Guideline on Pregnancy Discrimination

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Please Note:

The New Brunswick Human Rights Commission (Commission) develops guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are intended to raise awareness of rights-holders and other concerned parties about their rights and responsibilities under the New Brunswick *Human Rights Act* (*Act*).

This guideline offers the Commission's interpretation of human rights obligations in situations of pregnancy related discrimination. The guideline is based on relevant decisions by boards of inquiry, tribunals, and courts; it should be read in conjunction with those decisions, and with the relevant provisions of the *Act.*[1] In case of any conflict between this guideline and the *Act*, the *Act* would prevail.

For information on rights and duties under other grounds of discrimination, please review the Commission's guidelines on those subjects or contact the Commission directly.

This guideline is not a substitute for legal advice. For clarification on any of its sections, please contact the Commission.

[1] The Commission acknowledges and thanks human rights commissions from jurisdictions across Canada for the opportunity to study and draw on their policies and documents on pregnancy discrimination.

1.0 Introduction

The *Act* prohibits sex[1] discrimination in employment, housing, public services, and in memberships of trade unions, professional or business organizations, and trade associations.[2] Section 2 of the *Act* specifies that sex discrimination "includes pregnancy, the possibility of pregnancy or circumstances related to pregnancy".[3] Therefore, conduct, practices or policies that discriminate against women because of pregnancy or pregnancy-related circumstances are in violation of human rights law.

Human rights protections against pregnancy discrimination extend to the prenatal and postnatal stages of pregnancy, cover the time from conception to birth, and include post-birth recovery, breastfeeding, and other pregnancy-related conditions.[4] For example, an employee who is on maternity leave, or would proceed on maternity leave in the future, is in a pregnancy-related situation; employers would be prohibited from treating that employee differently because of her pregnancy-related condition.[5]

Human rights protections against pregnancy discrimination extend to the prenatal and postnatal stages of pregnancy, cover the time from conception to birth, and include post-birth recovery, breastfeeding, and other pregnancy-related conditions.

Discrimination against pregnant women and women of childbearing age manifests in subtle ways, and works to marginalize and disempower these women. For example, employers may withhold training, projects, promotions or job advancement opportunities from pregnant women, women on maternity leave, or women seen as likely to become pregnant in the foreseeable future. Such conduct, policies or practices would amount to pregnancy-based discrimination.

Employers are also prohibited from questioning the competence, commitment or capacity of pregnant women and women of childbearing age, based on stereotypes about pregnancy and pregnancy-related conditions. If pregnant women advise employers about potential work limitations due to their pregnancy, employers have a duty to accommodate these requests to the point of undue hardship. To justify treating a woman differently because of pregnancy, an employer (and a housing or service provider) will have to plead BFR and undue hardship.

Introduction

1.1 Statutory Definition of Pregnancy

In the Section 2 definition of pregnancy cited above, the words "possibility of pregnancy" are intended to protect women of childbearing age against pregnancy related discrimination; these women may face discrimination based on the presumption that they could become pregnant in the future or near future.[6]

The words "circumstances related to pregnancy" in the above definition are intended to encapsulate the following pregnancy-related circumstances, among others:

> Discrimination based on pregnancy is a form of sex discrimination, because of the basic biological fact that only women have the capacity to become pregnant.

- Medical complications arising from pregnancy or childbirth;
- Abortion or complications related to or resulting from abortion;[7]
- Miscarriage or stillbirth and conditions attending miscarriage or stillbirth;[8]
- Fertility treatment or family planning, and complications or circumstances related to them;
- Post-childbirth recovery, for an accepted and reasonable length of time; and
- Breastfeeding and situations related to breastfeeding.[9]

1.2 The Supreme Court of Canada on Pregnancy Discrimination

In a precedent-setting decision,[10] which brought pregnancy discrimination under the human rights umbrella and overturned its earlier ruling in the Bliss[11] case, the Supreme Court of Canada defined pregnancy-based discrimination as a form of sex discrimination. In compelling, unequivocal terms, the Supreme Court stated:

"How can pregnancy discrimination be *anything other than* sex discrimination (italics in original). The disfavored treatment accorded [to women] 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".[12]

The Supreme Court held that pregnancy is not an illness or a disability, but it is a valid health-related reason for absence from work. Pregnant employees with health-related needs should not be treated differently from employees with other health-based conditions, like illness, accident or disability.[13]

1.3 Establishing Pregnancy Discrimination

To establish discrimination based on pregnancy:

- The onus is on the complainant to show that her pregnancy was a factor in her employer's decision to demote, dismiss or otherwise apply an unequal employment rule on her; similarly, for pregnancy-based discrimination in housing and services, the complainant would have to prove *prima facie* discrimination.[14]
- An employee or a housing/services user does not have to show that pregnancy was the sole factor or even the primary factor[15] in an employer or housing/service provider's discriminatory treatment; it is enough to establish that pregnancy was one of the factors in the discriminatory conduct.[16]
- A complainant alleging pregnancy discrimination may have to show that the organization or person responsible for the discriminatory conduct knew or ought to have known of her pregnancy.[17]
- After a *prima facie* case of pregnancy discrimination is established, the onus shifts to the respondent to either show that discrimination did not occur, or to defend the discriminatory rule or practice as a BFR; the respondent must provide a credible, non-discriminatory justification of its actions, and show how it would suffer/would have suffered undue hardship if it accommodated the pregnant employee, housing or service user.[18] (For BFR and undue hardship, see section 4)

2.0 Pregnancy Discrimination in Employment

Human rights law prohibits employers from treating an employee or potential employee differently or with discrimination because that employee or potential employee is pregnant, is planning to become pregnant, or may become pregnant in the future.

2.1 Pregnancy Discrimination in Hiring, Pre-Hiring, and Post-Hiring

Employers are prohibited from discriminating against employees because of their pregnancy, plans of pregnancy or possibility of pregnancy.

At the hiring, pre-hiring, and post-hiring stages, human rights law prohibits employers to:

- Decline a candidate's application because she is pregnant, is planning to become pregnant, or may become pregnant in the future;
- Post a job advertisement that excludes or hints at excluding pregnant or would-be pregnant women from applying for that job;
- Ask an applicant or potential employee (in the job interview or application) if she is pregnant or planning to get pregnant;

Example – Discriminatory Interview Questions and Pregnancy Discrimination

The complainant applied for an office job with the respondent, and, during the interview, the hiring manager asked if she planned to start a family any time soon. The complainant was pregnant at the time, but did not disclose it to the interviewer, fearing that she would not be hired for that reason. She was hired on a 90-day probationary contract; three days after the contract ended, the complainant disclosed her pregnancy to her female coworkers. The respondent terminated her employment the next day, citing poor performance, and claiming right of termination during the probationary period. The complainant did not sign the termination letter, asserting that the probationary period had expired three days earlier; she alleged discrimination in employment based on pregnancy. The pregnancy question of the interview was corroborated by the notes of the hiring manager, so the Tribunal inferred that, on a balance of probabilities, the complainant's pregnancy was a factor in the respondent's termination decision. The respondent could not explain why the alleged performance issues were not pointed out in any written evaluations during the probationary period, and why, if performance was an issue, was the complainant terminated after the probation. Discrimination based on pregnancy was established.[19]

- Ask an applicant (in the job interview or application) if she is using birth control or family planning;
- Withdraw an employment offer after learning about a candidate's pregnancy or planned pregnancy;[20]
- Refuse to hire a pregnant woman to a fixed-duration contract, because her maternity leave would begin before the contract end-date.

Example – Refusal to Hire Because of Impending Maternity Leave

A nurse was denied a fixed-term contract because she was pregnant and would proceed on maternity leave half-way through the contract. The Court of Appeal held that although being available for work was an implied term of the contract, it was not a bona fide occupational requirement to justify the employer's refusal to hire the nurse; the hospital had failed its duty to accommodate the pregnant nurse to the point of undue hardship. [21]

2.2 Pregnancy Discrimination During Employment

During employment, human rights law prohibits employers to:

> Employers cannot treat employees differently and with disadvantage because they are pregnant, or because of their pregnancy-related circumstances.

