Date: 20090212
Docket: 08/37
Citation: 2009 NLCA 9

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

HUMAN RIGHTS COMMISSION FIRST APPELLANT

AND:

SHARON MCEVOY SECOND APPELLANT

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF NEWFOUNDLAND
AND LABRADOR, AS REPRESENTED
BY THE MINISTER OF HEALTH
AND COMMUNITY SERVICES FIRST RESPONDENT

AND:

BEST OF CARE LTD. SECOND RESPONDENT

AND:

THE ESTATE OF VINCENT
DALTON THIRD RESPONDENT

Coram: Roberts, Rowe and Barry, JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division 200601T4399

Appeal Heard: January 21, 2009
Judgment Rendered: February 12, 2009

Reasons for Judgment by Barry, J.A.
Concurred in by Roberts and Rowe, JJ.A.

Counsel for the First Appellant: Helen Conway
Counsel for the Second Appellant: No Appearance
Counsel for the First Respondent: Raylene Stokes
Counsel for the Second Respondent: No Appearance
Counsel for the Third Respondent: No Appearance

Barry, J.A.:

[1] The principal issue on this appeal is whether terminating the employment of a home care worker after maternity leave constituted discrimination because of sex, as prohibited by the **Human Rights Code**, R.S.N.L. 1990, c.H-14.

Background Facts

[2] Sharon McEvoy worked as a home care worker for Vincent Dalton from April 17, 2000 until she commenced maternity leave on August 5, 2001. The Department of Health and Community Services ("the Department") funded 75% of her employment under a Home Support Program and Mr. Dalton funded the balance. In 2001, Mr. Dalton was 80 years old, with health problems. He and his family had chosen Ms. McEvoy to be his home care worker to enable him to live in his own home. Having done so, they requested Best of Care Ltd. to hire Ms. McEvoy as an employee and manage her pay, since the Dalton family did not wish to deal with the employment issues related to her employment.

[3] Best of Care Ltd. was licensed by the Eastern Health and Community Services Authority, a corporation and agent of the Crown, funded by the Department and responsible for the administration and delivery of home support services in Eastern Newfoundland in accordance with policies of the Department. Ms. McEvoy's duties consisted of light housekeeping and cleaning, preparation and serving of meals, and supervision of Mr. Dalton's medications. She worked three shifts throughout the day: 8:30 to 10:00 a.m.; 12:30 to 1:30 p.m.; 4:00 to 6:00 p.m., centering around meal times.

Ms. McEvoy and Mr. Dalton had a positive relationship and there were no complaints about her job performance throughout her employment.

[4] When she commenced her maternity leave on August 5, 2001, Ms. McEvoy advised the Dalton family she would be able to return to work on January 2, 2002. Best of Care Ltd. hired a replacement worker, Patricia Power, at the request of the Dalton family, on the understanding between Best of Care Ltd. and the Daltons that she was a temporary maternity leave replacement for Ms. McEvoy.

[5] While Ms. McEvoy was on maternity leave, Mr. Dalton had gallbladder surgery. This meant that in addition to the duties performed by Ms. McEvoy, Ms. Power was also required to assist Mr. Dalton in bathing, getting dressed and going to the washroom. Evidence established Mr. Dalton was more comfortable with Ms. Power performing these duties because he had known her for a long time. In addition, he said he preferred her traditional cooking.

[6] Between December and March, 2002, discussions between the parties led to Ms. McEvoy's delaying her return to work until March 1, 2002, at the request of the Dalton family. On March 1, 2002, Mr. Dalton wrote Best of Care Ltd. to notify them that he intended to retain Ms. Power as his permanent caregiver. Mr. Dalton stated in his letter that Ms. Power had provided him with a higher level of care. Best of Care Ltd. offered Ms. McEvoy other work to commence in June or July. However, she found other work commencing May 22, 2002. She complained to the Human Rights Commission on March 13, 2002 that her termination was on the basis of her sex and pregnancy and thus constituted discrimination contrary to s. 9 of the **Human Rights Code**.

