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What are you Trying to Prove? Discrimination, Complainants and Human Rights

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Cases Considered:

Burgess v. Stephen W. Huk Professional Corporation, 2010 ABQB 424

In the past few years, it has become increasingly difficult to ascertain in human rights cases what exactly the complainant must prove in order to make out a claim of discrimination. The usual legal analysis for discrimination cases under the *Alberta Human Rights Act*, R.S.A. c. A-25.5 ("*AHRA*") was established in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("*O'Malley*") and is as follows:

> 1. Has the complainant made out a *prima facie* (sufficient to establish a case unless disproved) case of discrimination on a ground covered under the *AHRA*?
>
> 2. If yes, can the respondent nevertheless demonstrate that the contravention of the *AHRA* 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 *AHRA*. If no, what is the appropriate remedy?

For many years, human rights commissions used the test for "discrimination" under s.15(1) of the *Charter* set out by the Supreme Court of Canada 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.

Thus, the complainant has the burden of making out a *prima facie* case that he or she had experienced discrimination (as set out above) on the basis of a ground listed under an area (e.g., employment) covered under the legislation.

This procedure seemed to serve human rights commissions well, but in 1999 uncertainty was introduced when some commissions adopted the new and complex legal test for s.15(1) devised by the Supreme Court of Canada in *Law v. Canada*, [1999] 1 S.C.R. 497 ("*Law*"). The next several years of human rights cases often dealt with whether the test developed in *Law* was the proper test to be used in human rights cases. (See the discussion of this issue in my previous ABlawg 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* has been modified by the recent Supreme Court of Canada decision in *R. v. Kapp*, 2008 SCC 41. In *Burgess v. Stephen W. Huk Professional Corporation*, Madam Justice M.T. Moreau does not mention the *Kapp* decision in her reasons, but she does set out a requirement that a complainant demonstrate the respondents' knowledge of the grounds for discrimination. Arguably, this adds more complexity to this area of law.

Ms. Burgess was employed as a dental assistant starting in May 2005 in a clinic owned and operated by Dr. Huk (who was retired from dental practice). She was assigned to work primarily with Dr. Jacob, an associate dentist. Ms. Burgess was supervised by the office manager, Ms. Netter, and the head dental assistant, Ms. Brayer. Her duties included providing chair-side assistance to dentists (Dr. Jacob) during dental procedures, keeping operations sanitized, sterilizing equipment and managing patient flow (para. 5).

Ms. Burgess became pregnant in 2005 and shared this information with Dr. Jacob, but not with Dr. Huk, Ms. Netter or Ms. Brayer. Ms. Burgess had a miscarriage in November 2005. Dr. Jacob was informed, but there was no direct evidence that the others were aware of the miscarriage. Ms. Burgess became pregnant again in early 2006. Although Ms. Burgess testified that she suffered from frequent vomiting and trips to the office bathroom, Dr. Jacob testified that she did not notice Ms. Burgess was sick or nauseous. Ms. Burgess testified that by March 2006 "almost everybody" at work knew she was pregnant as she had made it common knowledge (at para. 6).

Ms. Burgess was warned on at least two occasions about the lack of cleanliness in her operatories (laboratories). There was evidence that Ms. Burgess and Ms. Netter had a meeting about this issue at which Ms. Burgess had used inappropriate language. Ms. Netter reported the events to Dr. Huk who testified that around February 21, 2006 he had decided to fire Ms. Burgess once he was able to find a replacement for her. The office advertised assistant positions in the local newspaper between March 1 and April 19, 2006 (para. 11).

Ms. Burgess had not missed work due to her second pregnancy until April 24, 2006. She had been in the hospital the night before. The evidence suggests that the reason for the hospitalization (i.e. the pregnancy) was not discussed with Ms. Netter, who had called Ms. Burgess at her home to inquire whether she would be coming to work. Ms. Burgess was off work for two days.

A staff meeting was planned for Sunday May 7, 2006. Ms. Burgess missed the staff meeting as she was attending church (para. 17).There was conflicting evidence as to whether the office manager knew that Ms. Burgess was Mormon and that she could not attend the staff meeting because of church obligations.

