term employees.

[39] Ms. Thompson could not remember any conversation with the DCM or Ms. Dokis in which she was asked to find work for the grievor. She testified that she had only two communications with the grievor, in November 2015 and on February 29, 2016. In August 2016, she also communicated with the grievor but could not remember why. She explained that work can fluctuate from month to month and that possibly, work had increased at that time.

[40] Ms. Thompson indicated that the workload decreased in 2016 as it was a census year, and the special surveys were not scheduled for that period. During a slowdown, the directive was to keep the indeterminate employees busy in priority over term employees. Some interviewers were even taken from their teams to work on the census.

[41] Ms. Dokis was examined thoroughly on the different surveys that her group handled. Her testimony was that no work could be assigned to the grievor in her area

as she was a term employee, and indeterminate employees had priority for ongoing core surveys. She explained that there were enough remaining interviewers to do the job in the grievor's area.

[42] Ms. Dokis described the problem being faced as having too many indeterminate employees and not enough work. When interviewers' term appointments were not renewed, they were not replaced as there was not enough work. This included the grievor, who was not replaced when her term was not renewed.

[43] Ms. Dokis explained that she knew of the grievor when she worked in Sturgeon Falls and that the grievor was a good interviewer. She later recommended the grievor for census work.

[44] The employer submits that ultimately, the decision to renew an employee's term belongs to the DCM and RPM. While the grievor was on leave, other employees had their terms not renewed, and no employees were hired to replace them due to the lack of work.

[45] The employer argues that Ms. Dokis made efforts to find work for the grievor. She asked the DCM to find out whether work was available for the grievor and later referred her to work on the census.

[46] The employer stresses that Ms. Thompson was asked to provide in writing the work that could be assigned to the grievor, but it did not come. Ms. Dokis needed to assure that work would not be taken away from indeterminate employees. As a term employee, the grievor was not hired for core surveys. Term workers were hired for special surveys, which were short term, while indeterminate employees were responsible for ongoing core surveys. While the grievor had some experience on one ongoing core survey, the LFS, the indeterminate employees had priority for it and all other ongoing core surveys.

[47] The employer argues that discrimination was not established *prima facie* as the grievor's term not being renewed and her disability or pregnancy were not connected. Her term was not renewed because there was no work for her in her area.

Analysis

[48] Issue 1: Did the grievor establish *prima facie* evidence that her term was not renewed due to discrimination?

[49] As the parties submit, the test to determine if there has been discrimination in employment proceeds in two steps. In the first step, the grievor must establish *prima facie* discrimination, that is evidence that in the absence of a response from the employer would be sufficient to conclude that discrimination occurred. See *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 45, at para 83.

[50] In employment, *prima facie* discrimination has three elements.

- 1) the grievor has a characteristic protected from discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6);
- 2) the grievor has experienced an adverse impact in her employment and
- 3) the protected characteristic was a factor in the adverse impact.

[51] In this case, there is no contest that the grievor meets the two first elements. The grievor must then demonstrate that there is a connection (also known as nexus) between her disability or pregnancy (the protected characteristic) and her term not being renewed (the adverse impact) while recognizing that other factors might be present. See also *Bourdeau v. Treasury Board (Immigration and Refugee Board)*, 2021 FPSLREB 43, and *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41.

[52] It is clear from the grievor's evidence that in November 2015, her supervisor told her that there would be work for her on her return to the workplace. When she was about to return to work at the end of February 2016, she discussed her limitations, disability, and pregnancy with Ms. Dokis. A few days later, Ms. Dokis informed her that her term would not be renewed. On the same date, she receives a text from her supervisor who wants to send her work and later sends her some files.

[53] I find the grievor's evidence sufficient *prima facie* to establish that there is a connection between her disability or pregnancy and her term not being renewed.

[54] Issue 2: Did the employer provide a reasonable explanation for not renewing her term?

[55] As I found that the grievor established *prima facie* discrimination, then the second step applies. I must determine if the employer provided a reasonable explanation for not renewing her term which was the lack of work. If I find that the employer did not provide one, then I will have to conclude that it discriminated against the grievor because of her disability or pregnancy.

[56] The employer explains that the grievor was not aware of the whole picture. In October 2015, her term was renewed while she was on leave, according to policy. However, at the same time, many term interviewers were let go and the term of one interviewer in her area was not renewed because of lack of work. Her supervisor did not inform her that a work slowdown in the fall 2015 with the end of the specialized surveys could affect her term's renewal. Nor was she told that a further slowdown was expected for the summer 2016 period.

[57] The grievor argues that Ms. Thompson had the best knowledge of the interviewers' productivity and the future requirements. However, Ms. Dokis and the DCM had the responsibility deciding if the term of employees could be renewed considering the work slowdown. In addition, the proportion of indeterminate employees was too high for the reduced workload. Ms. Dokis and the DCM had to make sure that there was enough work for the indeterminate employees in the grievor's area when deciding if her term could be renewed.

[58] In February 2016, Ms. Dokis asked the DCM to look for work that was available for the grievor in her area. The DCM reported that Ms. Thompson found only a few cases of the CCHS, which is an ongoing core survey. As Ms. Dokis' handwritten notes indicate, later, Ms. Thompson reported that she found some work, which she was supposed to send in writing. The DCM informed her that Ms. Thompson never provided it.

[59] Ms. Thompson could not remember the DCM asking her to find work for the grievor. On the other side, Ms. Dokis' testimony on this topic was clear and accorded with her handwritten notes. The events took place almost six years ago, which explains why witnesses could have difficulty recalling some discussions. I find that the overriding evidence is that the DCM asked Ms. Thompson to provide, in writing, the cases that she could assign to the grievor.

[60] Ms. Thompson could not have provided this work as there was no remaining work that could be assigned on specialized surveys and she only found a few CCHS cases. She knew of the slowdowns and had to apply the policy to assign ongoing core survey work to indeterminate employees in priority. While she foresaw some departures from her team of interviewers in the grievor's area, they had not yet happened when the DCM asked her to find work for the grievor.

[61] Ms. Dokis was not provided with Ms. Thompson's information. Ms. Dokis found that in the grievor's area, enough interviewers remained to do the job. She therefore could not renew the grievor's term because of lack of work. The grievor was not replaced when her term was not renewed.

[62] I conclude that the employer's evidence has convinced me, on a balance of probabilities, that the reason for the non-renewal of her term employment was solely the result of a lack of work and that her pregnancy and disability were not factors in that decision. Therefore, the employer did not discriminate against the grievor.

[63] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[64] The grievance is dismissed.

October 28, 2022.

**Guy Giguère,
a panel of the Federal Public Sector
Labour Relations and Employment Board**