[7] A single person Board of Inquiry, constituted pursuant to the **Human Rights Code**, found that Ms. McEvoy had established a *prima facie* case of discrimination on the basis of her sex, that the respondents had not established her termination resulted from any limitation, specification or preference based on a good faith occupational qualification, that both the Department and Best of Care Ltd. were employers of Ms. McEvoy, and that they were both liable to pay her $2,361.96 in lost wages and $3,000.00 in general damages.

[8] The Crown successfully appealed to the Trial Division. The Trial Division judge concluded that the finding of the Board that Ms. McEvoy

was discriminated against upon the prohibited ground of sex was unreasonable and that, in any event, the Department was not an employer and not vicariously liable for any wrongful termination. The Human Rights Commission now appeals that decision.

The Relevant Legislation

[9] Section 9 the **Human Rights Code**, as it then was, provided:

> 9.(1) An employer, or 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, physical disability or mental disability; or
>
> (b) that person's age, if that person has reached the age of 19 years, and has not reached the age of 65 years,
>
> but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

The Board of Inquiry's Decision

[10] The Board stated:

> I find that based on the evidence presented, it is reasonable to infer that Ms. McEvoy's maternity leave played a role in the termination of her employment. While Ms. McEvoy was off on maternity leave, Mr. Dalton decided that he preferred her replacement worker, Mrs. Power. Had Ms. McEvoy not taken maternity leave, she would likely have continued to work for Mr. Dalton as there were no complaints about her work. All evidence supports that she was a good worker and the two enjoyed a positive relationship. It was because Ms. McEvoy went on maternity leave that Mrs. Power was hired to replace her.
>
> I therefore find that Ms. McEvoy has established a prima facie case of discrimination on the basis of her sex.

[11] The Board found that Mr. Dalton's reason for asking that Ms. Power remain his home support worker was a matter of personal preference. He simply preferred Ms. Power to Ms. McEvoy. The Board concluded that the preference of an employer's clients or customers is not a defence to discrimination.

The Trial Division Decision

[12] On the issue of whether the refusal by Best of Care Ltd. to continue the employment of Ms. McEvoy was discrimination, the Trial Division judge stated:

> … 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, rather upon the basis that Mr. Dalton preferred to continue to have Mrs. Power (the replacement worker) provide home care services to him rather than have Ms. McEvoy do so. While the termination of 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 Ms. 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.

The Issues

[13] The parties raised three issues on this appeal:

(a) Did the Trial Judge err when he found that Ms. McEvoy was not discriminated against on the basis of sex under s. 9(1) of the **Human Rights Code**?

(b) Did the Trial Judge err in law in his conclusion that a *bona fide* occupational qualification did not exist?

(c) Did the Trial Judge err when he found that the Department was not Ms. McEvoy's employer?

The Law and Analysis

[14] The Supreme Court of Canada described discrimination in the following terms in **Andrews v. Law Society (British Columbia)**, [1989] 1 S.C.R. 143, at para. 19:

> I would say than 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.

[15] The comments of Dickson J. in **Brooks v. Canada Safeway Ltd.**, [1989] 1 S.C.R. 1219, at p. 1242, also provide an important context for analysis in this case:

> In retrospect, one can only ask - how could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to women. They were pregnant because of their sex. 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. [Emphasis in original.]

[16] The failure to allow a woman who has taken maternity and parental leave to return to work at the conclusion of her leave can be discrimination on the basis of sex. But a human rights tribunal must consider all the circumstances and ask whether it is reasonable to infer that the maternity leave was a causative factor in the refusal to continue employment. The cases relied upon by the Commission to support the submission of discrimination in the present case, all decisions of human rights tribunals, must be distinguished from Mr. Dalton's circumstances. Of course, this Court would not be bound by tribunal decisions in any event. But it is worthwhile to emphasize that a finding of nondiscrimination in the present case would not see this jurisdiction deviate from the basic principles of human rights law applied across this country.

