2008 NLTD 66, 842 A.P.R. 1, 275 Nfld. & P.E.I.R. 1

McEvoy v. Best of Care Ltd.

IN THE MATTER OF a complaint filed By Sharon McEvoy pursuant to Section 9(1) Of the Human Rights Code and an Award of a Board of Inquiry comprised of Erin Breen dated June 27, 2006

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by the Minister of Health and Community Services (APPELLANT) AND SHARON McEVOY (FIRST RESPONDENT) AND BEST OF CARE LTD. (SECOND RESPONDENT) AND VINCENT DALTON (THIRD RESPONDENT) AND THE HUMAN RIGHTS COMMISSION (FOURTH RESPONDENT)

Newfoundland and Labrador Supreme Court (Trial Division)

R.M. Hall J.

Heard: October 3, 2007
Judgment: April 16, 2008
Docket: 200601T4399

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Proceedings: reversing in part *McEvoy v. Best of Care Ltd.* (2005), 2005 CarswellNfld 400, 57 C.H.R.R. D/183 (N.L. Human Rights Trib.)

Counsel: G. Lori Savory for Her Majesty the Queen in Right of Newfoundland and Labrador

No one for First Respondent

No one for Second Respondent

No one for Third Respondent

Jane Fitzpatrick for Human Rights Commission

Subject: Constitutional; Labour and Employment; Public

Human rights --- What constitutes discrimination -- Sex -- Employment -- Pregnancy and maternity leave -- Terminations and lay-offs

Employee worked as homecare worker caring for D in his home until she commenced maternity leave -- Employment with D was partially funded by Department of Health and Community Services (Department) under home support program -- D had approached agency requesting that agency hire employee and manage her pay, as D's family did not wish to deal with employment issues -- Agency was obliged to follow regulations of Department -- Replacement worker was hired when employee commenced maternity leave -- When employee was due back at work after maternity leave, she was told that D would keep replacement worker -- Employee filed complaint with Human

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Rights Commission alleging that Department, agency, and D discriminated against her on basis of her gender by refusing to continue her employment after she took pregnancy leave -- Department was found to be vicariously liable for any damages -- Department was found to be employer and employee had made out case of discrimination on basis of sex -- Department appealed -- Appeal allowed -- Relationship between employee and agency was clearly that of employer-employee -- Department simply was funding agency which determined criteria under which persons in need of homecare services would qualify for receipt of subsidy for such services -- Department had general regulatory role and was not liable for any tortuous activity of agency or its employees -- While termination of employment may have given rise to a civil unjust dismissal claim, refusal to continue employment was clearly not based on fact that employee had taken pregnancy leave -- Finding that employee was discriminated on prohibited grounds of sex was unreasonable.

Human rights --- Vicarious liability for discrimination -- Factors in determining vicarious liability -- Statutory liability

Employee worked as homecare worker caring for D in his home until she commenced maternity leave -- Employment with D was partially funded by Department of Health and Community Services (Department) under home support program -- D had approached agency requesting that agency hire employee and manage her pay, as D's family did not wish to deal with employment issues -- Agency was obliged to follow regulations of Department -- Replacement worker was hired when employee commenced maternity leave -- When employee was due back at work after maternity leave, she was told that D would keep replacement worker -- Employee filed complaint with Human Rights Commission alleging that Department, agency, and D discriminated against her on basis of her gender by refusing to continue her employment after she took pregnancy leave -- Department was found to be vicariously liable for any damages -- Department was found to be employer and employee had made out case of discrimination on basis of sex -- Department appealed -- Appeal allowed -- Relationship between employee and agency was clearly that of employer-employee -- Department simply was funding agency which determined criteria under which persons in need of homecare services would qualify for receipt of subsidy for such services -- Department had general regulatory role and was not liable for any tortuous activity of agency or its employees -- While termination of employment may have given rise to a civil unjust dismissal claim, refusal to continue employment was clearly not based on fact that employee had taken pregnancy leave -- Finding that employee was discriminated on prohibited grounds of sex was unreasonable.

Labour and employment law --- Employment law -- Nature of employment relationship -- Elements constituting relationship between employer and employee -- Existence of contract of employment -- Miscellaneous

Employee worked as homecare worker caring for D in his home until she commenced maternity leave -- Employment with D was partially funded by Department of Health and Community Services (Department) under home support program -- D had approached agency requesting that agency hire employee and manage her pay, as D's family did not wish to deal with employment issues -- Agency was obliged to follow regulations of Department -- Replacement worker was hired when employee commenced maternity leave -- When employee was due back at work after maternity leave, she was told that D would keep replacement worker -- Employee filed complaint with Human Rights Commission alleging that Department, agency, and D discriminated against her on basis of her gender by refusing to continue her employment after she took pregnancy leave -- Department was found to be vicariously liable for any damages -- Department was found to be employer and employee had made out case of discrimination on basis of sex -- Department appealed -- Appeal allowed -- Relationship between employee and agency was clearly that of employer-employee -- Department simply was funding agency which determined criteria under which persons in need of homecare services would qualify for receipt of subsidy for such services -- Department had general regulatory role and was not liable for any tortuous activity of agency or its employees -- While termination of employment may have given rise to a civil unjust dismissal claim, refusal to continue employment was clearly not based on fact that employee had taken pregnancy leave -- Finding that employee was discriminated on prohibited grounds of sex was unreasonable.

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Cases considered by *R.M. Hall J.*:

Bazley v. Curry (1999), [1999] 2 S.C.R. 534, 62 B.C.L.R. (3d) 173, (sub nom. *P.A.B. v. Children's Foundation)* 124 B.C.A.C. 119, (sub nom. *P.A.B. v. Children's Foundation)* 203 W.A.C. 119, (sub nom. *B. v. Curry)* 99 C.L.L.C. 210- 033, 1999 CarswellBC 1264, 1999 CarswellBC 1265, 43 C.C.E.L. (2d) 1, (sub nom. *P.A.B. v. Children's Foundation)* 241 N.R. 266, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197, 46 C.C.L.T. (2d) 1, [1999] L.V.I. 3046-1 (S.C.C.) -- considered

Cormier v. Alberta (Human Rights Commission) (1984), 33 Alta. L.R. (2d) 359, 5 C.H.R.R. D/2441, 85 C.L.L.C. 17,003, 1984 CarswellAlta 134, 6 C.C.E.L. 60, 14 D.L.R. (4th) 55, 56 A.R. 351 (Alta. Q.B.) -- considered

Fontaine v. Canadian Pacific Ltd. (1990), (sub nom. *Canadian Pacific Ltd. v. Canada (Canadian Human Rights Commission))* 120 N.R. 152, (sub nom. *Canadian Pacific Ltd. v. Canada (Canadian Human Rights Commission))* [1991] 1 F.C. 571, 1990 CarswellNat 123F, (sub nom. *Canadian Pacific Ltd. v. Fontaine)* 91 C.L.L.C. 17,008, 1990 CarswellNat 123, 16 C.H.R.R. D/470 (Fed. C.A.) -- considered

