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Discrimination against pregnant employees in Canada (1988--2000).

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DISCRIMINATION AGAINST PREGNANT EMPLOYEES IN CANADA (1988-2000)

By

Andrew Wingate

A Thesis

**Submitted to the Faculty of Graduate Studies and Research
through the Faculty of Business Administration
in Partial Fulfillment of the Requirements for
the Degree of Master of Business Administration at the
University of Windsor**

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2000

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Abstract

This thesis offers an analysis of the topic of discrimination against pregnant employees in Canada in the period between 1988 and 2000. 1988 was chosen for the starting point for this study in order to update a comprehensive article published in 1990 that covered developments up to this date. In updating the research presented in this earlier article, this thesis focuses on the development of the topic in the legal setting. It offers an analysis of the Canadian public policy environment as it relates to the topic, along with a detailed analysis of related cases that were heard during the studied period. These cases include those heard by both human rights tribunals and labour arbitration boards. This case analysis offers insight into how public policy has been interpreted by legal bodies and the kinds of problems that have been arising in the Canadian workplace. In order to create a more global understanding of this topic, this thesis also presents a general overview of the topic on an international level. By doing all of this, this thesis aims at offering recommendations and conclusions about what employers should be aware of in regards to their pregnant employees. Most importantly, while updating conclusions created in the earlier article and creating new ones, this thesis' key recommendation is that employers stay aware of developments that have taken place in order to be sure of their requirements and responsibilities. In developing this recommendation, this thesis offers employers insight into what they need to be aware of and how they can go about ensuring that they meet and exceed their requirements.

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Introduction

There is no question that one of the most important trends in both Canadian society and the Canadian workplace during the closing decades of the twentieth century has been the increasing participation of women in the labour force. Women's representation in the labour force has grown substantially and women now occupy a more prominent position. Although traditional role stereotypes still persist in various forms, the makeup of today's workforce illustrates a move away from the male breadwinner-domestic female family role structure. This evolution has not only had dramatic effects on women's societal roles, but it has changed the structure and outlook of the Canadian workforce. Most importantly perhaps, the increased participation and importance of women in the workforce has thrust issues relating to workplace equality, harassment and discrimination into the spotlight.

Despite these developments, the road towards total equality is still a long one, as many problems continue to disadvantage women and limit their opportunities. Improvements that have allowed for increased women's participation have not necessarily been accompanied by improvements in other areas of workplace equality. To illustrate the inequalities that women face, commentators often point to disparities in wages, and in Canada, women's wages are a telltale sign of the inequalities that continue to exist. For instance, despite the fact that female enrollment in Canadian university undergraduate programs exceeds that of men, female graduates earn only 75% of male

graduates' wages.¹ In later years, this disparity continues to exist as Canadian women working in full-time positions make only 73.4% of comparative males' wages, which amounts to a difference of over \$10,000 per year.² Women not only face lower wages for the paid work that they do, but the unpaid work that they do is also undervalued and unrecognized. In Canada, 1992 calculations show that unpaid work, which Canadian women do approximately two-thirds of, was comparable to between 32 and 54.2% of Canada's GNP, yet continues to remain largely unrecognized.³ Statistics such as these serve as indicators of the underlying problems that exist and how these problems work to undermine the perceived value of women's contributions to society. It is quite clear that despite the improvements that have taken place, women continue to face significant barriers in their working lives.

Canadian trends can be viewed as a part of larger international developments. As in Canada, women around the world have become increasingly involved in the labour force. This increase has also resulted in improved social protection and equality measures relating to issues such as pay, benefits, leave, harassment and discrimination. These developments have been accompanied by an increase in the attention that women have received in theoretical discourse regarding human rights, as issues relating to women's rights in employment have taken on a more prominent role in international discussion. Rather than being considered as a separate entity, women's rights are increasingly being viewed as an integral component of international human rights, which implies more of a mainstream inclusion.⁴ Nevertheless, despite

these advances, women continue to face a range of inequalities relating to their working lives, including harassment, discrimination, and unequal access to opportunities, advancement, and compensation. These kinds of problems have been internationally recognized as barriers in the way of improving the condition of women in general.⁵

Nowhere perhaps have women's difficulties relating to employment been made more clear than in the experience of pregnant employees. This is the area in which many women feel the full brunt of workplace inequalities for the first time and where their biological role affects them the most negatively. Although both in Canada and internationally social protection programs have improved, women are still penalized for their maternal responsibilities in terms of employment and career opportunities. Canadian women have been negatively affected by problems such as terminations, the loss of benefits, demotions, and the lack of career and employment opportunities as a result of pregnancies. These problems speak to the fact that it has been very difficult for women to reconcile their family and career responsibilities. Although liberal in many respects and far in advance of many countries, Canadian society and employers still have some way to go to ensure that women are not paying an unequal price for their role in the procreation process that serves to benefit all of society.