[17] The parties correctly agree that a human rights complainant can establish a *prima facie* case of discrimination by showing that her pregnancy or pregnancy-related leave was a factor in refusing to continue to employ her. The Commission submits Ms. McEvoy met this burden by showing Ms. Power would not have been hired to replace her if she had not been on maternity leave. The Commission points to **Hazelwood v. Leask Argo Services Ltd.** (2004), 50 C.H.R.R. D/447 (Sask. H.R.T.) where an employer terminated a woman on maternity leave and a co-worker due to changes in the business but immediately rehired the co-worker to perform slightly modified duties. The tribunal found that, although no discrimination was intended, the fact that the woman was on maternity leave when the

terminations occurred meant that she could not compete for the modified position. There was work available that she could have done on her return from maternity leave, but because her employment had been terminated, this work went to the co-worker. The Tribunal correctly noted that, as decided in **O'Malley v. Simpsons-Sears Ltd.**, [1985] 2 S.C.R. 536, the test of discrimination is one of effect, not intention. Even if a decision is based on sound economic reasons, it may be discriminatory if the effect on a person is different from others.

[18] Mr. Dalton's case must be distinguished from that of **Hazelwood**. Mr. Dalton did not decide to permanently hire Ms. Power while Ms. McEvoy was on maternity leave. His decision was taken on March 1, 2002, when Ms. McEvoy was ready and able to resume her previous duties, which Ms. Power had been filling until then on a temporary basis. Accordingly, at the relevant time, Ms. McEvoy was in a position to compete with Ms. Power for the position.

[19] The Commission also points to **Dorvault v. Ital Décor Ltd. and Tinucci** (2005), 52 C.H.R.R. D/136 (B.C.H.R.T.), where a woman who had applied for a job as the "front end" person at a company, had been interviewed and offered the job in April 2004, but heard nothing further from the employer after informing the interviewer that she was pregnant and would have to go on maternity leave in October. The Tribunal, at para. 23, correctly stated the applicable law:

> Where a complainant's evidence, if believed, and without further evidence, supports an inference that it is more likely than not that the conduct of a respondent was discriminatory, a *prima facie* case of discrimination is established. The burden then shifts to a respondent to provide evidence that the prohibited ground was not a factor in its actions or that there was a *bona fide* occupational requirement for its actions.

[20] In that case, unlike the present, the employer failed to provide any credible evidence that the prohibited ground was not a factor. The Tribunal in **Dorvault** did not find the employer's explanation credible. In the present case Mr. Dalton provided credible reasons, unrelated to a prohibited ground, for preferring Ms. Power over Ms. McEvoy.

[21] The Commission also cites **Parry v. Vanwest College Ltd.** (2005), 53 C.H.R.R. D/178 (B.C.H.R.T.), where a woman on maternity leave had been informed by her employer, when she was ready to return to work, that her position had been "closed" due to declining enrollment and financial

problems at the college. The Tribunal correctly found that an employer is not prevented from reorganizing and shrinking its workforce while an employee is away on maternity leave. However, the Tribunal held that the **Human Rights Code** requires that a person who is absent from work because of pregnancy not be penalized because of her absence. I agree. In that case the Tribunal found that prior to her maternity leave she was a valued employee and could have returned to a senior instructor position, even if her previous position had been eliminated. The Tribunal found there was no legitimate business-related reason for not at least offering her an instructor's position. The Tribunal also found that the evidence presented regarding the college's enrollment and financial position was less than reliable.

[22] **Parry** must be distinguished from the present case because of the lack of any reliable evidence there to rebut the inference that maternity leave was a factor in the decision to terminate. In Mr. Dalton's case there is reliable evidence presented to rebut the inference.

[23] **Vestad v. Seashell Ventures Inc. operating as Rose & Crown Pub** (2001), 41 C.H.R.R. D/43 (B.C.H.R.T.), and other cases relied upon by the Commission may be distinguished from the present because the complainants brought forward sufficient reliable evidence to establish a *prima facie* case of discrimination on the basis of pregnancy or maternity leave and the employers did not rebut this.