Lewis (Guardian ad litem of) v. British Columbia (1997), 1997 CarswellBC 2356, 1997 CarswellBC 2357, (sub nom. *Lewis v. British Columbia)* 220 N.R. 81, 153 D.L.R. (4th) 594, 43 B.C.L.R. (3d) 154, [1997] 3 S.C.R. 1145, [1998] 5 W.W.R. 732, (sub nom. *Lewis v. British Columbia)* 98 B.C.A.C. 168, (sub nom. *Lewis v. British Columbia)* 161 W.A.C. 168, 40 C.C.L.T. (2d) 153, 31 M.V.R. (3d) 149 (S.C.C.) -- considered

New Brunswick (Board of Management) v. Dunsmuir (2008), (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1 (S.C.C.) -- followed

Pannu, Re (1986), 1986 CarswellAlta 175, 47 Alta. L.R. (2d) 56, 31 D.L.R. (4th) 338, 87 C.L.L.C. 17,003, [1986] 6 W.W.R. 617, 73 A.R. 166, 8 C.H.R.R. D/3911 (Alta. C.A.) -- considered

Rosin v. Canada (Canadian Forces) (1990), 1990 CarswellNat 240, 16 C.H.R.R. D/441, 1990 CarswellNat 718, 34 C.C.E.L. 179, (sub nom. *Canada (Attorney General) v. Rosin)* 91 C.L.L.C. 17,011, (sub nom. *Canada (Attorney General) v. Rosin)* [1991] 1 F.C. 391, (sub nom. *Canada (Attorney General) v. Rosin)* 131 N.R. 295 (Fed. C.A.) -- considered

Tulk v. Newfoundland (Minister of Health & Community Services) (2002), 42 C.H.R.R. D/225, 2002 CarswellNfld 64, 210 Nfld. & P.E.I.R. 101, 630 A.P.R. 101 (N.L. T.D.) -- considered

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 204 D.L.R. (4th) 542, 274 N.R. 366, 55 O.R. (3d) 782 (headnote only), [2001] 4 C.T.C. 139, 17 B.L.R. (3d) 1, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, 12 C.P.C. (5th) 1, 150 O.A.C. 12, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, (sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.)* 2002 C.L.L.C. 210-013 (S.C.C.) -- considered

Statutes considered:

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Generally -- referred to

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Health and Community Services Act, S.N. 1995, c. P-37.1

Generally -- considered

s. 4 -- referred to

s. 4(3) -- referred to

Human Rights Code, R.S.N. 1990, c. H-14

Generally -- referred to

s. 3 -- referred to

s. 9 -- pursuant to

s. 9(1) -- considered

s. 9(1)(a) -- referred to

s. 20(1) -- referred to

s. 25 -- referred to

s. 26 -- referred to

s. 27 -- referred to

s. 28 -- referred to

s. 30 -- referred to

s. 30(7) -- referred to

Individual's Rights Protection Act, R.S.A. 1980, c. I-2

s. 7(1) -- considered

Public Inquiries Act, 2006, S.N.L. 2006, c. P-38.1

Generally -- referred to

Self-managed Home Support Services Act, S.N. 1998, c. S-13.1

Generally -- considered

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s. 2 "home support services" -- referred to

s. 3 -- referred to

APPEAL from judgment reported at *McEvoy v. Best of Care Ltd.* (2005), 2005 CarswellNfld 400, 57 C.H.R.R. D/183 (N.L. Human Rights Trib.), finding Department of Health and Community Services liable to damages as result discrimination of employee based on sex.

***R.M. Hall J.*:**

Background

1 On March 13, 2002 the first respondent, Sharon McEvoy (hereinafter "Sharon McEvoy"), filed a complaint with the fourth respondent, the Human Rights Commission (hereinafter "the Commission") alleging that the appellant (hereinafter "the Department") as well as the second respondent (hereinafter "Best of Care Ltd.") and the third respondent, Vincent Dalton (hereinafter "Vincent Dalton") discriminated against her on the basis of her gender by refusing to continue her employment after she took a pregnancy leave. At the time of taking that leave Sharon McEvoy worked as a homecare worker caring for Mr. Dalton in his home.

2 Only the Commission and the Department appeared and argued this matter. The counsel for these parties were in basic agreement on the following facts as found by a Board of Inquiry conducted by Ms. Erin Breen, a St. John's lawyer. Sharon McEvoy worked as a homecare worker for Vincent Dalton from April 17, 2000 until she commenced maternity leave on August 5, 2001. Her employment with Mr. Dalton was partially funded by the Department under a home support program and partially funded by Vincent Dalton himself. The ratios of financial support for Ms. McEvoy's employment were approximately 75 percent by the Department and 25 percent by Mr. Dalton. The purpose of Sharon McEvoy's employment was that Mr. Dalton required assistance to live in his own residential setting. The Department had approved Vincent Dalton for this financial support pursuant to guidelines established by the Department. Vincent Dalton, and his family, had chosen Sharon McEvoy to be his homecare worker. Having done so, they then approached Ms. Gloria White (hereinafter "Gloria White"),who was the owner of Best of Care Ltd., requesting that Best of Care Ltd. hire Ms. McEvoy as an employee and manage her pay, as the Dalton family did not wish to deal with the employment issues related to Sharon McEvoy's employment.

3 During the course of Sharon McEvoy's employment in the Dalton home there were no complaints by Mr. Dalton or members of his family about the quality of her work. She continued working in accordance with the times agreed with the Dalton family and on terms agreed with Best of Care Ltd., up to the commencement of her maternity leave on August 5, 2001. At that time Sharon McEvoy advised the Dalton family that she would be able to return to work on or about January 2, 2002. A replacement worker, Patricia Power (hereinafter "Patricia Power") was hired at the request of the Daltons by Best of Care Ltd. on the understanding between Best of Care Ltd. and the Daltons that she was a temporary maternity leave replacement for Sharon McEvoy.

4 Around Christmas 2001 Sharon McEvoy called Theresa Bungay, Vincent Dalton's daughter, to ensure that everything was set for her return to work on January 2, 2002. At that time she was advised by Theresa Bungay that Mr. Dalton would be retaining Patricia Power until February 28, 2002 as they wished to employ Patricia Power a little longer. Apparently Sharon McEvoy was not happy about this situation and called Gloria White, the owner of Best of Care Ltd., to confirm the family's wishes.

5 Between the end of January and mid-February, 2002 there was another phone call between Sharon McEvoy and Gloria White. Sharon McEvoy was told by Gloria White that her return date to working with Mr. Dalton would be March 1, 2002. On the morning of March 1, 2002 Gloria White called Sharon McEvoy and told her to return to work on March 4, 2002. However, in a letter dated March 1, 2002 Vincent Dalton wrote to Gloria White to request

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that his then present caregiver, Patricia Power, be kept on instead of Sharon McEvoy. In this letter Mr. Dalton stated:

> ... I intend to retain Patricia Power as my care giver and that I expect your agency to abide by my wishes...
>
> Mrs. Power, although coming into my home as a replacement worker from your agency, proved to provide me with a higher level of care. It was not until this morning that I was told by Mrs. Power that she could stay with me, which accounts for the short notice given to you.