- Refuse to renew an employment contract because an employee is pregnant, is planning to become pregnant, or may become pregnant in the future;

Example – Refusal to Renew Annual Contract

A teacher became pregnant before her second one-year contract with the school board commenced, and went on maternity leave half-way through the second contract. Consequently, she was not granted a contract for the following school year. The Tribunal ruled that the school board discriminated against the teacher by refusing to renew her contract because of her pregnancy. The Tribunal also noted that the school board's policy of offering one-year contracts was discriminatory against pregnant employees, because it allowed the board to wriggle out of its obligations to them.[22]

- Refuse a promotion or to consider an employee for a promotion because of her pregnancy or pregnancy-related circumstances;[23]
- Withhold information from an employee when she is on maternity leave about new employment opportunities to which she would otherwise be eligible;[24]
- Demote an employee or disadvantage her in other ways[25] because she is pregnant, is planning to become pregnant, or may become pregnant in the future;[26]
- Terminate, dismiss or lay off (even with notice) an employee because she is pregnant, is planning to become pregnant, or may become pregnant in the future;[27]

Example – Immediate Dismissal Following Disclosure of Pregnancy

The complainant worked as a highly successful vice president of sales for the company's operations in British Columbia. The company was experiencing an economic downturn in its business, and was seeking to cut costs. The complainant informed the company that she was pregnant, and would proceed on maternity leave at the end of the year. Her job was terminated the very next day, citing the company's economic shortfalls and closing of its operations in British Columbia. The Board held that the circumstances indicated that

pregnancy was an operative factor in the termination decision. The complainant had not received any prior communication that her job might end, and the company could not furnish a non-discriminatory reason for its decision. Pregnancy discrimination was established as a factor in the termination.[28]

Example – Laying Off a Pregnant Employee

An employee who was proceeding on maternity leave was laid off by the employer, because the employer's business was experiencing an economic shortfall. However, another person was hired as replacement, and was kept employed after the complainant's maternity leave had ended. The Tribunal stated that while employers can take reasonable steps to address economic difficulties, evidence and circumstances showed that the employer could have retained the complainant in the job, because another employee was working at her position. Therefore, the employer discriminated against the complainant based on pregnancy.[29]

Miscarriage, abortion, birth control, and complications arising from these conditions are protected under the ground of pregnancy.

Example – Miscarriage-Related Complications Included in Pregnancy Protections

The employer discriminated against an employee when it dismissed her after she experienced pregnancy complications and was absent for four shifts on the advice of her doctor. She informed the employer about her medical condition, which subsequently led to miscarriage. The Tribunal stated that miscarriage is part of pregnancy-related conditions, and the employer had an obligation to accommodate the employee to the point of undue hardship: "This legal obligation extends to accommodating a miscarriage, one of the possible outcomes of pregnancy". The employee should have been given reasonable opportunity to present medical confirmation about her miscarriage, and then given time off to recover, which measures would not have caused undue hardship to the employer.[30]

- Change an employee's working conditions because of her pregnancy or planned pregnancy so disadvantageously that she is forced to leave her job (constructive dismissal);

Example – Constructive Dismissal of Pregnant Employee

A pregnant employee worked full-time at a nursery where her duties included spraying pesticides on plants. Her doctor advised her to avoid pesticide exposure, as it posed health risks for her unborn child. Instead of accommodating the employee's request for alternative duties, the employer reduced her work schedule to two-days a week. The employee was not incapacitated from working full-time, and other jobs suitable to her skill level were available at the nursery. It was held that the employer discriminated against the employee based on pregnancy, and created conditions of constructive dismissal.[31]

Constructive dismissal tactics against pregnant employees can take many forms:[32]

- *Harassing the pregnant employee;*[33]
- *Not scheduling the employee for work or adequate shifts;*[34]
- *Demoting the employee;*[35]
- *Transferring the employee to an unwanted task or location;*[36]
- *Forcing the employee to proceed on leave;*[37]
- *Excessive criticism of the employee's work;*[38]
- *Failure to accommodate the employee's pregnancy-related needs;*[39] *and*
- *Other hostile treatment.*

Actions or policies based on stereotypes about pregnant women are discriminatory under human rights law.

- Presume that a pregnant employee would be unable to perform essential job duties, without making an individualized, case-by-case assessment to determine possible work limitations of that employee;[40]

Example – Presumptions or Stereotypes about Pregnant Employees

A mobile patrol officer at a security company disclosed to her employer that she was pregnant. The employer cancelled her shifts citing health and safety reasons, and put her on short-term disability leave, even though she did not have a disability. The employee was not eligible for sick benefits, and her maternity leave benefits were affected by her being out of work, so she took a job with another company. On learning about her new job, the security company terminated her employment. The Tribunal stated that the employer's perception about health and safety concerns was based on stereotypes about pregnancy and pregnant women, and not on empirical data. The employer's stereotypical views about pregnancy were also indicated by its decision to treat pregnancy as a disability. Discrimination based on pregnancy was established in the case.[41]

Example – Presumption About Pregnant Employee's Capacity to Work

The owner of a bar changed the duties of his pregnant employee from waitressing to bartending, which reduced her hours of work. The employer also asked the employee to sign a waiver of liability, in case she sustained an injury during work. Although intended for the safety of the employee and her unborn child, the employer's measure amounted to discrimination, as objective evidence did not show that the safety concerns were warranted under the circumstances: the complainant had a healthy pregnancy, and her doctor had allowed her to work during the pregnancy.[42]

- Presume, based on stereotypes about pregnancy, that an employee would use her pregnancy as an excuse to work less, or to ask for unnecessary work-related concessions;[43]

Pregnancy Discrimination in Employment

- Ask a pregnant employee for medical proof of obvious physical restrictions that occur during pregnancy;[44]
- Penalize an employee because she has low energy or physical limitations because of her pregnancy;[45]

Harassment, reprisal, and victimization of women because of their pregnancy is a violation of human rights law.

- Presume that an employee would not return to work after her maternity leave, and make decisions pursuant to that perception;[46]
- Comment on or create adverse job-related consequences for an employee because she looks different or dresses differently due to her pregnancy;[47]

Example – Discrimination Based on Pregnant Employee's Physical Appearance

A pregnant massage therapist at a spa was subjected to offensive comments about her appearance and body shape. The employer reduced the pregnant employee's hours, which caused her to lose her clients and eventually lose her job. The Tribunal stated that the employer harbored stereotypical views about pregnant women and their capacity for work during pregnancy. The evidence also showed that the employer wanted attractive looking massage therapists, whose physical appearance (in the views of the employer) would appeal to clients – the complainant therefore had become less desirable as an employee. The employer discriminated against the complainant based on pregnancy.[48]

- Disallow washroom breaks as required, and/or clock out pregnant employees for washroom use;
- Disallow rescheduling of meal times for women who need to eat more often to counter the effects of nausea or other related conditions;[49]
- Terminate, penalize or morally reprimand a pregnant employee because she is single, or unmarried to her partner or the would-be father of her child;[50]
- Reprise against an employee for seeking accommodation for her pregnancy;[51]

Example – Reprisal for a Pregnancy Discrimination Claim

In a human rights claim, a woman alleged that the employer compelled her to take unpaid leave due to her pregnancy. The woman and the employer settled the claim. Three weeks after the settlement, the employer wrote to Human Resources Development Canada stating that the woman was dismissed due to a recent litigation (the human rights claim), which had tarnished the employment relationship to the point that it could not be continued. The Tribunal found that the employer's action amounted to reprisal, in violation of human rights law.[52]

- Differentiate a pregnant employee in any other way that detrimentally affects her terms of employment, or hurts her dignity and sense of worth.[53]

Example – Dismissal for Alleged Performance Issues Without Clear Evidence

The complainant worked as cook at a restaurant; she informed her employer when she became pregnant, following which the employer hired another cook to replace her. When the new cook was trained, the applicant's hours were reduced and she was later terminated. The employer claimed that she was terminated for disciplinary issues; however, the disciplinary process was never clearly explained to the employee and there were inconsistencies in the disciplinary letter she was issued. Based on the evidence, the Tribunal found that, on a balance of probabilities, pregnancy was a factor in the termination decision.[54]

If employers cite performance reasons for taking disciplinary action against pregnant employees, they must substantiate their claims by non-refutable evidence.

Example – Performance Issues and Pregnant Employees

In situations where a pregnant employee is terminated or adversely treated because of alleged performance issues, tribunals and courts rely on evidence to determine if job performance was the sole reason for the adverse treatment, or whether pregnancy was a factor in it as well. A domestic worker employed with a cleaning company had received poor customer evaluations; however, she was dismissed the very next day that she disclosed her pregnancy to the employer. The Tribunal noted, after scrutinizing the evidence and witness testimonies, that even if performance was an issue, the timing of the dismissal indicated pregnancy-based discrimination. The Tribunal noted that such cases should be dealt with on a case-by-case basis; if it is clearly established that the employer's decision was not motivated by pregnancy, it would not violate the Act, if it meets all other fairness requirements.[55]

Example – Pregnancy Discrimination and Sexual Harassment

The complainant, a 20-year old woman, was a few months pregnant when she began working as housekeeper with the respondent hotel. She did not inform the employer of her pregnancy, but it began to show after a few months. She was sexually harassed by the manager, including two incidents of sexually-inflected comments about her pregnancy and one incident of physical touching. When she was seven-and-a-half months pregnant, she was issued a formal reprimand letter, even though no issue about her performance had been raised before that time. She responded to each of the issues indicated in the letter, but was dismissed after two weeks. The employer stated on her record of employment that she had quit her job, which delayed her unemployment benefits. The Tribunal did not find any evidence of performance issues; it concluded that even if the employer had concerns about performance, they made no attempt to accommodate the complainant's situation. The complainant suffered discrimination on the ground of pregnancy, in addition to verbal and physical sexual harassment.[56]

3.0 Employee Benefit Plans and Pregnancy Discrimination

Human rights jurisprudence has established that employee benefit plans should not put pregnant employees, or those on maternity leave, at a disadvantage in comparison with other employees.