It is clear that the topic of discrimination against pregnant employees involves a range of diverse and multifaceted issues that often go to the root of societal problems. Nevertheless, a first step towards ensuring that necessary changes continue to take place is the creation of an environment in which the

issue is understood. Most importantly perhaps, employers must not only understand their legal responsibilities and how they are evolving, but they must also understand the extent of the problems that women face in their careers as a result of pregnancy. A full understanding necessarily involves the perspectives of all those involved, including legal bodies, governments, employers and employees. With this in mind, this thesis has a primary goal of presenting the issue of discrimination against pregnant employees as it stands in Canada today, in legal, social and emotional terms.

In order to understand current developments in this regard, it is important to understand how the issue has developed in the past. The most recent detailed study dedicated to this topic was published in 1990 as an article in the *Journal of Business Ethics* entitled "Discrimination Against Pregnant Employees: An Analysis of Arbitration and Human Rights Tribunal Decisions in Canada".⁶ This article offers an analysis of public policy, human rights boards of inquiry cases and labour arbitration cases as they related to discrimination against pregnant employees in the period prior to 1988. Although several studies published since this article have included discussion of this issue, this article offers one of the clearest and most succinct overviews of the topic in the pre-1988 period. With this in mind, this article will stand as a structural and informational base for the information and analysis that will be offered in this thesis.

In the twelve years that have passed since 1988, this issue has remained important and has gone through some evolution. This has not only played out in

many more relevant human rights and labour arbitration cases, but it has also led to changes in public policy and in employer responsibilities. By analyzing these developments, this thesis will work to create a snapshot of the current public policy environment as it relates to this issue. It will also illustrate how these policies have been interpreted in human rights and labour arbitration cases to define employee and employer responsibilities. To create a base of understanding, information from the first article will be incorporated into the discussion of modern developments so that it is clear how the issues have evolved over time. In this way, a key aim of this thesis is to update this research by offering an analysis of the issue in the past twelve years. This thesis will serve to create an awareness and understanding of the intricacies of the issue, which is one of the first steps towards ensuring that positive change continues to take place.

In order to do all of this, this thesis will consist of 5 chapters:

The first chapter will focus on presenting the public policy environment as it relates to discrimination against pregnant employees. It will begin with a discussion of the Canadian Charter of Rights and Freedoms and human rights codes from all jurisdictions, which will be used to illustrate the fundamental rights that all Canadians have and how these rights relate to pregnant employees specifically. The chapter will then go on to discuss legislation from both federal and provincial jurisdictions that contain specific policies relating to pregnant employees. This legislation includes the Canada Labour Code, employment standards acts, occupational health and safety acts and workers' compensation

acts. Again, the focus will be on how this legislation specifically relates to pregnant employees with emphasis on policies such as benefits, leave and protection.

In order to understand how this public policy environment has been created and applied, the two chapters to follow will offer detailed analysis of relevant cases. Chapter 2 will contain both quantitative and qualitative analysis of relevant human rights tribunal cases in Canada as published in the *Canadian Human Rights Reporter* between 1988 and the present. Although all cases are not published, studying this source allows for an understanding of how this issue has developed in the courts. By analyzing the nature of the complaints being made, the details of individual cases, along with how boards have perceived and decided on these issues, it will be possible to create conclusions about how the issue is evolving in both the workplace and in a legal setting.

Chapter 3 will contain an analysis of relevant labour arbitration cases in Canada as published in *Labour Arbitration Cases* between 1988 and the present. Studying these cases also allows for a deeper glimpse into current workplace practices and developments, but it does so from a different perspective than the human rights cases. While human rights boards concern themselves with applying the law, labour arbitration boards are interested in applying collective agreements. Studying labour arbitration cases therefore allows for an understanding of how this issue has developed in relation to unionized workplaces. It can also shed light on the kind of policies and standards that have developed, and how these elements have been viewed by different boards,

which is important for employers to understand. Again, key trends, developments and decisions will be analyzed and described using quantitative and qualitative analysis.