6 Sharon McEvoy filed a complaint with the Newfoundland Human Rights Commission on March 13, 2002 claiming that she believed that the termination of her position was done on the basis of her sex and pregnancy and thus constituted discrimination contrary to s. 9 of the *Human Rights Code.*

Applicable Human Rights Code Provisions

7 Section 9(1) of the *Human Rights Code*, R.S.N.L. 1990 c. H-14 (the "*Code*") provides:

> 9.(1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of
>
> > (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or
> >
> > (b) that person's age, if that person has reached the age of 19 years...
>
> but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

8 Section 20(1) of the *Code* provides:

> 20.(1) A person who has reasonable grounds for believing that a person has contravened this Act may file with the executive director a complaint in a form acceptable to the commission.

9 Section 25 of the *Code* makes provision for appointment by the Lieutenant-Governor in Council of members of boards of inquiry, which boards of inquiry under s. 27 of the *Code* have the powers of the commissioner appointed under the *Public Inquiries Act*, S.N.L 2006 c. P-38.1 and are given the authority to inquire into all matters referred to it and to give full opportunity to all parties to present evidence and make representations by counsel or otherwise. Section 26 of the *Code* provides that the parties to a proceeding before a board of inquiry with respect to a complaint are:

> > (a) the commission, which shall have the carriage of the complaint;
> >
> > (b) the person named in the complaint as the complainant;
> >
> > (c) a person named in the complaint who is alleged to have been dealt with contrary to this Act;
> >
> > (d) a person named in the complaint who is alleged to have contravened this Act; and

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(e) a person specified by the board, upon notice, and after that person has been given an opportunity to be heard against his or her joinder as a party.

10 The complaint was heard by Erin Breen, a St. John's lawyer acting as the Board of Inquiry. The hearing was held July 13 and 14, 2005 and Ms. Breen's decision was released on June 27, 2006.

Other Statutory Provisions

11 Counsel for the Department and the Commission were not in agreement as to whether the program of providing home support services to Mr. Dalton was operated under the *Self-managed Home Support Services Act*, S.N.L. 1998 c. S-13.1 or under the *Health and Community Services Act*, S.N.L. 1995 c. P-37.1. The Board of Inquiry determined that the home support provided to Mr. Dalton by Best of Care Ltd. was a service governed by the *Health and Community Services Act*. The debate between counsel as to which Act applied to the provision of the homecare services to Mr. Dalton was largely centered upon, and motivated by, a provision in the *Self-managed Homecare Services Act*. In that Act "home support services" were defined as follows:

2. In this Act

"home support services" means services which the person receiving them assumes responsibility for managing or which another person or group of persons assumes responsibility for managing on behalf of the person receiving them and includes personal care, household management, behavioural aide services and respite services paid for in whole or in part from public money and provided to individuals and families to assist with activities of daily living in their own homes but does not include services provided by a person whose business or a part of whose business it is to provide those services using persons in its employ to do so.

12 Section 3 of that Act dealt with who was to be considered to be the employer of the person who provided the home support services. That section stated:

3.(1) A person to whom home support services are being provided is considered to be the employer of the person who provides the home support services.

(2) Notwithstanding subsection (1), where a person to whom home support services are provided

(a) is not competent to make decisions and carry out tasks ordinarily associated with being an employer and another person or a group of persons undertakes to do so on his or her behalf; or

(b) agrees with another person or a group of persons that that person or group shall make decisions and carry out tasks ordinarily associated with being an employer

and that person or group enters into a contract with the minister to act as the employer, that person or group is considered to be the employer of the person who provides the home support services.

13 Under the *Health and Community Services Act*, however, the applicable statutory provision was s. 4 which provided for establishment by the Lieutenant-Governor in Council of regional health and community services boards who would provide services to members of the public. Section 4 of that Act provided:

4.(1) The Lieutenant-Governor in Council may, by order, establish regional health and community services

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boards.

(2) A board established under subsection (1) is a corporation.

(3) A board established under subsection (1) is responsible for and has the authority to provide those health continuing care and community services, including services to children, youth and families other than hospital services, that the Lieutenant-Governor in Council may direct.

(4) Notwithstanding a provision of the

(a) Child, Youth and Family Services Act;

(b) Adoption of Children Act;

(c) Child Care Services Act;

(d) Neglected Adults Welfare Act;

(e) Rehabilitation Act;

(f) this Act

the Lieutenant-Governor in Council may authorize a board to administer a program or service the responsibility to which is conferred by that Act on a minister or other public official.

14 Unlike the *Self-managed Home Support Services Act*, there was no attempt at a definition of what type of health continuing care and community services were to be provided by the regional health and community services boards under the *Health and Community Services Act*. Additionally, there is no indication in that Act as to who is to be considered to be the employer of the worker actually providing home support or other services under that Act. The Commission argued that because of the definition of "home support services" under the *Self-managed Home Support Services Act* excluding from the definition "...services provided by a person whose business or a part of whose business it is to provide those services using persons in its employ to do so," this therefore excluded situations where, like Mr. Dalton's, agencies like Best of Care (who were in the business of providing home care services), would be considered as doing so under the *Self-managed Home Support Services Act*. That being the case, then the designation of Mr. Dalton as an employer under that Act, and being the employer of Sharon McEvoy, would not be applicable.

15 I have concluded that it is unnecessary for me to determine whether the services provided to Mr. Dalton by Sharon McEvoy fell under a program established under the *Self-managed Home Support Services Act* or the *Health and Community Services Act*, as I will conclude whether the Department was or was not an employer of Sharon McEvoy based upon other considerations.

Who Was Sharon McEvoy's Employer?

16 Counsel agreed with the findings of Erin Breen that it was Vincent Dalton's family who arranged for Sharon McEvoy to become his home support worker. Sharon McEvoy signed a written employment contract with the Best of Care Ltd., including a hiring form with a start date and rate of pay, confidentiality forms and delegated nursing function forms. Sharon McEvoy would call the Best of Care Ltd. and report her hours and she was paid by the Best of Care Ltd. on the 1st and 15th of each month. If Sharon McEvoy required time off she would contact Vincent Dal-

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ton directly or his daughter Theresa Bungay. She did not contact the Best of Care Ltd. for this. Only once did Gloria White come to the Dalton home to check on Sharon McEvoy. Gloria White testified that Sharon McEvoy had received one formal evaluation and that that evaluation was positive.