> Employee benefit plans must not treat pregnant employees, or employees in pregnancy-related circumstances, unequally or with discrimination.

- Vacation, sick leave, disability and other benefits must be available to pregnant employees equally with other employees.
- Provisions of maternity, parental or childcare leave benefit plans should not classify or treat maternity-related conditions as illness, accident or disability.[57]
- Pregnant employees absent from work for health-related reasons (pregnancy induced or otherwise) should be compensated under sick leave or disability benefits.[58] These provisions should extend to the duration of the pregnancy, including the prenatal period, childbirth, and postnatal recovery.

Example – Denial of Sick Leave to Pregnant Employee

An employee notified her supervisor that she intended to take maternity and parental leave for her pregnancy. She also applied to use her accumulated sick leave to cover days she will be absent after childbirth. The request for sick leave was denied by the employer. The Tribunal concluded that the decision to deny sick leave benefits was based on the employee's pregnancy, so the employer's action constituted pregnancy discrimination.[59]

- If an employer pays benefit premiums of employees on sick leave, it must pay the same for employees on maternity leave.

Example – Pregnancy Discrimination in Employee Benefits

Under the collective agreement in place at her nursing home, a nurse was required to prepay 100 percent premiums for certain employment benefits during maternity leave, if she wished to retain those benefits during the leave. On the other hand, employees on sick leave only prepaid 25 percent of their premiums to retain the same benefits. The Board determined that the provisions of the policy discriminated against pregnant employees; the employee benefit plan should compensate pregnant employees equally with employees on sick leave.[60]

- If an employer provides health and dental, pension, life insurance, accidental death, and other employment benefits to employees on disability, sabbatical or other types of leave, it cannot deny the same benefits to employees on maternity or parental leave.

- If an employer does not have a sick leave plan or the pregnant employee has not accumulated sick leave, she must be allowed leave without pay or permitted to use vacation time for pregnancy-related absences from work.

3.1 Maternity and Parental Leaves

Human rights jurisprudence regards maternity leave as a pregnancy-related circumstance, which is protected against pregnancy discrimination.

Maternity leave provisions are addressed in statutes governing labour, labour relations or employment standards; they are not addressed directly in human rights acts. The New Brunswick *Employment Standards Act* guarantees eligible pregnant employees the right to unpaid maternity leave,[61] and entitles eligible parents, natural or adoptive, to unpaid parental or childcare leave.[62]

Along with the above legislative provisions, arbitration jurisprudence has interpreted collective agreements to set down equitable principles of leave and benefits for pregnant employees.[63] Likewise, human rights tribunals and courts have used the employment provisions of human rights acts to define fair practices in maternity leave and related benefits.

- Pregnant employees should not face employment-related disadvantages for being absent from work due to maternity or parental leave.

  Example - Employee's Seniority Should Continue to Accumulate During Maternity Leave

  According to the employer's policy, a term employee's status was converted to indeterminate (permanent) employment after a continuous service of three years. However, in calculating continuous service, the policy excluded unpaid leaves of greater than 60 days (including maternity and parental leaves). The Tribunal found that the policy created adverse effect discrimination for women, who were more likely to have gaps in their employment due to maternity and parental leaves. The employer argued that men were also entitled to parental leave, so the policy did not discriminate against women. However, relying on evidence and practice, the Tribunal concluded that most employees who avail parental leave greater than 60 days are women; therefore, while neutral on its face, the policy was found discriminatory based on pregnancy.[64]

- If maternity leave periods overlap with end-of-contract dates, contract renewal decisions should not be swayed by the fact that the employee is on/or would proceed on maternity leave.

Example – Maternity Leave and Renewal of Contract

An employee's contract date was set to expire in a few months; she became pregnant and applied for maternity leave, which would extend beyond the current contract end-date. She had had a series of discipline and performance issues, and her contract was not extended. The Board rejected allegations of pregnancy discrimination; if a contract end-date is set prior to the pregnancy or knowledge of pregnancy, a finding of discrimination cannot be made on that basis alone, if the contract is not renewed: "Employees on definite term contracts who become pregnant during the term of the contract do not have a legal basis to expect to have their contract renewed or extended simply because of their pregnancy. Pregnancy cannot be used as a reason to deny a person a job; nor can it create entitlement to acquire a job" (para. 204). However, the Board noted that an employer cannot use the expiration of a term contract to achieve a discriminatory objective, such as dismissing an employee it would have to accommodate (in the form of maternity leave, in this case). The Board also noted that if a fixed term employee, who has a reasonable expectation that her contract will be renewed, becomes pregnant, and the contract is then not renewed, a "temporal connection" is established, which should be considered in the analysis of discrimination.[65]

Employees on maternity leave should not be put in situations of disadvantage because of it.

- If a pregnant employee is terminated while she is on maternity leave, the employer should show a clear and categorical BFR for the termination.

Example – Termination of Employment During Maternity Leave

The employer terminated the complainant when she was on maternity leave, and retained the employee who had been hired as replacement for the maternity leave period. The Board noted that the employee had been discriminated against based on pregnancy-related circumstances, or maternity leave. Employees who need to take maternity or parental leave should not have to face adverse job-related consequences for doing so. Even if the company had found an employee they preferred, it did not justify penalizing the employee who had proceeded on maternity leave. The Board noted that while the employer had violated section 53 of the Ontario Employment Standards Act, they would also be in violation of human rights law.[66]

- Employers should not exclude employees who are on maternity or parental leave from decisions or policy changes that directly impact their employment, without consulting with or informing the concerned employees.

Example – Excluding Employees on Maternity Leave from Consultations that Impact Their Employment

An employee on maternity leave was excluded from all company matters, including consultations on a new sales structure that would impact her position. Moreover, a flexible work arrangement that she had in place with the company was cancelled in her absence,

and she was demoted from her current position of manager to salesperson. The Tribunal concluded that by taking job-related decisions during the employee's maternity leave that adversely affected her employment, the company discriminated against her based on pregnancy.[67]

- Employees on maternity leave should not face discrimination in employment benefits while availing their maternity leave.

Example – Denial of Supplemental Benefits to Birth Mothers

The employer's collective agreement did not provide supplemental employment benefits (to supplement employment insurance and parental leave benefits) to birth mothers, which was declared discriminatory by the Supreme Court of Canada, endorsing the decision of an arbitration board. The arbitrator had referred to a "respected and unassailable body of case law" which differentiates between pregnancy and parental leaves, and recognizes their separate and distinct purpose. Birth mothers must recover from pregnancy-related health issues before they can be in the same position as birth fathers and adoptive parents to care for and bond with their children. Birth mothers would be subject to differential treatment if they had to forego pregnancy leave top-up benefits to claim parental leave top-up, which was available to all other parents. The arbitrator concluded that the provision of the collective agreement infringed Section 15 (equality rights) of the Canadian Charter of Rights and Freedoms, *and the employment discrimination provisions of the provincial Human Rights Code. The arbitrator's decision was overturned by the Court of Appeal, but restored by the Supreme Court of Canada, which endorsed the "different purposes of pregnancy benefits and parental benefits".*[68]

Example – Maternity Leave Benefits and Collective Agreements

When a social worker, who was employed on a term contract, returned from maternity leave, she was informed that she would not be credited sick leave and vacation benefits for the duration of her maternity leave. The issue turned on the interpretation of the collective agreement, and whether it allowed accumulation of sick and vacation benefits during maternity leave. After analyzing the agreement, the Board concluded that it was the intention of the drafters to include sick and vacation benefits for periods of maternity leave. If collective agreements intend to limit the scope of employee benefits, these limitations should be stated in clear and unequivocal language in the agreements. The Board noted that other tribunal decisions on the same issue would not be relevant in this case, unless the language of the other collective agreements was exactly similar.[69]

3.2 Returning to Work After Maternity or Parental Leave

Upon returning from maternity or parental leave:

- Employee should be assigned to their most recent job, or a job with similar pay, benefits, and status, if the previous job no longer exists.[70]
- Employees must not be demoted from their latest position while they are/were on maternity or parental leave.[71]
- Employers can make changes to an employee's position while the employee is on maternity or parental leave; however, these changes should be necessary and justified, and the employee should be kept informed about them.
- Employees on maternity or parental leave should be reasonably accommodated and included in any new training relevant to their position, department or area or expertise.[72]
- In situations where there is uncertainty about an employee's return to work following maternity or parental leave, employers have a right to seek clarification from the employee about their plans.[73]

> Breastfeeding is a recognized privilege under human rights law; employers, housing, and service providers have a duty to accommodate breastfeeding women to the point of undue hardship.