The fourth chapter will take the information presented in the previous two chapters and work to compare and contrast human rights and labour arbitration cases with the aim of illustrating similarities and differences. This analysis will allow for an understanding of how the issue is treated in both situations, which has implications for both employers and employees. Cases will be compared using issues such as the nature of complaints made, the kinds of evidence and information that boards or adjudicators are willing to consider and the character of remedies offered. The remedies offered in both human rights and labour arbitration cases are an important part of this analysis, as they relate to the powers that each board or adjudicator has, along with the kind of solutions that they have deemed appropriate.

While the four preceding chapters will offer a strictly Canadian perspective on this topic, the fifth and final chapter will take a more global focus by presenting an overview of international developments. This focus will not only allow for an understanding of how this issue has developed on an international scale, but it will also create more detailed context for understanding where Canada stands internationally. The chapter will begin with an overview of general international developments that relate to women and the workplace. It will go on to discuss the international attention that the issue of pregnant employees has received, including a discussion of the international legislation that exists relating to the

topic. The chapter will go on to illustrate how this legislation has been applied by analyzing international policies as they relate to issues such as maternity leave and benefits.

The conclusion will begin with an overview of the thesis by summing up the key developments and trends that have taken place both within Canada and internationally. Based on these developments, the conclusion will offer recommendations and conclusions regarding employee and employer responsibilities. The emphasis will be clearly placed on what managers must be aware of in terms of requirements and responsibilities. This discussion will also be related to international developments so that employers have a larger context on which to base their action and decisions. It is the aim of this thesis to create an understanding of the position of pregnant employees in today's Canadian and international workforce. An understanding of what has been done, what is being done, and what can be done, is a first step towards ensuring that positive change will continue in the future.

Method of Analysis

As discussed, this thesis analyzes cases that relate to pregnancy discrimination as published from 1988 to 2000 in the *Canadian Human Rights Reporter* and in *Canadian Labour Arbitration Cases*. All published cases related to discrimination against pregnant employees have been studied, which include 49 human rights cases and 31 labour arbitration cases. It must be noted that because all cases are not published, it cannot be claimed that the cases studied are completely representative of all cases.

Endnotes

¹ **Cecilia Benoit, Women, Work and Social Rights: Canada in Historical and Comparative Perspective, (Scarborough: Prentice-Hall Canada, 2000), p.74.**

² **ibid., p.73.**

³ **ibid., p.92.**

⁴ **Hilary Charlesworth, "General Introduction", Women and International Human Rights Law, Volume 1, (New York: Transnational Publishers, Inc., 1999), p.xix.**

⁵ **Aileen McColgan, Women Under the Law, (London: Longman, 2000), p.136.**

⁶ **Palaniappan Andiappan, Martha Reavley and S. Silver, "Discrimination Against Pregnant Employees: An Analysis of Arbitration and Human Rights Tribunal Decisions in Canada", Journal of Business Ethics 9 (1990), pp.143-149.**

Chapter 1- Public Policy

As discussed in the introduction, this chapter will offer an overview of the Canadian public policy environment as it relates to pregnant employees. This environment is a multifaceted one, which involves various jurisdictions and a range of relevant legislation. This chapter aims at working through these complexities and presenting a straightforward overview of both the general and specific legislation that relates to pregnant employees. It will begin with a general discussion of the Charter and human rights acts and how they apply to women generally and pregnant employees specifically. The chapter will discuss relevant pieces of national and provincial legislation, including the Canada Labour Code, employment standards acts, occupational health and safety acts and workers' compensation acts. Emphasis will be placed on the kinds of standards and levels of protection that they offer pregnant employees, specifically relating to issues such as maternity leave and benefits. The goal is to create a general understanding of the legislation and standards that exist and what they mean for pregnant employees.¹