17 With respect to the operation of the agency Best of Care Ltd., Gloria White testified about its relationships to the Department of Health, its clients and the homecare workers. Gloria White only met Mr. Dalton when he became a client of her agency in April of 2000. Mr. Dalton had been assessed by a Donna Hearn who was a social worker employed by Health and Community Services which I assume to be a division of the Department. This assessment provided the number of approved homecare hours for Mr. Dalton to which the Department would contribute payment. Gloria White testified that Mr. Dalton had a choice of his homecare worker and that most of her clients personally chose their worker. Government regulations had provided that in order for home support workers to provide that service, they must be licensed by Health and Community Services and were required to be bondable, to provide a certificate of competency in first aid, to undertake required training, to provide references and to complete a medical evaluation. Gloria White testified that Best of Care Ltd. was obliged to follow the regulations of the Department of Health and Community Services. The agency's duty was to hire the homecare worker; to follow the guidelines of Health and Community Services; to keep in contact with the family and the client; to talk to workers when they call in their hours; to supervise and deal with problems; (to stay) in constant contact with the clients and family and to complete payroll, including making deductions for all employees. Sharon McEvoy had no contact with the Regional Healthcare Board or the Department of Health during her employment. On one occasion only she spoke with a Department of Health and Community Services social worker who was assigned to monitor Mr. Dalton's situation.

18 Vincent Dalton's daughter Theresa Bungay testified that she acted on behalf of her father and chose the Best of Care Ltd. agency to provide homecare for two reasons, namely to avoid the difficulties of dealing with employee deductions and to avoid employer problems and have the Agency address them. Una Tucker of the Department of Health and Community Services testified that the role of the Department in relation to agency homecare is to set policy in the approval process (references, training, medicals, certificates) and to determine the wages of homecare workers. Agencies are approved through the regional health boards and not through the Department and Ms. Tucker testified that the Department played no role in the hiring or firing of workers. Mr. Dalton paid a percentage of his homecare costs in the amount of $375 a month. The total cost for his homecare was approximately $1,100 to $1,200 a month and the Eastern Regional Integrated Health Authority paid the remaining amount to Best of Care Ltd. out of the money allocated to it by the Department of Health and Community Services. The Eastern Regional Integrated Health Authority determined what Mr. Dalton's share of the cost was to be and what amount the Authority would supplement per month based on a financial and clinical assessment of Mr. Dalton and a province-wide formula.

19 Erin Breen, in her reasons, concluded:

> Taking into the account the evidence as outlined ... and the relationships between Ms. McEvoy, Mr. Dalton and Ms. Bungay, The Best of Care Ltd., the regional authority and the Department of Health and Community Services, I find that Ms. McEvoy's direct employer was The Best of Care Ltd. Mr. Dalton and his family were clients of the agency and chose agency care so that they would not have to take on the responsibilities of the employer. When Mr. Dalton contacted Ms. White to communicate his wish to dismiss Ms. McEvoy, Ms. White as the employer should have refused the request and informed Mr. Dalton that such an action would be discriminatory. Mr. Dalton should have been informed that if he was not happy with the agency's decision then he had the option to go into self-managed care or find another agency. Instead, Ms. White dismissed Ms. McEvoy based on her belief that Mr. Dalton's personal preference was determinative of the issue. In so doing, I find that Ms. White acted with no malice, but simply out of inexperience in dealing with such a situation. Ms. White should have requested the assistance of the Board or Department in dealing with the issue but there is no evidence that she did so. In fact, the Department and Board should have provided training to the agency with respect to human rights issues and the agency's responsibilities in relation to same.

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20 There was no finding that Vincent Dalton or the Regional Health Care Board, or both, were also Sharon McEvoy's employers. Erin Breen then referred to the concept of vicarious liability on the part of the Department and cited with approval the decision of Thompson, J. of this court in *Tulk v. Newfoundland (Minister of Health & Community Services)* (2002), 42 C.H.R.R. D/225 (N.L. T.D.) where Thompson, J. upheld a ruling of a board of inquiry set up under the *Code* which board determined that the respondent department was liable for discrimination based on pregnancy. In the *Tulk* case the home support arrangement was governed under the *Self-managed Home Support Services Act*. There was no agency involved but rather the client hired the worker and the Department alone funded the wages. The Board of Inquiry found the Department was vicariously liable for the damages and Thompson, J. stated:

> ...While the Department did not exercise any direct control over the complainant, it did provide the funds for her remuneration, and received an indirect benefit from the complainant's provision of services to the second respondent. The Department also retained the right to withhold the funds for the complainant's remuneration if they did not believe she was properly providing homecare services, which would effectively result in her termination. The Department exercised some control in the hiring of homecare workers, in prohibiting the hiring of close relatives by the applicants. While Roseanne Wilson was required to obtain an employee number with Revenue Canada, she was required to send a copy of her records and remittances to the Department. The Department did not have a direct employment relationship with the complainant, but I find that it did exercise some control over the terms and conditions of her employment...
>
> The Department utilized the complainant to fulfill its mandate and obligation to provide services to persons with disabilities. In keeping with the broad and purposive approach to be taken in interpreting human rights legislation, and upon careful consideration of the evidence presented during the hearing, and the authorities submitted, I therefore find that the first respondent employed or utilized the complainant such that the first respondent falls within the meaning of an "employer" in the Code. While the first respondent did not directly terminate the complainant's employment, in violation of the Code, it is vicariously liable for that discrimination.

21 Relying upon this judgment, Erin Breen found the Department to be vicariously liable for any damages. She noted that the Department should have made it clear to all agencies that they are required to abide by the *Code*. She also stated that agencies should be provided with direction as to how to deal with human rights issues in relation to the termination of employees. She stated there was no evidence to establish that the Department or Board ever provided policy, guidance or direction on human rights issues to agencies.

Issues

22 Counsel for the two contending parties are in general agreement that the following are the issues in this matter:

> 1. What is the appropriate standard of review?
>
> 2. Did the Board of Inquiry err in law by finding that Her Majesty the Queen in Right of Newfoundland as represented by the Minister of Health and Community Services was Sharon McEvoy's employer?
>
> 3. Did the Board of Inquiry err in determining that Sharon McEvoy made out a *prima facie* case of discrimination on the basis of sex, contrary to s. 9(1)(a) of the *Human Rights Code*?
>
> 4. Did the Board of Inquiry err in determining that the employer did not demonstrate that termination of the complainant's employment was based on a "good faith occupational qualification" pursuant to s. 9(1) of the *Human Rights Code?*

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Standard of Review

23 Counsel for the Commission basically agreed with the standards of review applicable in this matter as presented by counsel for the Department. This matter, however, was argued before the recent decision of the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] S.C.J. No. 9 (S.C.C.) was rendered on March 7, 2008. In *Dunsmuir*, the Supreme Court of Canada essentially decided that there ought to be only two standards of review: correctness and reasonableness. The Court opined that the system of judicial review in Canada had proven to be difficult to implement and that it was therefore necessary for the Court to reconsider and restate both the number and definition of the various standards of review and the analytical process employed to determine which standard applies in a given situation. The Court concluded that notwithstanding the existence of theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appeared to the Court to be illusory.