3.3 The Right to Breastfeed

Breastfeeding is a recognized privilege in human rights law, included under pregnancy-related circumstances. Employers, housing, and service providers must not discriminate against women because they are breastfeeding, which includes expressing of breast milk. Some ways in which employers, housing, and service providers should strive to accommodate breastfeeding mothers include:

- Providing a quiet, private space for breastfeeding, if requested by an employee, client or customer;
- Granting requests for longer lunch or other breaks, or allowing employees to finish work early to fulfill their breastfeeding needs;[74]
- Allowing employees to bring their infants to the workplace for breastfeeding;[75]
- Providing storage space for expressed milk;
- Providing seating for an employee, customer or client to breastfeed their child;

- Allowing employee requests for changes in work schedules to accommodate breastfeeding times.[76]

An employer does not have a right to request medical documentation before allowing a mother to breastfeed in the workplace.[77]

Breastfeeding is an integral part of child-rearing, and it is a woman's choice how she feeds her child. It is a health issue, not an issue of public decency.[78]

Breastfeeding women have the right to breastfeed in public; therefore, it is discriminatory to ask a nursing mother, without reasonable cause, to stop breastfeeding or move to another location, or to be more discreet while breastfeeding.[79]

Example – Employer Obligations to Accommodate Breastfeeding

An employee (the grievor) was on maternity leave, and requested an extension in the leave to allow her to meet her breastfeeding needs. Instead of granting leave extension, the employer suggested that the grievor return to work, and she would be permitted to express milk during scheduled breaks or at lunch hour. The suggested accommodation was inadequate for the grievor, because she had a difficult breastfeeding history that required specific management. The arbitrator concluded that the employer failed to accommodate the grievor's breastfeeding requirements, and discriminated based on pregnancy-related circumstances.[80]

Example – Breastfeeding Right is Inherent in Grounds of Sex and Pregnancy

An employer forbade an employee to breastfeed her nine-month-old baby during noon-hour seminars that she was required to attend at her workplace, or to bring her baby to the workplace at all. When she protested the policy, she was reassigned to another ministry of the provincial government. It was held that restricting a woman employee to breastfeed her infant was unreasonable and qualified as sex (pregnancy) discrimination. Strictures against breastfeeding in the workplace were discriminatory based on sex, because only women breastfeed, and therefore, such limitations only affect women.[81]

4.0 Duty to Accommodate Pregnancy, and the Doctrines of BFR/BFQ and Undue Hardship

Employers, housing, and service providers have a legal duty to accommodate pregnant women, to enable these women to work to their full potential, and to avail housing and services without inconvenience. Accommodation of pregnant women should be undertaken in a way that best promotes their dignity, equality, inclusion, and individual situations.[82]

> Employers, housing and service providers have a legal duty to extend reasonable accommodation to pregnant women, and women in pregnancy-related circumstances.

The duty to accommodate extends to the furthest point possible, short of undue hardship. The onus is on the employer, housing or service provider to show that the pregnant employee, housing or service user was accommodated to the point of undue hardship.[83]

4.1 Examples of Accommodation of Pregnancy

- Assignment to alternate or light duties;[84]
- Flexible work schedules to allow pregnant employees to take medical appointments, tests or treatment;
- Changes in work location and or duties as requested or deemed suitable to the situation of the pregnant individual;

Example – Employers Must Provide Reasonable Accommodation

A pregnant woman who cleaned houses requested accommodation from her employer because she found it hard to clean floors and bathtubs on her hands and knees. The employer accommodated her on one occasion, but stated that she would lose her job if she failed to clean in the required manner in the future. The complainant obtained notes from her doctor, which said that she could work with modifications, but the employer did not schedule her for work again. According to the Tribunal, the employer's specific floor cleaning demand (on hands and knees instead of using a mop, for example) was not a bona fide occupational requirement, and the employer could have accommodated the woman's pregnancy without undue hardship.[85]

- Changes in work duties or shift schedule, or reduction of work hours, if requested by the pregnant employee;

Example – Failure to Accommodate Pregnant Employee

The respondent, a daycare owner, failed to accommodate the functional limitations of the complainant's pregnancy and terminated her instead; the complainant had requested that she

be exempted from lifting children heavier than 25 pounds, as she had hurt her back doing so and her doctor had advised against it.[86]

Example – Accommodating Reduced Hours Due to Pregnancy

A pregnant garbage truck driver informed her employer that she needed to reduce her work hours from 11.5 hours/day to 10 hours/day on the advice of her physician. Her employer seemed to accept this request, but later fired the employee for leaving her shift early. The Tribunal found that the employer failed to adequately accommodate the pregnant employee.[87]

- More breaks during the workday, as requested and arranged with the employee;
- Change or flexibility in shifts to allow pregnant employees to avail health-related activities or engagements, if they so request;[88]
- An appropriate place to sit and/or rest during breaks or at work;[89]

Example – Reasonable Accommodation Requests of Pregnant Employee

A pregnant customer service associate, who worked at the front counter of a health club, was required to stand for most of her shift. After she developed swelling in her feet and pain in the legs, she obtained a doctor's note that advised rest and sitting for parts of her shift. She requested the employer to put a stool behind the counter to allow her to sit between tasks, but the employer denied the request, stating that a stool behind the counter would cause safety issues. As a result, the employee was forced to ask for part-time hours. According to the Tribunal, the employer failed to accommodate the employee: the employer took no steps to measure the space behind the counter or test out a chair or stool; it did not review the doctor's note, or discuss possible accommodation options with the employee.[90]

- Time off in case of miscarriage, stillbirth or abortion;

Example – Employer Should Show Substantial and Plausible Accommodation

An employee suffered a miscarriage at work, and needed surgery to attend to its complications. She was absent for 3.5 days; upon returning to work, she was dismissed for excessive absenteeism and performance problems. The Tribunal did not find a pattern of absenteeism, except the doctor's appointments for pregnancy and the time off for the miscarriage. While there was some evidence of performance issues, the employer did not follow its progressive discipline policy, assess if performance was linked to the pregnancy, or evaluate accommodation needs. The pregnancy and its resulting circumstance were factors in the termination, and thus it was discriminatory.[91]

- Option to refuse supervisor requests for overtime work;
- Leave of absence without pay at employee's request;
- Other reasonable accommodations as and when requested, and in keeping with the circumstances of each individual situation.

Example – Collective Agreement Cannot Override Duty to Accommodate

A Customs Inspector at Toronto's Pearson Airport, experiencing a difficult pregnancy, requested transfer from rotational shift work to daytime duties on the advice of her physician. The employer refused the request for three months, and then transferred the inspector temporarily to a position of lower rank. After her child was born, the complainant again requested transfer to the day shift, to enable her to meet her childcare needs. Instead of adhering to the request, the employer agreed to grant her a period of unpaid leave. The Tribunal held that even though the collective agreement required Customs Inspectors to be available for rotational shifts, that did not exonerate the employer from providing reasonable accommodation to pregnant employees. The complainant was discriminated against based on sex (pregnancy) and family status.[92]

Accommodation is a collaborative process: pregnant women seeking accommodation have an obligation to provide sufficient information that allows respondents to understand their accommodation needs.

Example – Duty to Accommodate Includes Health and Safety of Pregnant Employee and Unborn Child

A pregnant employee, who worked as a spray painter at an industrial plant, requested transfer to an available position in the packing area of the facility, because her doctor expressed concern about her exposure to paint fumes. When the employers received her request along with the doctor's note, they placed her on involuntary leave for the duration of her pregnancy. The Tribunal's decision, which was upheld by the Divisional Court, concluded that the employer did not fulfill its duty to accommodate, which includes employer responsibility to safeguard the health and safety of both the pregnant employee and her unborn child. The employer's decision amounted to pregnancy discrimination.[93]

Example – Termination of Pregnant Employee Based on Performance

The employer documented his concerns about the employee's inadequate job performance: ongoing difficulties in completing colour treatments in a timely manner at the salon where she worked, and problems in interactions with clients, colleagues, and her supervisor. Prior to her termination, she was given three disciplinary letters addressing these problems in the six months that she was on the job. Under the given circumstances, even though the employee was terminated five days after she announced her pregnancy, the Tribunal found no nexus between the termination and the pregnancy. The documented record of performance concerns was credible, and the termination was non-discriminatory and based entirely on the complainant's job performance issues.[94]

4.2 Responsibilities of Pregnant Employees in the Accommodation Process

Pregnant employees must participate in the accommodation process; accommodation is a collaborative endeavor, and its success depends on effective communication and cooperation between the concerned parties.[95]

- Pregnant employees have a responsibility to inform the employer of their accommodation needs, so that employers understand the nature of the requested accommodation; this is especially true if the pregnant employee requires specific accommodation, the details of which the employer may have no way of knowing.

The employer's duty to accommodate, and the employee's duty to inform about the required accommodation exist in a fine balance; tribunals and courts scrutinize these respective duties on a case-by-case basis to arrive at findings of discrimination.

Employers should be vigilant about the accommodation needs of pregnant employees,[96] and pregnant employees should be equally clear in communicating their specific accommodation requirements.

For example, a Tribunal has stated: "If a woman is pregnant and requires accommodation in the performance of her job duties, it is her responsibility to come forward to request such accommodation. It is not the employer's role to question a pregnant employee about whether she can perform certain duties, particularly in the absence of an indication of any actual difficulty in performing such duties".[97]

> ***Example – Employee's Lack of Cooperation in the Accommodation Process***
>
> *A pregnant employee suffered pregnancy-related complications, and could not report to work as a result. The employer issued her Record of Employment, without asking the employee to clarify about her return to work or her need for further accommodation. The Tribunal found that the employer discriminated against the employee based on pregnancy; however, the Tribunal also noted that the complainant did not cooperate in the accommodation process: she did not inform the employer about her condition, and if or when she intended to return to work. Therefore, while damages were awarded for pregnancy discrimination, the damages amount was reduced because of the complainant's failure to participate in the accommodation process.*[98]

- To receive specific accommodations for individualized pregnancy-related needs, pregnant employees may be required to provide requisite medical documentation.
- The employer is not obligated to provide the employee's preferred accommodation, but is obligated to offer reasonable accommodation commensurate with human rights law, health and safety requirements, and acceptable employment practices.