Canadian Charter of Rights and Freedoms

The first two sections of this chapter will discuss the Canadian Charter of Rights and Freedoms and the human rights codes that exist in all Canadian jurisdictions. The Canadian Charter of Rights and Freedoms is a component of the Constitution, which was presented in the Canada Act of 1982. The rights

contained in the Charter are the most fundamental rights that Canadians have, and that no government or legislation can violate. These rights include basic freedoms along with democratic, mobility, legal, equality, linguistic and aboriginal rights.² The basic equality rights that the Charter provides are described in section 15, which contains the key premise: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".³ In section 28, it is made clear that these rights, along with all others in the Charter, apply equally to male and female Canadians: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".⁴ Although sections 15 and 28 make a clear statement on the rights that Canadians are entitled to, they do not strictly prohibit discrimination. Section 1 of the Charter states that these rights are "subject...to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".⁵ These are the basic equality rights that the Charter provides.

As is the case with all legislation, regardless of the specific wording of the Charter, it is not guaranteed that its protections can be enforced for all Canadians. The Charter's jurisdiction only applies to government actions and not the actions of private individuals. This limitation has been made even more stringent by the Supreme Court's narrow interpretation of what government is.⁶ More importantly perhaps, even when a certain action falls under the Charter's

jurisdiction, it has limited powers to ensure that these actions cease. The Charter does not have the power to force governments to protect Canadians' rights, in that it does not require them to enact legislation or create programs.⁷ These kinds of limitations have lessened the effect that the Charter has had on protecting disadvantaged Canadians.

These limitations clearly apply to pregnant employees. Legislation or government action that serves to discriminate against pregnant employees would be a violation of the Charter. As a result of the Charter's jurisdiction, which does not apply to the market, its ability to protect pregnant employees is limited.⁸ Because of this jurisdiction, the Charter does not prohibit employers from discriminating due to pregnancy. At the same time, although section 15(2) includes discussion of the permissibility of affirmative action, the Charter cannot force employers to implement affirmative action programs. More importantly perhaps, although the Charter requires that pregnancy discrimination be included in sex discrimination (the developments leading to this will be discussed in the next chapter), it does not require federal or provincial governments to create legislation that prohibits pregnancy discrimination. The combination of these limitations means that the Charter has limited relevance to pregnant employees.

Human Rights Codes

It has been argued that some of the jurisdictional and enforcement gaps in the Charter are filled and corrected by the existence of human rights legislation.⁹ Unlike the Charter, human rights codes in each of Canada's jurisdictions apply to

private bodies and individuals rather than just governments. These codes prohibit discrimination in all areas of employment, and in these ways offer more protection to disadvantaged groups such as pregnant employees. Although this legislation takes less precedence than the Charter, it will often override all other legislation. To illustrate this, in one human rights tribunal case the adjudicator argued that normally

according to rules of construction no broader meaning can be given to the [Ontario Human Rights] Code than the narrowest interpretation of the words employed. [But in human rights legislation the Court recognizes] the special nature and purpose of the enactment and give[s] to it an interpretation which will advance its broad purposes.¹⁰

As a result of this kind of special treatment, human rights legislation is a very important component of Canadian law, and its applicability to pregnant employees is therefore important to understand.

As stated before, each Canadian jurisdiction has its own human rights legislation, with jurisdictions defined by constitutional law. Although there are some differences across jurisdictions, for the most part, the rights protected are similar. This is the case for the legislation as it is relevant to pregnant employees. Under these human rights acts it is unlawful for an employer to make distinctions based on the prohibited grounds of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, mental or physical disability, pardoned conviction or sexual orientation. The prohibited ground of sex either explicitly or implicitly includes pregnancy and childbirth, which has important implications for pregnant employees.¹¹ This means that women cannot be discriminated against in employment due to pregnancy, the possibility of

pregnancy, or circumstances relating to pregnancy. Employers would be in violation of these codes if they refused to hire a pregnant employee, fired her, or treated her differently from other employees because of her pregnancy. Human rights codes therefore ensure that women who have an illness related to pregnancy are entitled to sick leave and disability benefits on the same basis as other employees. If an employee's pregnancy does not limit her abilities to carry out her job, the employee has a right to continue working and to receive the same opportunities as all other employees. Employer attitudes or customer preferences cannot play any role in a decision to terminate, demote or transfer an employee. These are the general protections that human rights codes provide for pregnant employees.