24 Writing for the majority, Justices Bastarache and LeBel restated the constitutional law basis and the purpose of judicial review. At para. 27 they stated:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures. [Emphasis added]

25 At para. 29 the Court stated:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: ... [Citations omitted]

26 In establishing two standards of judicial review, the Court at para. 43 referred to how the three prior standards of review had evolved and stated that it:

> ...has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

27 In defining the concepts of reasonableness and correctness, the Court stated as follows:

> As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of ju-

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> dicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

28 The Court thereafter, in para. 47, proceeded to define "reasonableness" as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

29 At paras. 48, 49 and 50 the Supreme Court of Canada explored the concept of "deference" to the decision of the tribunal from which the appeal or judicial review has emanated. At para. 48 the Court states:

> ...Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" ...We agree ... that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision"... [Citations omitted]

30 At para. 49 the Court continues:

> **Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. ...a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime"...In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.**

31 At para. 50 the Court states:

> ...When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring

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> the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Determining the Appropriate Standard of Review

32 At para. 51 the Court states:

> ...questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

33 At para. 52 the Court states:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative...

34 Again, at para. 53 the Court continues:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically... We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

35 With respect to the expertise of an administrative tribunal, the Court continued at para. 54 as follows:

> ...Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context...[Citations omitted]

36 The Court summarized the factors leading a court to be deferential to a tribunal decision as follows:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> • A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> • A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> • The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

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> If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.
>
> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

Correctness Standard

37 The Court continued at para. 59, stating:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra *vires* or to constitute a wrongful decline of jurisdiction...We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

38 In paras. 60, 62 and 64 the Court stated:

> As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).
>
> . . . . .
>
> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> . . . . .
>
> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the

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expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

Application or Standards of Review to Issues in Dispute

(a) Who was/were Sharon McEvoy's Employer/Employers?

39 In determining this question, it is firstly appropriate to determine whether the Board of Inquiry had the power to decide this question. S. 9 of the *Code* creates a right for a person not to have their employment terminated by reason of their sex. A person alleging to have been so discriminated against is entitled under the *Code* to make the complaint and the Human Rights Commission is authorized to appoint a board of inquiry to hear the complaint. It is patently obvious that such a board of inquiry, in order to determine if the complainant has been discriminated against in her employment must, as a natural incident of that specifically granted investigative power, at least implicitly have the jurisdiction to determine whether a person complained about, by the complainant, was an "employer" of the complainant.

40 Therefore, Erin Breen, acting as the Board of Inquiry, acted within her jurisdiction in so deciding and her decision cannot be set aside on the basis of it being *ultra vires* the powers given to a board of inquiry by the *Code*. In this regard the decision of the Board of Inquiry as to its jurisdiction only, meets the correctness standard of review.

41 Having thus decided that the Board of Inquiry had the jurisdiction to determine who was Sharon McEvoy's employer, I must nonetheless analyze this question further to determine which standard of review -- correctness or reasonableness -- should be applied in my analysis of the Board of Inquiry's decision that Best of Care was the direct employer of Sharon McEvoy and the Department was vicariously liable for the actions of Best of Care in terminating Sharon McEvoy's employment.

42 What guidance does the Supreme Court of Canada's decision in *Dunsmuir* provide to me as to how I should determine the appropriate standard of review with respect to these two issues? The Supreme Court has indicated that a consideration of the following factors will lead to the conclusion that the decision-maker should be given deference and the reasonableness standard applied. The first test is whether there is a privative clause. In this particular case there is no privative clause in the *Code*. In fact, s. 30 of the *Code* provides that a party to a proceeding before a board of inquiry may appeal an order or decision of the board by application to this Court. Subsection 7 of s. 30 provides that the Court may confirm, reverse or vary the order of the board and may make an order that the board may make under s. 28. On the basis that there is no privative clause, no particular deference is owed to the decision of the Board of Inquiry.

43 However, the administrative regime established by the *Code* is one in which it is anticipated that the decision-makers have a special expertise in the application of the *Code*, in this case, to employment situations. This consideration therefore militates in favour of deference to the decision of the Board of Inquiry and the application of a reasonableness standard of review to its decision.

44 Additionally the Supreme Court directs lower courts to consider the nature of any question of law which arises in the judicial review. It defines a question of law as being one which is of "central importance to the legal system...and outside...the specialized area of expertise" of the administrative decision-maker. Where the question to be determined fits within this definition, such a question will always attract a correctness standard of review. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two factors so indicate.

45 Within the determinations of the Board of Inquiry there are two issues with respect to its determination as to this question. The first is the finding of the Board of Inquiry that Best of Care Ltd. was the employer of Sharon

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McEvoy. The second is the issue that the Department is vicariously liable for the actions of Best of Care Ltd. in terminating her employment. In my view the first question, i.e. the determination of Best of Care as Sharon McEvoy's employer, is a question, in the human rights context, which is within the special expertise of the Board of Inquiry and thus should be reviewed on a reasonableness standard. On the other hand, the question of the vicarious liability of the Department for the actions of Best of Care Ltd. in terminating the employment of Sharon McEvoy, is a question of general law of central importance to our legal system generally. Thus, the question, whether the Department was vicariously liable for the actions of Best of Care Ltd., ought to be reviewed on the standard of correctness.

46 The concept of what is involved in being an "employer" has evolved in the human rights context, differently from what an "employer" might be in a purely employment law scenario. A most useful decision in showing this evolution in the employment law field and its application to human rights legislation is contained in the Alberta Queen's Bench decision of Mr. Justice D. C. McDonald in the case *Cormier v. Alberta (Human Rights Commission)* (1984), 33 Alta. L.R. (2d) 359 (Alta. Q.B.). In that case Ed Block Trenching Ltd. supplied trucks and drivers to a major mining company. Block's foreman notified truck drivers when their services were required and the drivers would perform the work as directed by the foreman of Ed Block. Payment was made every two weeks on an hourly-rate basis, with deductions made only for union dues. The truck drivers owned their own trucks and were responsible for all their vehicle maintenance expenses. Ed Block Trenching Ltd. had retained a number of truck drivers on this basis for several years, but had refused to retain the applicant and his truck. The applicant believed that Ed Block Trenching Ltd. refused to hire him because he was black. Accordingly, he laid a complaint with the Human Rights Commission of Alberta alleging a contravention of s. 7(1) of the *Individual's Rights Protection Act*, R.S.A. 1980 c. 1-2 as amended. The Commission declined to act because it found that the relationship was one of dependent-contractor rather than an employer-employee relationship. Upon a review of that decision, the Commission was satisfied that the complaint was properly dismissed because an employer-employee relationship was not created in the circumstances and the Act did not cover dependent or independent contracting relationships. An application was brought to the Court of Queen's Bench to quash the decision and for a *mandamus* to compel a hearing of the complaint. The Court of Queen's Bench granted the application. It held that the words "employer," "employ" and "employment" have an ambiguous meaning when used in s. 7(1) of the *Individual's Rights Protection Act*. Therefore these words were found by the Court as requiring a remedial and liberal construction consistent with the purpose of the Act. The Court held that the term "employment" includes any contract in which one person agrees to execute any work or labour for another. The fact that the person providing the services also furnished his own tools or truck does not mean that he is not employed. The definition of employer and employment may be different when considered in different contexts and the definition used in one context may be of no assistance in forming the definition used in another context. The Court held that the Commission had erred in declining jurisdiction on the basis that the applicant was an independent contractor. Although the applicant may have been an independent contractor for the purpose of some other legal rule, that fact was found by the Court not to be decisive as to whether he could be an "employee" for the purpose of s. 7(1) of the *Individual's Rights Protection Act*. It is interesting to note that in this litigation the mining company, for whose benefit the work was being done, was not added as a party to the litigation or the complaint before the Human Rights Commission. Nothing in the fact situation set out in this decision indicates that the mining company had any role in the employment of the applicant other than to set certain rules and regulations for the operation of vehicles on their mining premises.