Example – Employee Responsibility to Accept Reasonable Accommodation

The complainant became pregnant a few months after her promotion as head of a prestigious department of the employer's store. Previously, she had served as head of another department in the store. Before she commenced on maternity leave, the employer transferred her back to her former position, without loss of pay or benefits. The employer argued that it took the step to ensure year-long stability in the new department, and provide another employee with management experience. The Tribunal held that although pregnancy was a factor in the store's decision, and the employee's transfer therefore amounted to adverse effect discrimination, the employer had reasonably accommodated the employee. Consequently, the employee was now under a corresponding obligation to accept the store's accommodation by resuming her former position, instead of resigning her employment. An employee's duty to accept reasonable accommodation is similar to the duty to mitigate losses, which an employee does by accepting alternative employment, elsewhere or under the same employer.[99]

4.3 BFR/BFQ and Undue Hardship

To justify not hiring a woman because of pregnancy or pregnancy-related circumstances, or introducing a *prima facie* discriminatory rule or practice affecting a pregnant employee, an employer should show (after all reasonable accommodation measures have been exhausted) a *bona fide* requirement or qualification (BFR/BFQ) for the discriminatory practice.

Human rights law recognizes that "some hardship" is an aspect of accommodation; only "undue hardship" can justify an employer's refusal to accommodate pregnant employees.

Employers should be able to demonstrate clearly that pregnancy or pregnancy-related circumstances would create undue hardship for them. The BFR and undue hardship principle also extends to pregnancy-discrimination complaints in housing and services.

Human rights law recognizes that "some hardship" is an aspect of accommodation; only "undue hardship" can justify an employer's refusal to accommodate pregnant employees.

4.3.1 The Supreme Court of Canada on Undue Hardship

The Supreme Court of Canada has identified the following components of undue hardship, which should be balanced against the employee's right of protection from discrimination:

- Financial cost: the cost of the accommodation is too high and would alter the nature or viability of the employer's work or business;

- Serious health or safety risks: these risks (for workers, members of the public, or the environment) are so serious that they outweigh the requested accommodation;
- The employee's inability to perform essential duties of the job: however, employers should not presume that the pregnant employee would be unable to perform their

  duties; the decision should be made after an accurate, ethical, and individualized assessment;
- Disruption of a collective agreement;
- Problems of morale of other employees that seriously impact those employees' work and job functions; and
- Interchangeability of workforce and facilities.[100]

Other factors to consider when assessing if an employer has reached the point of undue hardship in accommodating an employee's pregnancy or pregnancy-related circumstance include:

> Employers should furnish direct, objective, and tangible evidence of undue hardship – vague, indistinct accounts of undue hardship are not recognized by human rights tribunals.

- The employer's previous efforts at accommodation;
- The nature and seriousness of the employee's performance or discipline issues;
- The employee's response and commitment to the accommodation process offered by the employer;
- The size of the workplace and availability of alternative work options; and
- The financial health of the employer's business.

The employer must provide direct and objective evidence of any of the above undue hardship factors. For example, to show excessive financial costs of accommodation, clear and quantifiable estimates should be presented, not just vague impressions about potential expenses.

To qualify as a BFR/BFQ, a rule, practice or policy adopted by an organization must pass the three-part Meiorin Test established by the Supreme Court of Canada: 1. The rule or action must be rationally connected to the job; 2. It must be adopted in good faith; and, 3. It must be reasonably necessary under the circumstances, so that without it the employer, housing or service provider would suffer undue hardship.[101]

Example – The Meiorin Test and Pregnant Employees

The complainant was hired as a live-in caregiver for two young boys. Shortly before beginning her employment, she told her employer that she was pregnant and suffering from nausea; she also revealed that she was emotionally distraught, because of relationship problems she was having with her boyfriend. Based on these reasons, the

employer decided not to hire her. Using the Meiorin Test, the Tribunal concluded that the potential employee was discriminated against because of her pregnancy. The employer

satisfied the first two parts of the test, but failed its third part: It was rational to presume that the woman may not be physically and emotionally fit to care for the young boys; the presumption was made in good faith; however, the employer made no attempt to address the employee's specific situation, or assess how he could accommodate her distinct circumstances without incurring undue hardship.[102]

Example – Employment Insurance and Undue Hardship

A BFR rule must be based on serious, reasonable, and objective considerations – it must be justifiable in the context where it is applied.

The Canadian Employment Insurance Act set a 30-week ceiling for special benefits (including maternity, sickness, and parental benefits), which were payable during any benefit period. It provided 15 weeks of maternity, 15 weeks of sickness, and 10 weeks of parental benefits. Due to her pregnancy, the complainant reached her benefit limit, and could not avail parental benefits after the birth of her child. The Tribunal rejected the employer's argument that the rule applied equally to men and women; in actual terms, only women were affected by the rule. Applying the Meoirin Test, the Tribunal found that the rule was rationally connected to the objective of providing short-term income replacement for eligible employees; it was applied in good faith; however, it was not reasonably necessary – the employer could not show that there was no alternative mode of accommodation short of undue hardship. The Tribunal asked the department (HRDC) to retire the rule within 12 months, and find other non-discriminatory means to accomplish its objective.[103]

- The onus is on the employer, housing or service provider to prove a BFR/BFQ for a *prima facie* discriminatory treatment of a pregnant person.

Example – Respondent's Burden to Prove BFR/BFQ

The complainant worked as a server at the respondent's sports bar; she had worked at the bar with the previous owners and was highly regarded as an employee. She was visibly pregnant when the respondent took over the business; he made disparaging comments about her appearance, and told his manager that he did not want a pregnant woman to represent the bar. Soon he started revamping the bar, and on pretext of increasing work efficiency, started reducing the shifts of all staff. The complainant's shifts, however, were cut more drastically than those of the other employees; because of reduced shifts and scheduling conflicts, she was sent home many times. Then she heard from coworkers that she was being dismissed, at which point she obtained legal advice and alleged constructive dismissal. The respondent argued that the reduction of shifts was a BFR, as it was required to reinvigorate the business and other employees were similarly treated. However, he could not show why the complainant's shifts were more adversely affected, so the BFR defense was disregarded. The Board held that the complainant had suffered adverse treatment due to pregnancy.[104]

- A BFR should proceed from serious considerations, and should be reasonable and justifiable in the context where it is applied.

Example – Requiring Employees to Have Attractive Physical Appearance Not a BFR/BFQ

The owner of a strip bar fired a waitress who worked there when she was four-months pregnant. The owner argued that it was a bona fide requirement of employment at these types of establishments for waitresses to look attractive and not be pregnant, because it could interfere with the enjoyment of the bar's patrons. The Board rejected the argument: it was based on sexist and stereotypical views about women's bodies, and was not a BFR. The owners were held to have discriminated against the waitress based on pregnancy.[105]

Example – Inconvenience is Not Undue Hardship

A senior teacher applied for a one-year position as Vice Principal; she had previously worked at that post with notable success. The school board, however, did not consider her application, because she would be on maternity leave for the first part of the term. The school board argued that appointing the teacher would disrupt the continuity and flow of administrative work at the school, which would result in undue hardship to them. The Alberta Court of Queen's Bench acknowledged that some inconvenience would have occurred had the teacher been hired, but accommodating her maternity leave would not have caused undue hardship to the school board. The teacher had been discriminated against based on pregnancy.[106]

Example – Only Disruption of Important Job Functions Qualifies as BFR

A police constable requested modification in her job duties during the latter weeks of her pregnancy. According to the Police Act, constables could not be assigned to lighter-than-normal duties even for short periods of time, and must be ready to perform all duties on every shift. The Board held that failure to provide light duties to pregnant constables was discriminatory, as it was not a BFR. The request for lighter duties triggered the police board's duty to accommodate. A BFR could only be pleaded if the police board could show that accommodating the complainant would seriously compromise its policing functions.[107]

- An employer should be able to show an objective basis for implementing a BFR, or a discriminatory measure or policy impacting pregnant employees.