Human rights codes do allow discrimination, but only if it based on bona fide occupational requirements or qualifications. Simply put, codes do not apply when certain attributes, such as sex, age, or a certain ability, are deemed to be essential to the job. As argued in a human rights case:

To be a bona fide occupational qualification and requirement a limitation... must be imposed honestly, in good faith, and in the sincerely held belief that such a limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related to an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, fellow employees and the general public.¹²

If an employer can prove that the requirement in question is indeed bona fide, the discrimination in question can be allowed. At the same time, even if a requirement is found to be bona fide, if it serves to cause indirect discrimination

against a certain group, the employer must attempt to accommodate the employee to the point of undue hardship. The burden is placed on the employer to prove that this accommodation was carried out to its full extent, which will become evident in the case discussion in the next chapter. This is important for pregnant employees because the nature of pregnancy can often limit a woman's ability to carry out her normal job duties, which may require them to be modified. Human rights codes may require that some changes to a certain job take place for the sake of accommodating a pregnant employee. These are the basic elements of human rights codes that relate to pregnant employees, and they form one part of the public policy environment. The effectiveness of these codes often relies on how they are interpreted, and the second chapter of this thesis will offer an analysis of human rights cases in order to see the codes in action.

Labour Legislation

While both the Charter and human rights codes contain more general legislation applicable to all Canadians, more detailed legislation dealing specifically with pregnant employees can be found in federal and provincial labour acts. These contain specific policies and legislation for pregnant employees, relating to issues such as leave, benefits, and job protection. In Canada, this kind of legislation dates back to British Columbia's Maternity Protection Act of 1966, which provided the right to maternity leave.¹³ As will be discussed, the Canada Labour Code was amended in 1971 to include the right to maternity leave and protection, which ultimately led all Canadian jurisdictions to

enact such legislation by 1988. With all 14 Canadian jurisdictions having their own labour legislation, there is a range of provisions relating to pregnant employees. All of these provisions work together to form the body of legislation that works to protect pregnant employees. The following section is an overview of this legislation as it stands today. It begins with a discussion of the labour legislation that exists in the federal jurisdiction and then discusses provincial legislation.

Canada Labour Code

The Canada Labour Code contains labour legislation that is applicable in the federal jurisdiction. This code is not only important for its applicability to the federal jurisdiction, but it also acts as a standard for much provincial legislation. The federal government gains its power to enact labour legislation from the Constitution Act of 1867, which gives the Parliament of Canada the ability to create labour laws that are applicable to those Canadians who are either assigned to Parliament or excepted from provincial jurisdiction. Federal legislation therefore applies to Canadians involved in activities of national, international, or interprovincial importance, works that are contained within a province that are “for the general advantage of Canada or for the advantage of two or more of the provinces”, and to most employees of Crown corporations.¹⁴

Employees in the following industries fall under the federal jurisdiction:

- aircraft operations and aerodromes
- banks
- radio and television broadcasting (including cablevision)
- grain elevators

- uranium mining and processing
- undertakings concerned with the protection and preservation of fisheries as a natural resource

Employees involved in the following interprovincial or international activities are also under federal jurisdiction:

- railways
- highway transport
- telephone, telegraph and cable systems
- pipelines
- marine shipping and shipping services
- air transport
- canals
- ferries, tunnels and bridges ¹⁵

With these members of the population falling under the federal jurisdiction, the Canada Labour Code applies to approximately 10% of the Canadian workforce.¹⁶

In 1971, the Canada Labour Code was officially amended to grant maternity leave and offer certain protections for pregnant employees.¹⁷ This amendment includes three important elements that are relevant to pregnant employees: maternity related reassignment and leave, maternity leave for the pregnant employee's health related needs before and after childbirth, and parental leave.¹⁸ Before an employee goes on leave due to pregnancy, if the requirements of her present job pose some form of risk to mother or fetus, she can request to be accommodated through the use of job modification or reassignment. As long as a medical certificate accompanies this request and as long as the request can be carried out without undue hardship, the job must be modified or the employee must be reassigned.