47 The decision in *Cormier* was considered by the Federal Court of Appeal in *Fontaine v. Canadian Pacific Ltd.* (1990), 16 C.H.R.R. D/470 (Fed. C.A.). In this case Mr. Fontaine was not directly an employee of Canadian Pacific or an independent contractor of Canadian Pacific. Rather, Mr. Fontaine was employed as a cook by R. Smith (1960) Ltd., a company which contracted with Canadian Pacific to provide food services to railroad gangs performing maintenance work. The issue of discrimination against Mr. Fontaine arose on an allegation by Mr. Fontaine that he was constructively dismissed from his position as a cook because he was diagnosed as being HIV positive. Iacobucci, J., at para. 11 of his decision, agreed with case authorities that had previously given a broader meaning to "employ" than that afforded by a mere conventional or technical master-servant relationship. He approved of the Alberta Court of Appeal acceptance of the approach of MacDonald, J. in *Cormier* in a case entitled *Pannu, Re* (1986), 31 D.L.R. (4th) 338 (Alta. C.A.) to the effect that the words "employer," "employ" and "employment" are to

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be interpreted to advance the purposes of the provincial human rights statute. Iacobucci, C.J. cited with approval the words of Laycraft, C.J. in *Pannu* where he stated:

> In my view, the whole context of the *Individual's Rights Protection Act*, demonstrates that in s. 7 the words are used in a sense broader than the ordinary master/servant relationship. The *Act* does not purport to intervene in purely private relationships but where a person provides a service to the public it seems clear the *Act* does intervene. It does so not primarily by aiming at the offender but by establishing a mechanism to remedy the wrong done or about to be done to the victim of the discrimination. In that context the broader sense of "employ" as meaning "to utilize" is, in my opinion, the proper interpretation.

48 Iacobucci, C.J. then continued to find that Canadian Pacific had refused to continue to "utilize" Mr. Fontaine as a cook. Importantly in the case, however, was very active involvement of the foreman for Canadian Pacific who essentially refused to eat any meals which had been prepared by Mr. Fontaine. The Court indicated that this constituted an indirect discriminatory practice. The Court found that Canadian Pacific was the only customer that Smith had at the time in question and with the inference that Canadian Pacific would undoubtedly call the shots as to who would work as a cook on its railroad gangs, it was clearly open to the tribunal to conclude that Canadian Pacific indirectly refused to continue to employ Mr. Fontaine by interpreting "employ" to mean "utilized."

49 Subsequent to the *Canadian Pacific* case, the Federal Court of Appeal, in 1990, rendered a decision in *Rosin v. Canada (Canadian Forces)* (1990), 16 C.H.R.R. D/441 (Fed. C.A.). In that case, Mark Rosin was an eighteen-year-old Royal Canadian Army cadet who was part way through a summer course in parachuting when he was summarily removed by his commanding officer because it was discovered that Rosin had vision in only one eye. Mr. Rosin complained that he had been denied a public service and discriminated against with respect to employment because of this disability. A tribunal found that the *Canadian Human Rights Act* was breached and ordered remedies. On appeal the Armed Forces argued that the parachuting course was not a service customarily available to the public. However, the Federal Court of Appeal ruled that the parachuting course was a public service. The fact that it was only open to qualified cadets was not determinative. The Court found that virtually everything that Government does is done for the public, is available to the public, and is open to the public. Requiring that certain conditions or qualifications be met does not rob a service of its public character.

50 In addition, the Court of Appeal ruled that Mr. Rosin's participation in the course constituted employment within the meaning of the *Canadian Human Rights Act*. Though it may not have been the traditional master-servant relationship, the Armed Forces exerted control over Mr. Rosin, there was some remuneration, and the Armed Forces received the benefit from Mr. Rosin's training. A liberal interpretation must be given to the term 'employment' in order to ensure the human rights laws are given their full effect. The Federal Court of Appeal found no error in this reasoning and declined to interfere with the tribunal's finding.

51 I have, earlier in this judgment, at para. 20 set out portions of the decision of Mr. Justice Thompson of this Court in the case of *Tulk v. Newfoundland (Minister of Health & Community Services)*. In this particular case the Department was found to be the employer of the healthcare worker and in coming to that conclusion the Court found the Department to be vicariously liable on the basis that while the Department did not exercise any direct control over the worker, it did provide the funds for her remuneration, and received an indirect benefit from the complainant's provision of services to the second respondent. The Department also retained the right to withhold the funds for the complainant's remuneration if it did not believe that she was properly providing homecare services which would effectively result in her termination. The Department also exercised some control in the hiring of homecare workers and in prohibiting the hiring of close relatives of the applicants. In addition, the Department dealt with the complainant's employment records and remittances.

52 I am satisfied that the relationship between Sharon McEvoy and the Best of Care Ltd. was clearly that of employer-employee. This is so whether one applies the normal criteria of a master-servant relationship or in the broader context of employment as envisaged by s. 9 of the *Human Rights Code*. I therefore conclude that the decision of the

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Board of Inquiry in this aspect of its reasoning was both reasonable and correct.

53 Turning now to the conclusion on the part of the Board of Inquiry that the Department was vicariously liable for the actions of Best of Care Ltd. in terminating the employment of Sharon McEvoy, I have previously indicated that the law of vicarious liability is a principle of general legal application and must therefore be decided correctly by the Board of Inquiry and if not so decided, that decision is not entitled to any deference. Was the Board of Inquiry correct in finding the Department vicariously liable in this matter?

54 The imposition on a person of liability, in the absence of fault, runs counter to the basic tenet of tort law that compensation is payable by a tortfeasor to a victim because the tortfeasor is at fault; that is, the tortfeasor's conduct has departed from the standard or norm expected of the reasonable person.

