

Roper Greyell Case Law Update – May 2009

Revisiting Elemental Concepts of Human Rights Law

Baum v. Calgary (City), 2008 ABQB 791 (CanLII) is the latest in a series of recent court decisions pushing human rights adjudicators to meticulously analyze whether a human rights complainant has established a *prima facie* case of discrimination before calling on an employer to justify an impugned workplace rule or standard as a *bona fide* occupational requirement and, significantly, before requiring the employer to demonstrate that it has discharged the duty to accommodate to the point of undue hardship.

Facts

Robert Baum was a long-time millwright with the City of Calgary. He worked for the City from 1982 until his resignation from employment in September 2006.

Prior to his resignation, Mr. Baum filed a human rights complaint in which he alleged he was subjected to prohibited discrimination in employment on the basis of physical disability.

Specifically, Mr. Baum took the position that the City failed to accommodate the physical disability which precluded him from performing his millwright duties. He complained about what he said was a delayed and ineffective search for accommodation.

Human Rights Panel

A human rights panel constituted under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 dismissed Mr. Baum's complaint, holding, among other things, that "insufficient evidence was submitted to establish [a] *prima facie* case of discrimination".

The panel highlighted that "[t]he complainant and director¹ have the burden to establish a *prima facie* violation of the Act" and it is only when that burden is discharged that "the respondent must provide evidence that the violation did not exist or that it was reasonable and justifiable such as a *bona fide* occupational requirement".

Mr. Baum and the Director of the Alberta Human Rights and Citizenship Commission (the "Director") appealed the panel's decision to the Alberta Court of Queen's Bench.

¹ "Director" is a reference to the Director of the Alberta Human Rights and Citizenship Commission, who is a party to human rights proceedings under the *Human Rights, Citizenship and Multiculturalism Act*.

Alberta Court of Queen's Bench

Madam Justice Eidsvik of the Alberta Court of Queen's Bench upheld the decision of the human rights panel that Mr. Baum had failed to establish a *prima facie* case of discrimination.

Madam Justice Eidsvik began her analysis by pointing out that:

- “[t]he law with respect to determining discrimination in physical disability cases has evolved significantly in the last 10 years, especially since the *Meiorin*² case”; and
- until very recently, there was “sparse ... discuss[ion]” in the case law about the “first test of *prima facie* discrimination”, and human rights adjudicators tended to “jump over” or “give ... lip service” to the discrimination analysis preceding the inquiry into the duty to accommodate and undue hardship.

Madam Justice Eidsvik rejected the Director's argument that “there was sufficient ‘expansive’ evidence of *prima facie* discrimination ... which should have been sufficient to shift the onus of proof to the City to show that it had properly accommodated Mr. Baum”. Relying on the concurring minority judgment of the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] S.C.J. No. 4, Madam Justice Eidsvik held:

In order for the complainant to be successful with these complaints as *prima facie* discrimination based on disability, the Panel [i.e. the human rights panel] had to be, and now this Court in review, has to be satisfied **that the alleged underemployment, unmodified position etc. was based on “attributed characteristics” as opposed to “actual abilities based on the individual's own merits or capacities” or “that the employer's conduct is based on stereotypical or arbitrary assumptions about persons with disabilities” (to paraphrase the test in *McGill*).**

Reviewed on a global basis, a review of the Record shows that Mr. Baum was not treated in an arbitrary or stereotypical way, but instead was given opportunities based on his own physical capabilities within the City's employment framework. I am of the view that the Panel was correct in finding insufficient evidence of *prima facie* discrimination in this case ...

[Emphasis added.]

There was, in the view of the Court, no evidence to show “any arbitrary or stereotypical conduct on the part of the City that amounts to discrimination”. According to the Court, “the City dealt with Mr. Baum appropriately on his own personal merits and capacities”.

² This is a reference to the Supreme Court of Canada case of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

Dealing with the part of Mr. Baum's complaint in which he alleged that "[t]he City relied on union issues to delay a search of a permanent accommodated position", Madam Justice Eidsvik found:

... **Mr. Baum's treatment was not arbitrary but was based on City and union guidelines that all employees had to go through, not just disabled ones.** It can hardly be said that Mr. Baum was being arbitrarily dealt with in that regard.

[Emphasis added.]

In sum, it was the Court's view that Mr. Baum had failed to make out a case of *prima facie* discrimination. There was no evidence of "a distinction based on 'stereotypical or arbitrary characteristics'" or that the City's treatment of Mr. Baum was based on "stereotypical or arbitrary assumptions about persons with disabilities".

Because Mr. Baum had been "reasonabl[y] treat[ed]" on the basis of his "personal merits and capacities", the Court said that "the onus [did] not shift to the City" to justify its conduct in relation to Mr. Baum as a *bona fide* occupational requirement and, specifically, to demonstrate that it had discharged the duty to accommodate to the point of undue hardship.

Conclusion

As most human rights professionals can attest, the employer's duty to accommodate to the point of undue hardship is an onerous one and generally not easily discharged.

For employers and employer counsel, it is encouraging to see courts across the country revisiting elemental concepts of human rights law and placing increased emphasis on the discrimination analysis that precedes the inquiry into the duty to accommodate and undue hardship.

If you have questions regarding the issues raised in this case law update and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this case law update. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this case law update. *