Example – Demonstrating Objective Basis for a Discriminatory Policy

The owners of a metal processing plant restricted women employees from working in a certain area of the workplace, for fear that exposure to gas would harm them and their unborn children. After reviewing the nature of the metal processing operation, the Board concluded that the risk of exposure and consequent harm involved to mother and child was minimal. To establish that a prima facie discriminatory practice in employment is a BFR, the employer must show an "objective real need for the restrictive employment policy", and show that reasonable accommodation cannot be provided without undue

hardship. The employer's rule was not reasonably necessary for the protection of the foetus,[108] *or related objectively to the performance of job duties. Therefore, despite legitimate concerns for safety, the "small risk [did] not warrant blanket discrimination on the basis of sex", and denial of equality of opportunity in employment to all women. A test case on whether concerns about the foetus justify excluding women from a workplace or a certain job duty, the case established that each situation should be carefully assessed to prevent discrimination, taking into consideration "conflicting interests, claims, and values".*[109]

Example – Employers Must Show They Fulfilled Their Duty to Accommodate

The complainant was hired to participate in a two-year apprenticeship program at a hair salon. She received a positive performance review after three months, and no concerns were raised about her work. Soon afterwards, she became pregnant and informed her employer about the pregnancy. The smell of colouring products made her dizzy, so she requested modification in her schedule, which would allow her to stay away when colouring was being done at the salon. Instead of accommodating her request, the employer terminated her contract, citing performance problems: schedule change requests, interpersonal staff conflicts, failure to learn, and refusal to perform hair colouring. The Board concluded that the evidence did not substantiate the poor performance allegations. Even if working assigned shifts and using salon products could be established as a legitimate work-related purpose that was made in good faith, the employer made no attempt to accommodate the complainant's pregnancy, or demonstrate that accommodating it would impose undue hardship. The employer did not respond to the schedule modification request in a reasonable manner, and failed in its duty to accommodate. Pregnancy discrimination was established in the case.[110]

5.0 Pregnancy Discrimination in Housing and Services

Housing and service providers must not discriminate against pregnant women, women who are breastfeeding, and women with newborn babies, in the provision of housing facilities and public services.[111]

Housing and service providers have a duty to accommodate pregnancy and pregnancy-related conditions, unless they can plead a BFR/BFQ as defense, or show that accommodating a pregnant woman in the given circumstances would cause them undue hardship.

> Housing and service providers must not discriminate against pregnant women, women who are breastfeeding, and women with newborn babies – they have a legal obligation to accommodate these women to the point of undue hardship.

5.1 Examples of Pregnancy-Based Discrimination in Housing and Services

The following actions, practices or policies would be discriminatory under the *Act*, as it applies to housing and services:

- Evicting a woman from residential premises because she has become pregnant.

Example – Eviction of a Tenant for Pregnancy

A young woman shared a two-bedroom apartment with various roommates. The owners were aware of the arrangement, and she received their approval for each co-tenant. She was later involved with one of these co-tenants and became pregnant. When the superintendent found out she was pregnant, he asked her if she was "intending to give the baby up for adoption" and said that the owners "didn't want kids in the building." The Board found that the woman was discriminated against based on sex and family status, and evicted because of "her pending motherhood." The respondent's contention that other children resided in the building was inadequate, because it was not necessary to show discrimination against all members of a protected class to show discrimination against one individual.[112]

- Refusing rental accommodation or services to women with newborn babies.

Example – Refusal to Rent to the Mother of a Young Infant

The Tribunal found that a landlord discriminated on the basis of sex when he refused to rent an apartment to a pregnant woman, because he was concerned about his liability as a landlord should the baby fall down the stairs in the apartment building.[113]

- Forbidding customers or clients to breastfeed in public, or asking them to move elsewhere to breastfeed.[114]

Example – Breastfeeding in a Public Place

A mother, who was waiting in a courtroom to contest a parking ticket, began to breastfeed her infant son. The security guard asked her to leave the courtroom and nurse her son in a place where she would not be seen. The Tribunal ruled that the security guard's action was discriminatory based on pregnancy; the mother was in the courtroom to receive a public service, and was discriminated in the provision of that service.[115]

Example – Breastfeeding in a Service Location

The complainant nursed her child on an expensive chair in the respondent's antique shop. She was asked to relocate to a semi-private courtyard for the feeding. The complaint of discrimination was dismissed because, according to the Board, the complainant had no absolute right to sit in the store's chair, and the courtyard offered a suitable, comfortable, and semi-private alternative, in pleasant weather conditions.[116]

- Refusing rental accommodation or services to women because they are pregnant or likely to become pregnant.

Some landlords try to avoid having children on their premises – such policies are discriminatory based on sex, pregnancy, and family status.

Landlords might refuse renting to pregnant women on the pretext that an apartment is not "childproof". Or they might use other terms that are devised to exclude pregnant women or women with children, such as "quiet building", "adult lifestyle", "not soundproof", "geared to young professionals", etc.[117]

Using such labels in rental advertisements is discriminatory, and in violation of the *Act*, which prohibits the publication of discriminatory notices, signs etc.[118] In this context, it would be an example of reasonable accommodation on the part of housing or service providers, if they accommodated reasonable noise or discomfort associated with a newborn child or young infant.

- Using other ways to discriminate against pregnant women, or women of childbearing age, in housing and services.

Single mothers are particularly vulnerable to discriminatory treatment, especially if they are young, are receiving social assistance, have Aboriginal ancestry, belong to a racial minority, or are lesbian, trans or bisexual. These groups are often victims of vicious

Pregnancy Discrimination in Housing and Services

Stereotyping; they are stigmatized as irresponsible and unreliable, and as inadequate parents who are likely to default on their rent.

Behaviors, actions or policies based on such stereotyping are discriminatory under human rights law, as they flout fundamental human rights precepts of equality, dignity, and respect.

6.0 For More Information

For more information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301.

You can also visit the Commission's website at http://www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

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Endnotes

[1] *Human Rights Act*, R.S.N.B. 1973, s. 2.1 [*Human Rights Act*]. The category of sex in human rights statutes embraces different aspects related to sex, including pregnancy; other grounds of discrimination that have clear linkage to sex, like sexual orientation and family status, are separate categories in human rights codes. Sexual harassment is also a separate ground in most provincial codes, but is still included under sex discrimination in a few provincial jurisdictions.

[2] *Ibid.*, ss. 3-8.

[3] *Ibid.*, s. 2.

[4] *Alberta Hospital Association v Parcels* (1992), 17 CHRR D/167 (Alta. QB) [*Parcels*]: The Board determined that the duration of post-delivery period protected under human rights law would depend on the specific circumstances of the mother and the pregnancy in question.

[5] *Charbonneau v Atelier Salon & Spa*, 2010 HRTO 1736 (CanLII).

[6] *Wiens v Inco Metals Co. (1988)*, 9 CHRR D/4795 (Ont. Bd. Inq.) [*Wiens*]: Women of childbearing age were not employed in an area of the company's plant that had risk of accidental gas emissions; the employer was concerned that gas exposure could potentially harm a fetus. A woman who became pregnant, or intended to become pregnant, was transferred from the unit. The Board found the policy discriminatory because it put employment limitations on women of childbearing age.

[7] *Chohan v Dr. Gary W. Lunn Inc.,* 2009 BCHRT 448 (CanLII).

[8] *Ford v Adriatic Bakery,* 2010 HRTO 296 (CanLII) [*Ford*]: The employer argued that the employee was dismissed after her miscarriage; therefore, as she was not pregnant at the time of her dismissal, she did not experience pregnancy discrimination. The Tribunal rejected the argument, stating that miscarriage was included under circumstances of pregnancy. In *Tilsley v Subway Sandwiches* (2001), 39 CHRR D/102 (BCHRT) [*Tilsley*], an employee, who was in hospital because of a miscarriage, was fired for being absent from work. The Tribunal declared that discrimination because of miscarriage was a form of sex (pregnancy) discrimination. The employer had a duty to accommodate the employee's pregnancy and pregnancy-related circumstances, including miscarriage, to the point of undue hardship.

[9] *Poirier v British Columbia (Ministry of Municipal Affairs, Recreation and Housing)* (1997), 29 CHRR D/87 (BCCHR) [*Poirier*]: The decision in this case established that differential treatment meted out to a breastfeeding woman was a form of sex (pregnancy) discrimination.

[10] *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219 [*Brooks*]: A pregnant employee was denied sickness or disability benefits during her pregnancy, because the employer's sickness and accident plan disentitled pregnant women from these benefits during the seventeen-weeks that comprised their pregnancy period. If a pregnant employee suffered an aliment unrelated to her pregnancy during the seventeen weeks, she would be ineligible for sickness or disability benefits. The employer argued that pregnancy did not qualify as either sickness or accident, so its omission from the sickness and accident provisions was justified. Rejecting the employer's argument, the Supreme Court of Canada stated that pregnancy was a "valid health-related reason for absence from the workplace" and should not be treated differently from other health-related absences from work; its exclusion from the plan was thus discriminatory. This landmark judgement overruled the Supreme Court's ruling in the Bliss case (note 11).

[11] *Bliss v Canada (Attorney General) (1978)*, [1979] 1 SCR 183: According to Section 46 of the then *Unemployment Insurance Act*, pregnant employees were entitled to pregnancy benefits for eight weeks before and six weeks after confinement, but employees were required to have a prior period of 10 weeks

of insurable employment to qualify for the pregnancy benefits. Also, during these 15 weeks, women could only claim pregnancy benefits and could not claim ordinary benefits, because it was assumed that they would be unavailable or incapable of working during this period. The complainant had worked long enough to claim ordinary benefits, but not long enough to qualify for pregnancy benefits, with the result that she was denied both benefits during her confinement period. Section 46 of the *Unemployment Insurance Act* was challenged for violating the "Equality before the Law" provision of Paragraph 1(6) of the now superseded *Canadian Bill of Rights*. The Supreme Court of Canada held that section 46 did not contravene the principle of equality before the law: it was enacted by parliament's legislative authority, and the *Unemployment Insurance Act* conferred other benefits on women which balanced the said provision. As mentioned in note 10, this ruling was overturned in the Brooks case.