55 In recent years, courts have faced significant claims against employers, governments and others for intentional torts -- usually sexual or physical assaults -- committed by employees and others. The nature of the acts in question -- far removed from any acts 'authorized' by the employer, has caused courts to consider seriously the rationale for vicarious liability and the circumstances in which it is 'fair' to impose liability to pay substantial damages on a without-fault party. A variant of the imposition of no-fault liability occurs in so-called 'non-delegable duty' cases. In such cases, by finding a duty the responsibility for the non-negligent performance of which cannot be delegated to another, thus 'insulating' the principal, courts have found blameless defendants liable to pay for negligence of their independent contractors and others to whom the performance of a particular duty has been entrusted.

56 In *Bazley v. Curry* (1999), 174 D.L.R. (4th) 45 (S.C.C.) at para. 41, McLachlin, J. (as she then was) dealt with the question of whether there is a connection or nexus between the employment enterprise and the wrong that justifies imposition of vicarious liability on the employer. She answered the question by reference to risk stating:

> Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.

57 In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 204 D.L.R. (4th) 542 (S.C.C.) at para. 35, Major, J. enunciated a policy basis for the imposition of vicarious liability stating:

> ...the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm... Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. Each of these policy justifications is relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. As discussed above, the policy justifications for imposing vicarious liability are relevant where the employer is able to control the activities of the employee but may be deficient in the case of an independent contractor over whom the employer has little control.

58 There is, however, a further ground upon which vicarious liability may be attributed to a not-at-fault party, the concept being called the "non-delegable duty." In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 (S.C.C.) the Supreme Court of Canada considered a situation where the British Columbia Ministry of Transportation and Highways engaged a contractor to scale the rock face bordering a particular highway. The objective was to prevent rocks from falling onto the highway. The contractor did the work negligently, and a rock which should have been removed fell on the highway killing a driver. At para. 17 Cory, J. discussed the essence of the inquiry concerning the no-fault liability of the Crown as an assessment of the scope of duty owed by the blameless

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party to the plaintiff. He stated:

> Whether the duty of care owed by a defendant may be discharged by exercising reasonable care in the selection of an independent contractor will depend upon the nature and the extent of the duty owed by the defendant to the plaintiff. Therefore, the extent and nature of the duty owed by the respondent Ministry of Transportation and Highways to members of the travelling public must be considered...

59 At para. 20 Cory, J. continued:

> The strict duty to perform a particular act imposed by statute and the common law duty to take reasonable care if an act is undertaken reflect two divergent positions on a spectrum of liability. Within that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principal's liability for the negligence of an independent contractor. Whether or not there will be liability for the negligence of the acts of the independent contractor will depend to a large extent upon the statutory provisions involved and the circumstances presented by each case.

60 At para. 23 Cory, J. continued:

> ...That statutory authority, when exercised, gives rise to a duty to perform that work with reasonable care. In the absence of a specific statutory exclusion from that duty, it must arise from, and proceed in tandem with, the authority to manage, control and direct the repair and maintenance of the highways. That duty to reasonably perform the maintenance work would of course require the employees of the Ministry who undertook the work to perform it with reasonable care. The same responsibility to exercise reasonable care in performing the authorized work that is applicable to the Ministry extends to independent contractors engaged by the Ministry to perform the work. This is the appropriate interpretation and application of the authorizing statutory provisions.

61 In compelling reasons, McLachlin, J. defined the duty at para. 50 as follows:

> In essence, a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent... The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation -- the duty to ensure that the independent contractor also takes reasonable care.

62 At para. 53 McLachlin, J. continued:

> ...To determine whether a non-delegable duty should be imposed, the Court should examine the relationship between the parties and ask whether that relationship possesses elements that make it appropriate to hold the defendant liable for the negligence of its independent contractor...

63 The concept of non-delegable duty and the factors to be considered in determining that such a non-delegable duty exists and that as a result thereof vicarious liability on the part of the employer exists, can be summarized as follows:

> 1. The term non-delegable duty does not refer to the delegation of a duty. Rather, it describes a duty the *content* of which is such that it requires the person on whom the duty rests to ensure that reasonable care is observed in carrying out a particular task. That is, the duty extends to carrying out the task itself, and not just to the selection of the person to carry it out. The essential question is the *definition* (or content or extent) of the duty (if any) of the defendant to the victim.

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2. It follows that, when such a duty is found, the employer (or government authority etc.) is liable to the victim for injury flowing from a want of due care and carrying out the task in question. Whether the task is carried out by the employer, an employee or an independent contractor is not relevant.

3. A non-delegable duty may be imposed by statute of a common law.

4. A non-delegable duty may be imposed by the common law when the activity to be carried out carries an inherent risk of danger.

5. A non-delegable duty may be imposed by the common law when the relationship between the defendant and the victim is such as to warrant -- or find appropriate -- the imposition of such a duty. The factors that will be relevant in assessing appropriateness include, but are not limited to:

i. the extent of any authority or duty placed on the defendant by the statute;

ii. the degree of control of the defendant over the activity in question;

iii. the vulnerability or position of dependence of the victim on the defendant with respect to how and by whom the activity is performed;

iv. the seriousness of potential consequences of a lack of due care, particularly when personal safety is involved;

v. the reasonable expectations of potential victims, in the sense of whether or not it is reasonable for them to expect that the defendant will be responsible for the negligence of those actually entrusted with performing the task in question.

64 Determination of, or refusal to continue employment by reason of a prohibited consideration such as sex, while it may be grounded in human rights legislation, nonetheless bears all the characteristics of an unjust dismissal. Thus, I am satisfied that the considerations of potential vicarious liability, as it arises in the tort context, are equally and undoubtedly applicable to the termination or refusal to continue the employment of Sharon McEvoy as it exists in this particular case. It is thus necessary to view the considerations set out above in order to arrive at a conclusion whether or not vicarious liability for the termination of the employment of Sharon McEvoy, or the refusal to continue it, can be attributed to the Department.