[24] In the present case there is no evidence upon which to base an inference that maternity leave or pregnancy factored into Mr. Dalton's request that Ms. McEvoy be no longer employed to look after him. The uncontradicted evidence established that the reason for Mr. Dalton's request was that he was more familiar with Ms. Power and more comfortable with her providing personal care which he had not required prior to Ms. McEvoy's maternity leave. This care involved assistance in bathing and in the washroom generally, following his gallbladder surgery. In addition Mr. Dalton preferred Ms. Power's traditional meals. The trial judge correctly concluded that, in the circumstances of this case, the refusal to continue employment following maternity leave was based not upon the prohibited ground of sex by reason of Ms. McEvoy's having taken the pregnancy leave, but rather upon the basis that Mr. Dalton preferred to have Ms. Power continue to provide the homecare services.

[25] To support its position that Mr. Dalton's preferences should not determine the matter, the Commission refers to **Middleton v. 491465 Ontario Ltd.** (1991), 15 C.H.R.R. D/317 (Ont. Bd. Inq.), at para. 34, where the Board stated:

> A long line of human rights decisions has enunciated a clear principle that customer preference cannot be used to justify a discriminatory act. *Berry v. Manor Inn* (1980), 1 C.H.R.R. D/152 at D/153 [paras. 1358-59] states:
>
> > To say that the preference of an employer's customers or clients… is a bona fide occupational qualification based on sex, would be tantamount to creating a 'community standard' test to determine whether discrimination exists. It would be a minor extension of this principle to hold that if most customers in a restaurant held prejudices against Blacks or Jews or Scotsmen, the proprietor would be legally entitled to refuse to serve Blacks or Jews or Scotsmen. The long history of human rights struggles on this continent and elsewhere can leave no doubt that such an argument is totally without merit…
> >
> > The standards are set by the Act, and were intended to be universally applicable throughout the province, regardless of group or community sentiment.

[26] While the preference of an employer's clients or customers may not be a defence to discrimination, where the preference relates to prohibited grounds, this does not mean that the preference of a client or customer should never be considered in seeking to establish the reason or reasons for the refusal to employ following maternity leave. Here Mr. Dalton did not say he did not wish to employ Ms. McEvoy because she had been pregnant. He provided valid reasons for his preference, unconnected to any prohibited ground, and in taking his instructions, the employer did not discriminate against Ms. McEvoy.

[27] Also, while the timing of Ms. McEvoy's termination, coming at the end of her maternity leave, is a factor to be carefully and thoroughly considered in determining whether the refusal to continue her employment was based on the fact she had taken maternity leave, or whether the refusal had the unintended effect of disadvantaging Ms. McEvoy because of her pregnancy, in all the circumstances of this case, the timing did not make it reasonable to infer that Ms. McEvoy had been terminated because of her pregnancy and maternity leave, when one considers Mr. Dalton's reasonable stated preferences. The trial judge correctly concluded here that even though Mr. Dalton's decision was contemporaneous with the end of Ms.

McEvoy's leave, and the leave had provided him an opportunity to find a more suitable employee, the circumstances did not justify an inference of discrimination. Her maternity leave played no role and had no causative effect in the decision to terminate her employment.

[28] Apart from Mr. Dalton's legitimate intentions, in the present case there is no evidence of any unintended discriminatory effect. It would be unreasonable to conclude that Mr. Dalton's decision was founded on any distinction "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". See **Andrews**, at para. 19.

[29] Having concluded there was no discrimination, it is not necessary to consider whether the trial judge correctly decided that the Department was not Ms. McEvoy's employer or whether he was correct in his conclusions regarding a *bona fide* occupational qualification.

Summary and Disposition

[30] In summary, in the circumstances of this case it is not reasonable to infer that the taking of maternity leave was a causative factor in the refusal to continue Ms. McEvoy's employment or that the refusal had any unintended discriminatory effect. Accordingly, the trial judge was correct in finding the Board was unreasonable to conclude that Ms. McEvoy was discriminated against on the basis of sex. The appeal is dismissed.

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L.D. Barry, J.A.

I concur: _____
D.M. Roberts, J.A.

I concur: _____
M. Rowe, J.A.