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## Disability Discrimination in the Workplace

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**Cases Considered:**

*Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 435;
*Baum v. Calgary (City)*, 2008 ABQB 791

Two recent Alberta decisions (one from the Court of Queen's Bench and one from the Court of Appeal) illustrate the significance of the process followed by decision-makers when analyzing whether, under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 ("*HRCMA*"), a person has been discriminated against, and, if so, whether the employer has accommodated the person to the point of undue hardship. As noted by Madam Justice Eidsvik in *Baum v. Calgary (City)*, 2008 ABQB 791 ("*Baum*"): "Accordingly, the law on the duty to accommodate has become quite well developed however, the initial test [see #1 below] has been sparsely discussed until recently" (at para. 29). These two cases illustrate this observation.

The usual legal analysis for employment discrimination cases was established in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 and is as follows (as applied to the *HRCMA*):

> 1. Has the complainant made out a *prima facie* case (sufficient to establish a case unless disproved) of discrimination on a ground covered under the *HRCMA*?
>
> 2. If yes, can the respondent nevertheless demonstrate that the contravention of the *HRCMA* did not occur, was a bona fide occupational requirement, or was reasonable and justifiable in the circumstances?
>
> 3. If yes, there is no discrimination under the *HRCMA*. If no, what is the appropriate remedy?

In both cases, the ground of discrimination was physical disability. The *HRCMA* provides the following definition of physical disability:

> 44(1) (l) "physical disability" means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual

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> impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device; …

Ms. Brewer, a legal assistant, suffered from a condition described by her doctor as multiple chemical sensitivities, which caused dyspnea (laboured breathing), chest tightness, light-headedness, rashes, dizziness and disorientation. Triggers included scents, perfumes and chemical smells. Despite several attempts to decrease the exposure to the triggers while working, Ms. Brewer ended up unable to work at the law firm.

Mr. Baum, a millwright for the City of Calgary, suffered from gout, bursitis and osteoarthritis. He became unable to do the heavier work required of a millwright and was first given non-millwright projects and, despite attempts at placing him in accommodating positions within the City, was later placed on disability insurance when suitable alternative work was unavailable.

Both complainants argued that they were discriminated against on the basis of physical disability (in employment) and that their employers did not make reasonable efforts to accommodate their disabilities.

**The Analysis:**

1. Has the complainant made out a prima facie case of discrimination on a ground covered under the *HRCMA*?

In *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 435 (”*Brewer*“), an investigator assigned by the Human Rights and Citizenship Commission concluded that Ms. Brewer had not adequately cooperated with the employer’s accommodation efforts, and thus the complaint should be dismissed. The Director agreed and dismissed the complaint. When Ms. Brewer applied to the Chief Commissioner for a review of the dismissal, the Chief Commissioner upheld the dismissal. In his reasons, the Chief Commissioner stated that the respondents were “justified in rejecting her contention that she had a physical disability…” (para. 22). He supported this conclusion because: no physician had provided a firm diagnosis of multiple chemical sensitivity; Ms. Brewer denied the investigator direct access to her doctors; Ms. Brewer resisted her employer’s request for a current specialist’s assessment of her condition; and surveillance of Ms. Brewer conducted by the insurer to whom she had applied for long term disability benefits brought into question how incapacitated and restricted she really was (para. 27).

Brewer applied for judicial review of the Chief Commissioner’s decision. The Court of Queen’s Bench held that the Chief Commissioner erred when he assumed that the employer denied that the respondent had a disability (see: *Brewer v. Fraser Milner Casgrain LLP*, 2006 ABQB 258). Further, the Chief Commissioner was wrong to equate a physical disability with a firm diagnosis, because the presence of symptoms could be a sufficient disability under the statute even if the doctors were unsure of the cause. Also, the Chief Commissioner was not justified in drawing an adverse inference from Brewer’s denial of direct access to her doctors. Finally, there was not

enough surveillance evidence gathered by the insurer to prove that Brewer did not have a disability. The decision of the Chief Commissioner was quashed.

While the Court of Queen's Bench (per Justice Brian Burrows) in the *Brewer* case spent a fair bit of time analyzing whether the fact that Ms. Brewer did not have a firm diagnosis for her condition affected whether she had a physical disability, the Court of Appeal (per Justices Berger, Watson and Slatter) did not actually spend much time dealing with whether she had made out a *prima facie* case of discrimination.