65 It can be noted in reviewing the list of considerations that in para. 2 thereof the employer is liable to the victim for injury flowing from a want of due care in carrying out "the task in question." Whether the task is carried out by the employer, an employee or an independent contractor is not relevant. Also, in para. 3 a non-delegable duty may be imposed by statute. What is the duty here and how is it imposed? Some guidance in that regard may be found in s. 4(3) of the *Health and Community Services Act* which provides that a regional health and community services board is "...responsible for and has the authority to provide those health continuing care and community services, including services to children, youth and families other than hospital services, that the Lieutenant-Governor in council may direct." Does that definition of duty in the form of the board being "responsible for and (having) the authority to provide health continuing care and community services" envisage a duty to any person other than the recipient of those services, in this case, Vincent Dalton? While the concept of a non-delegable duty in the sense of being responsible for the provision of services to Mr. Dalton may not be able to be delegated by Government in hiring Best of Care Ltd., is the duty of an "employer" not to discriminate against its employees on the basis of sex, also encompassed in that non-delegable duty by being a necessary and ancillary component of the delivery of services to Mr. Dalton? Obviously the services could not be delivered to Mr. Dalton without the involvement of homecare worker

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such as Mrs. McEvoy. Therefore, there is, perhaps, some tenuous connection to Mrs. McEvoy on the part of the Board or Department where it engages agencies, such as Best of Care Ltd., to provide homecare services to the clientele of the Department. But does that connection impose a non-delegable duty to ensure compliance by such independent contractors with statutory duties such as compliance with the provisions of the *Human Rights Code*? The concept of vicarious liability for breaches of the Code does not engage the concept of inherent danger or risk in the carrying out of the task. First of these considerations is the extent of any authority or duty placed on the defendant by statute. Clearly, the *Health and Community Services Act* imposes a duty or responsibility for the provision of these services to people like Mr. Dalton. Additionally, s. 3 of the *Human Rights Code* provides that the prohibitions contained in the *Code* apply to and bind the Crown and every agency of the Crown. Thus, both the Department and the Regional Health and Community Services Board are bound by the *Human Rights Code*. This connection (albeit tenuous) might indicate some vicarious liability. A more important consideration however is the degree of control which the Department or the Board had over the employment activity in question. In this regard the Department simply was a funding agency which determined the criteria under which persons in need of homecare services would qualify for the receipt of a subsidy for such services. Additionally the Department attempted to regulate the quality of any individuals who were to provide those services directly to the Department or Board's clients like Mr. Dalton. That, however, is the only extent of control over the activity of the provision of health services. In my view this degree of control was simply part of the Department's general regulatory role and is insufficient to impose liability upon the Board or the Department for any tortuous activity of Best of Care Ltd., or its employees, in their care of Mr. Dalton. *A fortiori* the control is even less adequate to support a finding of liability on the part of the Department or the Board for breaches of the *Human Rights Code*, if there were same, by Best of Care Ltd.

66 Another consideration in determining appropriateness in finding vicarious liability is the vulnerability to or position of dependence of the victim on the defendant with respect to how and by whom the activity is performed. Consideration of this factor is irrelevant in the fact situation at hand. The relationship of Ms. McEvoy to Best of Care Ltd. was simply that of employee to employer and vulnerability or dependence was not a factor in that relationship. Her employment with them was consensual.

67 Nextly, the seriousness of potential consequences of a lack of due care, particularly when personal safety is involved must be considered. Again, this consideration is irrelevant in the fact situation at hand where personal safety was not a question.

68 The final factor is the reasonable expectations of potential victims, in the case of whether or not it is reasonable for them to expect that the Department would be responsible for the negligence of those actually entrusted in performing the task in question. Expressed another way, could Ms. McEvoy reasonably have expected that the Department would be responsible for breaches by her employer, Best of Care, of its duties under the *Human Rights Code*? Again, I am of the view that this factor is far too remote to be considered in the fact situation at hand. I am satisfied that no vicarious liability on the part of the Regional Health Board, or the Department of Health, exists in this matter for the alleged termination or refusal to continue the employment of Sharon McEvoy. Erin Breen, as the Board of Inquiry, enunciated an obligation on the part of the Department to provide education or training in human rights issues to Best of Care Ltd. and/or its employees. In my view such a conclusion is entirely incorrect in law and unreasonable. Such a conclusion, if supported, could require Government, for example, as the owner of the highways in the province, to ensure that trucking companies who trucked asphalt for highway constructors, were educated by Government in the requirements of the *Human Rights Code*. Such a consideration is totally and entirely impracticable and unreasonable. On this basis, therefore, the finding of the Board of Inquiry that the Department or the Regional Health Board as its Agent, is/are vicariously liable for the termination or refusal to continue the employment of Sharon McEvoy is overturned and the appeal is allowed.

Was There Discrimination Against Sharon McEvoy on the Basis of Sex?

69 There is no dispute about the reasoning of the Board of Inquiry as to whether or not discrimination based on pregnancy was equivalent to discrimination based on sex. The Board of Inquiry stated:

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> Discrimination based on pregnancy is equivalent to discrimination based on sex (*SC Brooks v. Canada Safeway Ltd.* (1989) 59 D.L.R. 321). As noted by the Court, "Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant." Further, the failure to allow a woman who has taken maternity and paternal leave to return to work at the conclusion of her leave can be discrimination on the basis of sex (See *Hazelwood v. Leask Agro Services Ltd.* (2004), 50 C.H.R.R.D./447(Sask. H.R.T.))

70 However, the parties here disputed whether there was discrimination on the basis of pregnancy in the case at hand.

71 With respect to this question, it is within the jurisdiction of the Board of Inquiry to determine this issue as it is within the core expertise of the Board and therefore entitled to deference. However, on the evidence, it is clear that the refusal on the part of Best of Care Ltd. to continue the employment of Sharon McEvoy was based not upon the prohibited ground of sex by reason of her having taken the pregnancy leave, but rather upon the basis that Mr. Dalton preferred to continue to have Mrs. Power (the replacement worker) provide homecare services to him rather than have Mrs. McEvoy do so. While the termination of the employment of Sharon McEvoy may have given rise to a civil "unjust dismissal" claim, the refusal to continue her employment was clearly not based on the fact that she had taken a pregnancy leave. That event was merely contemporaneous with the opportunity for Mr. Dalton to discover that Mrs. Power was more suited to his homecare needs than was Mrs. McEvoy. Mere opportunity on the part of Mr. Dalton to find a more suitable employee does not equate with discrimination. Mrs. McEvoy's maternity leave had no causative effect in the termination of her employment.

72 I therefore conclude that the finding of the Board that Sharon McEvoy was discriminated against on the prohibited grounds of sex is unreasonable and that finding is overturned.

Good Faith Occupational Qualification

73 Lastly, I have been asked to determine whether the Board of Inquiry erred in determining that the employer did not demonstrate that the termination of Sharon McEvoy's employment was based upon (a) "good faith occupational qualification" pursuant to s. 9(1) of the *Human Rights Code*. Although, in the light of my other findings in this matter, it is not necessary for the purposes of this decision to find such a bona fide occupational qualification, I would simply comment that I can think of no other employment relationship where suitability of the employee to the patient's needs is more of a requirement than it is in this particular case. However, in the hiring relationship, suitability was not defined as a "good faith occupational qualification" for the position although, upon consideration of the role of healthcare worker or homecare worker, most reasonable people would consider that suitability to the person availing of the services is a major concern. I am therefore not prepared to overturn the finding of the Board that a bona fide occupational requirement did not exist.

Summary

74 Therefore, the complaint of Sharon McEvoy as against the Department and Best of Care is dismissed.

75 There is nothing in the *Human Rights Code* which prohibits the awarding of costs in this matter to the successful party. Leave is therefore granted to the appellant to apply on notice to the Human Rights Commission for costs in this matter.

Appeal allowed.

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