[12] *Brooks*, *supra* note 10 (D/6194 and D/6198).

[13] *Ibid*.

[14] To establish discrimination, the complainant must show that there is more probability that discrimination occurred. *Peel Law Association v Pieters*, 2013 ONCA 396 (para. 83).

[15] *Despres v The Crossbar Inc. (No. 1)*, 2015 HRTO 1624, CHRR Doc. 15-2124 (para. 27) [*Despres*].

[16] *Wratten v 2347656 Ontario Inc*, 2015 HRTO 1041 (CanLII): The employer cited performance issues and "legitimate business reasons" for terminating a pregnant employee, but the Tribunal found no credible evidence of these claims and concluded that pregnancy was a factor in the termination decision. In *Dhillon v Planet Group*, 2013 BCHRT 83 (CanLII), the Tribunal acknowledged that the employer's decision to terminate a pregnant employee was motivated in part by performance issues, but her pregnancy was also a factor in the decision. Similarly, in *Guay v 1481979 Ontario Inc. (No. 3)*, 2010 HRTO 1563, the Tribunal concluded that despite the employee's performance issues, her pregnancy was a significant factor in her termination. See also: *Vestad v Seashells Ventures Inc*. *(2001)*, 41 CHRR D/43 (BCHRT) (para 39); *Rhode v Kamloops Society for Community Living*, 2005 BCHRT 41.

[17] *King v S.P. Data Capital*, 2012 HRTO 500 (CanLII) [*King*]. See also: *Sloan v Just Energy Corp. (No. 2)*, 2012 HRTO 127 (CanLII).

[18] *Rice v Brehon Agrisystems Inc*., 2012 SKQB 229 (CanLII).

[19] *Baker v Crombie Kennedy Nasmark Inc.*, 2006 AHRC 4 (CanLII).

[20] *Century Oils (Canada) Inc. v Davies,* [1988] BCJ No. 118 (BCSC). See also: *Dorvault v Ital Décor Ltd. (No.3)*, 2005 BCHRT 148, 52 CHRR D/136.; *Young v 633785 B.C. Ltd.*, 2004 BCHRT 135, CHRR Doc. 04-264.; *Maciel v Fashion Coiffures Ltd. (No.3)*, 2009 HRTO 1804, CHRR Doc. 09-2373.

[21] *United Nurses of Alberta, Local 115 v Calgary Health Authority,* [2004] A.J. No. 8 (C.A.). See also: *Gilmar v Alexis Nakota Sioux Nation Board of Education*, 2009 CHRT 34 [*Gilmar*].

[22] *Gilmar*, *supra* note 21.

[23] *de Lisser v Traveland Leisure Vehicles Ltd.*, 2009 BCHRT 36, CHRR Doc. 09-0190; *Magee v Warner Lambert Canada* (1990), 12 CHRR D/208 (BCHRC).

[24] *Kern v Human Resources Capital Group Inc.*, 2011 HRTO 144.

[25] *Richards v 905950 Ontario Ltd*., 2015 HRTO 517, CHRR Doc. 15-1017: In this case, the employer reduced the hours that a part-time daycare worker was contracted to work every week, after she became pregnant and needed time off for medical examinations and sickness during her first trimester.

[26] *Dance v ANZA Travel Ltd. (No.3)*, 2006 BCHRT 148, CHRR Doc. 06-235.

[27] *Ong v Poya Organics & Spa Ltd.,* 2012 HRTO 2058: The employer terminated the employee one day after she disclosed her pregnancy. See also: *Ballendine v Wiloughby (No.5)*, 2009 BCHRT 33 [*Ballendine*]; *Johnston v Poloskey*, 2008 BCHRT 55.

[28] *Kooner-Rilcof v BNA Smart Payment Systems and another*, 2012 BCHRT 263 (CanLII).

[29] *Su v Coniston*, 2011 BCHRT 223.

[30] *Tilsley*, *supra* note 8 (para. 33).

[31] *Sidhu v Broadway Gallery* (2002), 42 CHRR D/215 (BCHRT).

[32] *Policy on Preventing Discrimination Because of Pregnancy and Breastfeeding*. Ontario Human Rights Commission, 2014 (p. 36) [*Ontario Policy*].

[33] *Shinozaki v Hotlomi Spa*, 2013 HRTO 1027 [*Shinozaki*].

[34] *Graham v 3022366 Canada Inc.*, 2011 HRTO 1470 (CanLII) [*Graham*].

[35] *Brown v PML and Wightman (No. 4)*, 2010 BCHRT 93 (CanLII) [*Brown*].

[36] *Graham*, *supra* note 34.

[37] *Ibid*.

[38] *Korkola v Maid Day! Maid Day! Inc.,* 2013 HRTO 525 (CanLII) [*Korkola*].

[39] *Ibid*.

[40] *Bickell v The Country Grill (No.4)*, 2011 HRTO 1333 (CanLII): A pregnant waitress was discriminated against when her shifts were reduced and she was eventually dismissed from her employment. The employer commented that she was getting "too big to do the job", even though she had a doctor's note stating she could still work. The Tribunal noted that the employer dismissed the waitress when her pregnancy became visibly noticeable – a classic example of pregnancy discrimination.

[41] *Graham*, *supra* note 34.

[42] *Gareau v Sandpiper Pub (2001)*, 39 CHRR D/295, 2001 BCHRT 11 (BCHRT). In *Duxbury v Gibsons Landing Slo-Pitch League (1997)*, 28 CHRR D/441 (BCCHR), the complainant was expelled from a baseball league under the pregnancy rule, which disallowed pregnant women from participating "for reasons of safety and possible detrimental effect such participation may have on other players' performance". The complainant was seven-months pregnant at the time of her exclusion, but the Council argued that the league had "failed to show a sufficient degree of risk to [the complainant] or her unborn child to justify her exclusion under the pregnancy rule". See also: *Nguyen v Pacific Building Maintenance Ltd. (1991)*, 15 CHRR D/472 (Sask. Bd. Inq.).

[43] *Peart v Distinct HealthCare Services Inc*., 2013 HRTO 305 (CanLII) [*Peart*]: The Tribunal found that the employer's perception that the applicant was using her pregnancy as an excuse not to work was a factor in terminating her employment.

[44] *Ford*, *supra* note 8.

[45] *Gilmar*, *supra* note 21.

[46] *Phillips v Distinctive Vertical Venetians Mfg. Ltd.* (2006), CHRR Doc. 06-853 (Sask. HRT) [*Phillips*]: The Tribunal ruled that the onus is on the employer to clarify if there is confusion whether an employee would return to work after maternity leave.

[47] *Peart*, *supra* note 43: The employer expressed concern about a pregnant employee's appearance (a manager commented that she was "looking big") and way of dressing; she was advised to proceed on early maternity leave, and later terminated. *McKenna v Local Heroes Stittsville*, 2013 HRTO 1117 (CanLII): The owners of this sports bar cut the shifts of a pregnant employee because her physical shape and dress did not match the sexually attractive image they wanted female employees to project. See *Shinozaki*, *supra* note 33, for similar stereotyping of pregnant women's bodies, which is discriminatory under human rights law.

[48] *Shinozaki*, *supra* note 33.

[49] In *King*, *supra* note 17, the Tribunal noted that comments about a woman's excessive eating or frequent use of the washroom relate to physical effects of pregnancy, and could be adduced as evidence of pregnancy discrimination. In this case, however, the complainant could not establish that such comments were made.

[50] *Ballendine*, *supra* note 27: An employer terminated a pregnant employee because he did not approve her relationship with her partner, and was worried about its impact in the workplace. *Johnston v Poloskey* (2008), CHRR Doc. 08-079, 2008 BCHRT 55: A pregnant employee was terminated because she was not married to her common-law partner. In an early case (*Bird v Ross (1987)*, 9 CHRR D/4531 (Sask. Bd. Inq.)), which involved an employment decision based on moral judgement, an employer dismissed the complainant after learning that she had undergone an abortion. The Board concluded that the dismissal amounted to sex discrimination: the employee had undergone a legal abortion in accordance with the criminal code, which allowed abortion of pregnancies that posed danger to the mother's health.

[51] *Lougheed v Little Buddies Preschool Centre (No. 1)*, 2015 HRTO 909, CHRR Doc. 15-1409 [*Lougheed*].

[52] *Chan v Tai Pan Vacations Inc.*, 2009 HRTO 273 (CanLII).

[53] In *Kelly v Nova Scotia Liquor Corp., (2015)*, 80 CHRR D/408 (NS Bd. Inq.), a pregnant employee in a male-dominated workplace was subjected to snide remarks about her pregnancy, held to higher performance standards and more rigid criticism than her male peers, and deprived of support and direction for a development plan.