In terms of leave, the Labour Code provides both maternity and parental leave. These leaves are made available for employees who have completed 6

months of continuous employment with the same employer when the leave is scheduled to begin, which includes any absences that have occurred. Maternity leave can be taken for a maximum of 17 weeks, while 24 weeks of parental leave are available, which can be shared by both parents. In terms of timing, maternity leave is available starting 11 weeks before the expected date of birth and ending 17 weeks after the actual delivery date. The 24 weeks of parental leave is available during a period of 52 weeks following childbirth. In order to be eligible for these leaves, the employee must give the employer written notice 4 weeks in advance, and in the case of maternity leave this notice must be accompanied by a medical certificate. The only way that an employee can be forced to take maternity leave early is if she can no longer perform essential functions of her job. Even though a collective agreement may not include these leaves, the Code ensures that employees can still take maternity or parental leave.

The Labour Code also provides certain levels of protection for pregnant employees on leave. It requires that an employee returning from pregnancy leave be reinstated in a similar pre-leave position that offers the same wages and benefits. As long as the employee continues to pay her premiums, benefit coverage must continue and the employer must continue to pay its share of benefit contributions. For purposes of definition, the period that an employee spends on maternity leave is considered to be part of continuous employment. If the wages and benefits of the employee's group are either increased or decreased, upon return from pregnancy leave the employee's wages and benefits must also be equally changed. An employee's job is also protected

while she is on maternity leave, as the Code prohibits an employee from being dismissed, suspended, demoted, laid-off or disciplined due to pregnancy or pregnancy leave. Similarly, the fact that an employee is pregnant or is about to go on leave cannot have any involvement in decisions to promote or train. As the Labour Code stands today, these are the basic policies that relate to pregnant employees. However, as will be discussed shortly, there are changes about to take place to benefit legislation, which will lead to changes to the Labour Code, especially as it relates to the length of leave available.

Employment Standards Acts

The Canada Labour Code often acts as a standard for legislation in provincial jurisdictions, and this is made clear in legislation relating to pregnant employees. After the amendment to the Labour Code in 1971 to include maternity leave and protection, provinces followed suit and enacted similar policies and protections. Like the Labour Code, provincial governments gain their power to enact labour legislation through the Constitution Act of 1867. Labour laws often relate to the contracts that employers and employees enter into, and the right to enter into contracts is a civil right. Because property and civil rights fall under provincial authority, these laws also fall under provincial authority, giving provincial governments a wide range of jurisdiction in these areas.¹⁹ While the Labour Code only applies to about 10% of the workforce, the majority of employees work in companies that are under provincial jurisdiction,

which means that the terms of their employment must conform to provincial legislation and employment standards.

With each jurisdiction creating its own labour legislation, there is a range of provisions relevant to pregnant employees. Across most jurisdictions, legislation relating to the length of leave is fairly uniform due to the reliance on the Canada Labour Code. At the same time however, there are variations in terms of the conditions and requirements that establish entitlement to this leave. The following section will discuss policies and legislation from each of the 14 jurisdictions within Canada, beginning with maternity leave. It will discuss parental leave and the various levels of protection that these Acts offer pregnant employees. For each section, elements that are similar across most jurisdictions will be discussed together. Information from individual pieces of legislation has been used in the following section, but this section has also relied on “Family-Related and Other Leaves” from the federal HRDC website. It should be noted that this article contains summary tables of the legislation that relates to pregnant employees in all Canadian jurisdictions.²⁰

In most of Canada’s jurisdictions, legislation relating to the length of maternity leave remains fairly standard. Like the federal legislation, most jurisdictions provide 17 weeks of unpaid leave, with Alberta, British Columbia, Saskatchewan and Quebec providing 18 weeks. In all jurisdictions, this leave can begin no earlier than 16 or 17 weeks prior to the expected date of birth and can end no later than 17 weeks after the actual date of childbirth. In terms of becoming eligible for this leave, provisions across jurisdictions contain some

differences. While the federal jurisdiction requires an employee to have 6 months of continuous service to be eligible, Alberta, Manitoba, Nova Scotia and territorial jurisdictions require one full year. Newfoundland, PEI and Saskatchewan require 20 weeks, Ontario requires 13 weeks, and British Columbia, New Brunswick and Quebec do not require any specified length of employment for eligibility. Like the federal jurisdiction, 8 others require medical certificates, while the remaining jurisdictions only require this certificate if it is specifically requested by the employer. Most jurisdictions require notice of an upcoming maternity leave 4 weeks in advance.