On May 11, 2006, Dr. Jacob was told that Dr. Huk intended to terminate Ms. Burgess without cause. Dr. Jacob told Dr. Huk on that date that Ms. Burgess was pregnant. On that same day, Dr. Jacob also informed Dr. Huk about Ms. Burgess' Mormon faith and church obligations. Dr. Huk had prepared four reprimand letters to give to Ms. Burgess because they were part of her file: one for using inappropriate language at the meeting she had with Ms. Netter regarding the cleanliness

of her operatory; one relating to a meeting with Dr. Huk that Ms. Burgess had been notified of, but did not attend; one relating to her failure to call in regarding whether she would attend work on April 25, 2006; and, one relating to her failure to attend the May 7, 2006 staff meeting (at para. 19). After learning that Ms. Burgess was Mormon, Dr. Huk told Dr. Jacob to discard her copy of the letter about missing the May 7, 2006 meeting (at para. 20).

Ms. Burgess indicated that she told both Dr. Huk and Ms. Netter on May 11, 2006 that she was pregnant. The letters of reprimand were given by Dr. Huk to Ms. Burgess on May 11, 2006. Dr. Huk testified that he had decided to terminate Ms. Burgess in February but had not done so until May because he had finalized a replacement dental assistant at the end of April.

The Alberta Human Rights Tribunal's decision of November 12, 2009, cited the *O'Malley* decision regarding the requirement that the complainant present a *prima facie* case of discrimination. The Tribunal (Brenda Chomey) emphasized the fundamental principle of human rights law that it is not necessary for the complainant to prove that discrimination was intentional. Further, working on the basis that pregnancy is a form of gender discrimination (*Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219), the Tribunal held that the onus was on the complainant to establish, on a balance of probabilities, that pregnancy was a factor in the termination of the employment. The Tribunal was careful to note that pregnancy need only be one factor, and not necessarily even the primary factor in the termination. The Tribunal found that Ms. Burgess was pregnant and a practising Mormon at the date of her termination. The Tribunal also held that in order to be successful in her claim that her pregnancy and/or religious observances were factors in the employment termination, Ms. Burgess had to be able to show that the respondent (Dr. Huk) had knowledge of those facts (see *Richard Burgess (on behalf of Jennifer Burgess) v. Stephen W. Huk Professional Corporation*, November 16, 2009 (Brenda Chomey) at para. 170). (As an interesting side point, Richard Burgess, the complainant's husband, actually brought the complaint on behalf of Ms. Burgess.) Citing a number of factors (such as the decision to terminate based on cleanliness in the operatory), the Tribunal held that Ms. Burgess had failed to establish a *prima facie* case of discrimination based on her pregnancy and/or religious beliefs and dismissed the complaint.

On appeal, Justice Moreau at the Court of Queen's Bench dealt with the issue of whether the Tribunal applied the wrong legal test in concluding that Burgess failed to establish a *prima facie* case of discrimination in the area of employment on the basis of gender and religious beliefs. In particular, the issue was whether, as part of her case, the *complainant* must establish that the employer knew or should have known of the complainant's protected characteristics (she was pregnant and a practicing Mormon) that gave rise to her claim of discrimination (at para. 2).

Justice Moreau applied the correctness standard of review when considering whether the Tribunal applied the correct legal test to determine whether Ms. Burgess had established a *prima facie* case of discrimination. The Tribunal had correctly noted that provisions in human rights legislation that prohibit discrimination must be construed broadly, and that defences must be construed narrowly, having regard to the remedial purpose of human rights legislation (at para. 57). The Justice agreed that there is a three-part test for establishing a *prima facie* case of discrimination:

a) the complainant's circumstances or characteristic constitute a protected ground;
b) the complainant was adversely treated by the respondent; and
c) the protected circumstances or characteristic was a factor in the adverse treatment (para. 63).