The Alberta Court of Appeal, in its Memorandum of Judgment, held that the Court of Queen's Bench actually applied an overly strict standard of review (correctness) rather than the one required in the circumstances (reasonableness). The employer's and Chief Commissioner's appeal was allowed.

By way of contrast, in the *Baum* case, the Court of Queen's Bench (per Madam Justice Eidsvik) deals in great detail with whether there was sufficient evidence to establish a *prima facie* case of discrimination and the correct legal test.

Madam Justice Eidsvik relied on the judgment of Madam Justice Abella in the Supreme Court of Canada decision of *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de L'Hopital General de Montreal*, [2007] 1 S.C.R. 161 ("McGill"), who stated that before dealing with the duty to accommodate, one had to determine whether the complainant had established a *prima facie* case of discrimination. Justice Abella referred (at para. 47) to the Supreme Court of Canada definition of discrimination as stated in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143:

> I would say then that 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.

Madam Justice Eidsvik also relied on the discussion of Justice Abella in *McGill* at paras. 48 and 49:

> At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on

> attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.
>
> What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

Thus, when a link is made between group membership and the arbitrariness of the disadvantaging criterion, a *prima facie* case of discrimination is made out.

In *Baum*, Madam Justice Eidsvik relied on the legal tests for discrimination cited above and found that Mr. Baum, although disabled, was not treated in an arbitrary or stereotypical way, and, hence, the Human Rights Panel was correct in finding insufficient evidence of *prima facie* discrimination.

Interestingly, neither *Baum* nor *Brewer* addresses the live issue of whether the test for discrimination set out by the Supreme Court of Canada in *Law v. Canada*, [1999] 1 S.C.R. 497 is the proper test to be used in human rights cases. See the discussion of this issue in my previous post: [Human Rights Panel Faced with Mandatory Retirement (Again)](). To further complicate matters, many legal experts believe the test for discrimination set out in Law, above, has been modified by the recent Supreme Canada decision in *R. v. Kapp*, 2008 SCC 41.

<u>2. If yes, can the respondent nevertheless demonstrate that the contravention of the *HRCMA* did not occur, was a *bona fide* occupational requirement, or was reasonable and justifiable in the circumstances?</u>

In *Baum*, Madam Justice Eidsvik did address the issue of reasonable accommodation to determine whether the City's efforts to accommodate Mr. Baum's disabilities amounted to any arbitrary or stereotypical behaviour (thus indicating whether he had made out a case of *prima facie* discrimination). She also noted that the Panel had concluded that the City did accommodate the complainant to the point of undue hardship, because it had provided accommodated work to Mr. Baum, it had kept his millwright position open for several years, he had received top up salary from his disability insurer, and the City was trying to work out some of the issues with his union. In the end, despite the discussion of accommodation, Justice Eidsvik concluded that the onus did not shift to the respondent City to prove that the alleged practice was justified or a *bona fide* occupational requirement (para. 62). This was because Mr. Baum had not made out a *prima facie* case of discrimination.

In *Brewer*, Court of Queen's Bench Justice Burrows found that the Chief Commissioner's decision that the employer had met its duty to accommodate was unreasonable (para. 49). This conclusion was based on the way that the employer had implemented some of the recommendations made by a doctor. For example, the doctor had recommended some changes to Ms. Brewer's work environment, which were not implemented by the employer. Instead, the employer re-assigned Brewer to a new workspace, which she refused to test, as she believed her employer should have modified her existing work environment.

The Court of Appeal disagreed and held that the complainant had not been willing to try the accommodation proposed by the employer. The Chief Commissioner was reasonable to conclude that the duty to accommodate had been discharged by the employer and thus dismiss the complaint (para. 25). The appeal was allowed.

These two decisions illustrate the need to demonstrate and clearly set out the process to be followed by the Commission or the courts in determining whether a complainant has been discriminated against on the basis of a disability under the *HRCMA*, and whether the employer has met its duty to accommodate the disability. This will enable employees to better know their rights and employers to better understand their responsibilities under the *HRCMA*.

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