[54] *Despres*, *supra* note 15.

[55] *Szabo v Dayman*, 2016 MBHR 2 (CanLII): "However, even where an employer knows that an employee is pregnant, the employer may nonetheless terminate the employment without contravening the *Code*, provided that the pregnancy or circumstances related to the pregnancy do not inform any part of the decision to terminate the employee's employment" (para. 19).

[56] *Pelchat v Ramada Inn and Suites (Cold Lake),* 2016 AHRC 11.

[57] *Brooks, supra* note 10.

[58] *Brooks, supra* note 10: Pregnant employees who are absent from work for health-related reasons caused by their pregnancy must not be treated differently from employees who are absent for other health-related reasons.

[59] *Parcels, supra* note 4.

[60] *Ibid*.

[61] *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 43.

[62] *Ibid.,* s. 44.02.

[63] As early as 1954, an arbitrator suggested that just as employees are entitled to family bereavement leave, they should not be arbitrarily denied childbirth leave. *U.E., Local 504 v Canadian Westinghouse Co.* (1954), 5 LAC 1824.

[64] *Lavoie v Canada (Treasury Board) (No. 2) (2008)*, 2008 CHRT 27.

[65] *Quilty-MacAskill v Community Justice Society*, 2013 CanLII 33709 (NS HRC).

[66] *Henderson v Marquest Asset Management Inc*., 2010 CanLII 34120 (ON LRB).

[67] *Brown*, *supra* note 35.

[68] *British Columbia Teachers' Federation v British Columbia Public School Employers' Association, 2014 SCC 70, [2014] 3 SCR 492.*

[69] *Saskatchewan Government and General Employees' Union v Mobile Crisis Services Inc. (Kochar Grievance)*, [2013] SLAA No. 22.

[70] *Parry v Vanwest College Ltd.*, 2005 BCHRT 310, 53 CHRR D/178.

[71] *Germain v Groupe Major Express Inc.*, 2008 CHRT 33, CHRR Doc. 08-468.

[72] *Kung v Peak Potentials Training (No.3)*, 2010 BCHRT 41, CHRR Doc. 10-0328.

[73] *Phillips*, *supra* note 46.

[74] *Cole v Bell Canada*, 2007 CHRT 7, 60 CHRR D/216 [*Cole*].

[75] *Poirier*, *supra* note 9.

[76] *Cole*, *supra* note 74.

[77] *Ibid*.

[78] *Ontario Policy*, *supra* note 32 (p. 7).

[79] *Valle v H&M Hennes & Mauritz Inc.*, 2008 BCHRT 456, CHRR Doc. 08-1046 [*Valle*].

[80] *Carewest v Health Sciences Association of Alberta (Degagne Grievance)* (8 January 2001), [2001] AGAA No. 2.

[81] *Poirier*, *supra* note 9.

[82] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

[83] *Gourley v Hamilton Health Sciences*, 2010 HRTO 2168 (CanLII): "It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship" (para. 8).

[84] *Lord v Haldimand-Norfolk Police Services Board* (1995), 23 CHRR D/500 (Ont. Bd. Inq.) [*Lord*]: A police officer requested light duties for the last stages of her pregnancy. The Police Service had a "no modified duties" policy, so her request was denied. The Board ruled that the "no modified duties" policy adversely affects pregnant women as it fails to recognize their special needs. See also: *Hoyt v Canada National Railway Co. (No.2)*, 2006 CHRT 33; *Emrick Plastics v Ontario (Human Rights Commission)* (1992), 16 CHRR 300 (Div. Ct.).

[85] *Korkola*, *supra* note 38.

[86] *Watters v Creative Minds Childrens Services LTO Daycare (No. 3)*, 2015 HRTO 475, CHRR Doc. 15-0975.

[87] *Stackhouse v Stack Trucking Inc. (No. 2)*, 2007 BCHRT 161.

[88] *Leeder v Alisa Japanese Restaurant*, 1999 BCHRT 1 (CanLII): The complainant, a waitress at a restaurant, was dismissed when she requested shift adjustments to attend prenatal fitness classes to help with her pregnancy.

[89] *McIntosh v Shami*, 2006 BCHRT 527, CHRR Doc. 06-720: The Tribunal ruled that the employer failed to accommodate the employee's pregnancy by not providing her a place to sit and rest at her workplace. See also: *Williams v Hudson's Bay Co. (No.2)*, 2009 HRTO 2168, CHRR Doc. 09-2818.

[90] *Purres v London Athletic Club (South) Inc.,* 2012 HRTO 1758.

[91] *Osvald v Videocomm Technologies Inc. (No. 1)*, 2010 HRTO 770 (CanLII).

[92] *Brown v Minister of National Revenue (Customs and Excise) (1993),* 19 CHRR D/39 (CHRT).

[93] *Heincke v Emrick Plastics (1990),* 14 CHRR D/68.

[94] *Fleming v Salon 130 Inc*., 2015 HRTO 743, CHRR Doc. 15-1243. In *Cieslinski v Aon Reed Stenhous Inc. (No. 2)*, 2015 HRTO 644, the Tribunal agreed with the employer that pregnancy, maternity leave, or reprisal were not factors in the employee's termination. There were performance concerns about the employee, and four poor performance incidents were on her file. The employer was also restructuring the business, and the employee had sought a significant salary increase, which was outside her regular compensation cycle and not warranted by the employer's budget constraints or the employee's job performance. See also, *Blatz v 4L Communications Inc. (No. 2)*, 2015 MBHR 2, CHRR Doc. 15-3050: The respondent was found to have plausible reasons unrelated to pregnancy for the termination of the complainant's employment. In *Comeau v Community Solutions Ltd.*, 2010 HRTO 1391, the Tribunal relied on performance logs produced by the employer to substantiate the employer's claim of ongoing performance issues.

[95] *Lougheed*, *supra* note 51: "The law regarding the duty to accommodate clearly establishes that all parties to the accommodation process have obligations. An individual seeking accommodation, for example, is responsible for initiating the process by stating the need for accommodation. The duty to accommodate is a cooperative duty and requires the applicant, who is seeking accommodation, to provide sufficient

information to allow the respondents to understand the nature of the request. The duty to accommodate would require, at the least, the party seeking accommodation to act in a reasonable and cooperative manner" (para. 43).

[96] For example, in *Turnbull v 539821 Ontario Ltd*. (*cob Andre's Restaurant*), [1996] OHRBID No. 20 [QL], the Board found that because the employee's pregnancy was visibly impacting her capacity to work, the employer's duty to accommodate was triggered, even though the employee had not requested specific accommodation.

[97] *Vaid v Freeman Formal Wear*, 2009 HRTO 2273 (para. 23).

[98] *Gonneau v Dennninger*, 2010 HRTO 425.

[99] *Bonetti v Escada Canada Inc. (1995),* 25 CHRR D/148 (BCCHR).

[100] *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 (CanLII) (paras. 62-64).

[101] *British Columbia (Public Service Employee Relations Commission) v B.C.G.S.E.U.*, [1999] 3 SCR 3.

[102] *Mazuelos v Clark*, 2000 BCHRT 1, 36 CHRR D/385.

[103] *McAllister-Windsor v Canada (Human Resources Development) (2001)*, 40 CHRR D/48 (CHRT).

[104] *Lipp v Maverick's Sports Lounge*, 2014 BCHRT 199 (CanLII).

[105] *Middleton v 491465 Ontario Ltd*. *(1991)*, 15 CHRR D/317 (Ont. Bd. Inq.).

[106] *Woo v Alberta (Human Rights and Citizenship Commission)*, 2003 ABQB 632, 49 CHRR D/510.

[107] *Lord*, *supra* note 84.

[108] Rights of the unborn child to freedom from discrimination remains an unexplored area in human rights, attaching ethical, medical, and legal questions, including the meaning of "person" in the context of human rights law. Walter Tarnopolsky and William Pentney. *Discrimination and the Law*. Toronto: Thomson and Carswell, 2004 (8-63).

[109] *Wiens*, *supra* note 6: The Board stated that discrimination based on "female reproductive capacity, whether it relates to pregnant women or to women with the potential to become pregnant, should be classed as *prima facie* discrimination on the basis of sex" (D/4811).

[110] *LaCouvee v Alchemy Studios and another*, 2013 BCHRT 126 (CanLII).

[111] *Human Rights Act*, *supra* note 1, ss. 5-6.

[112] *Peterson v Anderson* (1992), 15 CHRR D/1 (Ont. Bd. Inq.).

[113] *Segin v Chung*, 2002 BCHRT 42, CHRR Doc. 02-0223.

[114] *Valle, supra* note 79.

[115] *Quebec (Commission des droits de la personne et des droits de la jeunesse) et Giguère c Montréal (Ville)*, 2003 QCTDP 88, 47 CHRR D/67.

[116] *Morriseau v Wall (2000)*, 39 CHRR D/422 (Man. Bd. Adjud.).

[117] *Ontario Policy*, *supra* note 32 (p. 42).

[118] *Human Rights Act*, *supra* note 1, s. 7(1).