This test reflects the test for discrimination set out in *O'Malley* and *Andrews*. Justice Moreau noted that the issue at hand was whether the complainant not only had to establish that she had the disability (or other protected ground) at the relevant time, but also that the employer was aware or ought reasonably to have been aware of the disability (or other protected ground) (at para. 63).
Justice Moreau noted that requiring the complainant to demonstrate that the respondent knew or ought reasonably to have known that the complainant was pregnant and a practising Mormon might displace the focus of a human rights analysis from the impact of the conduct on the complainant, to ascertaining its motive (at para. 65). This could then result in focusing indirectly on intention, which is supposed to be irrelevant in human rights cases. She also noted that some confusion may have arisen about the issue of knowledge of the employer and discrimination because the issue of the employer's knowledge is often discussed in relation to the employer's duty to accommodate (i.e., knowledge of the employee's condition and the need for it to be accommodated). Finally, she noted that if knowledge or imputed knowledge of the characteristics was not part of the *prima facie* case of discrimination, the burden would shift to the employer then to disprove knowledge (at para. 79).

In assessing these concerns about the burden of showing the employer knew or should have known about the characteristic (e.g. pregnancy and/or religious beliefs), Justice Moreau does not adequately address the situation where the disability or other characteristic might actually result (intentionally or unintentionally) in discrimination (e.g. termination). For example, if an employee is an alcoholic (which is a disability), this might affect his or her job performance. The employer, not knowing that the employee is an alcoholic, might fire the employee for the poor job performance. The requirement for knowledge of a disability or other protected ground is usually discussed in the context of accommodation. The employer has a duty to accommodate disability, religious beliefs, etc. to the point of undue hardship. However, in order to accommodate a person, the employer has to know about the circumstances that require accommodation. Justice Moreau notes that the knowledge about the disability or other ground triggers the duty to accommodate (at para. 72). The real issue for discussion in *Burgess* is whether the knowledge requirement for accommodation is the same as the requirement to know that the person has the disability or other ground in order to be liable for discrimination. Justice Moreau mentions the issue of accommodation versus discrimination, but does not adequately explain why the two situations are now to be treated in law the same way.

Justice Moreau adopted a three-part test for the requirements of a *prima facie* case of discrimination as set out by the British Columbia Human Rights Tribunal in *Wilson v. Transparent Glazing Systems Ltd. (No. 4),* [2008] B.C.H.R.T. 50 at para. 65. According to this test, the complainant must establish the following factors:

- the employee had a physical disability at the relevant time and their employer was aware or ought reasonably to have been aware of the disability;
- the employer subjected the employee to adverse treatment with respect to their employment or a term or condition of employment; and
- the employee's physical disability was a factor in that adverse treatment.

Justice Moreau and the Tribunal had both adapted and applied a test for discrimination on the basis of disability in employment to discrimination for any ground under the area of employment, without any explanation. One has to assume that both concluded that the analysis is the same no matter what the ground. As the judgment proceeds, however, it appears that Justice

Moreau relies heavily on jurisprudence dealing with disability and accommodation and (as noted above) this may have actually impacted the ultimate conclusion of the case.

Justice Moreau concluded that the Tribunal had applied the correct legal test and that the respondent's knowledge or imputed knowledge of the circumstances giving rise to the discrimination claim must be established by the complainant as part of her *prima facie* case. Evidence of the respondent's knowledge may be direct or circumstantial. If it is circumstantial, the evidence must permit the judge to draw an appropriate inference to meet the threshold (at para. 85).

In applying the test to the facts of the case, Justice Moreau held that although Ms. Burgess was pregnant at the relevant time, she had not shown that her employer knew or ought to have known that she was. Further, Ms. Burgess had not established that her pregnancy was a factor in the decision to terminate her. Rather, it was her failure to notify the respondent on a timely basis that she would not be coming to work the next day. Justice Moreau concluded that the Tribunal correctly concluded that Ms. Burgess had failed to establish a *prima facie* case of discrimination based on pregnancy (para 96). Similarly, in applying the three factors in *Wilson* to the issue of religious belief, Justice Moreau concluded that Ms. Burgess had failed to demonstrate that Sunday observance was a factor in Dr. Huk's decision to terminate her.

While this case does not expressly discuss *Kapp*, or its role in human rights cases, it does appear to provide an additional requirement for complainants when making out a *prima facie* case of discrimination. Now, the complainant, as part of his or her case, must show that the respondent knew or ought to have known about the characteristic or ground that is the subject of the complaint.