Legislation from most jurisdictions in Canada (9 of 14) only allows employers to place employees on maternity leave early if they can no longer reasonably perform the normal duties of their job. In two of these jurisdictions, this only applies in the period 12 or 13 weeks before the expected date of delivery. In three other jurisdictions it only applies if there is no alternative employment. Quebec is the only provincial jurisdiction that allows a pregnant employee to take an unpaid leave of absence prior to her maternity leave if she cannot work due to pregnancy or pregnancy related problems that serve to risk the mother or unborn child. Similarly, Quebec is the only provincial jurisdiction that has a policy that allows pregnant women to request reassignment or job modification prior to maternity leave. If this is impossible, the employee can take a leave of absence immediately, which can be accompanied with some form of income support through Quebec's Occupational Health and Safety Act. Quebec legislation also allows pregnant employees to be absent for medical exams that

are related to pregnancy. In these regards, Quebec is clearly ahead of other jurisdictions in their protection and assistance for pregnant employees.

Depending on when a maternity leave began, leave that has not been used up after the birth of the child can continue. While 7 jurisdictions allow for no less than 6 weeks of post-natal leave, 6 others provide an extension of maternity leave to account for differences between the estimated and actual date of birth. Some jurisdictions also provide for problems such as premature birth, miscarriage or complications. In Alberta, British Columbia, Quebec and Saskatchewan, if health problems affect the mother (or the child in Alberta and Quebec) after birth, maternity leave can be extended for another six weeks.

Although parental leave does not solely relate to pregnant employees, it is important to understand because it is so closely related and often occurs directly after maternity leave. Legislation varies a great deal across jurisdictions in this regard. While federal legislation provides 24 weeks, Quebec provides 52 weeks, Ontario 18 weeks, Manitoba, Nova Scotia and PEI 17 weeks, and the rest of the jurisdictions provide 12 weeks. Like the federal jurisdiction, most provincial jurisdictions allow this leave to be shared between parents. As with maternity leave, in 4 jurisdictions parental leave can be extended if the child has health problems that require the parents' attention. The qualifications for entitlement to parental leave are the same as for maternity leave. Parental leave can be taken any time during the 52 weeks following birth, with 10 provincial jurisdictions requiring parental leave to be taken right after maternity leave if it is being taken by the mother.

When it comes to employment protection, employment standards acts from the various provincial jurisdictions closely resemble legislation from the federal level. All jurisdictions forbid employers to lay off, suspend or discipline employees when they are on maternity or parental leave. Most jurisdictions also mimic the federal legislation in that employees must be reinstated in comparable positions with the same salary and benefits, and in five jurisdictions with the same wage increases that they would have received had they been at work. In several jurisdictions, legislation allows pregnant women to continue to accrue benefits while on leave, but this normally depends on the employee continuing to pay benefit premiums. Four jurisdictions allow seniority to accrue, while three consider there to be no break in employment when there is absence due to leave. Some jurisdictions ensure that an employee who is on maternity or parental leave cannot have her job changed unless she gives her consent.²¹

This analysis of employment standards acts in the provincial jurisdictions indicates how they tend to mimic the federal Canada Labour Code. Legislation across the various jurisdictions is very similar in terms of the length and kinds of leave available. Because each jurisdiction creates its own legislation, there are a number of differences across the jurisdictions, especially in terms of the conditions and requirements relating to pregnancy leave. Some differences are more significant than others, but it should be noted that Quebec is clearly the most advanced in providing extensive provisions for pregnant employees.

Occupational Health and Safety Acts and Workers' Compensation Acts

Occupational Health and Safety Acts and Workers' Compensation Acts also exist in all Canadian jurisdictions, and they contain legislation that is important for the protection of pregnant employees. Depending on the jurisdiction, responsibility for occupational health and safety either falls to a government ministry or a workers' compensation board.²² Relevant legislation is often called something similar to the Occupational Health and Safety Act, but is also known as Workers' Compensation Acts in areas where the WCB is responsible. Although details of the Acts can vary from jurisdiction to jurisdiction, basic elements remain the same and they work toward ensuring that workers are physically protected on the job. This protection generally applies to pregnant employees, but elements of the legislation also take specific measures to protect pregnant employees when the workplace becomes unsafe for the woman or the unborn child.

Underlying this legislation are the concepts of the Internal Responsibility System and 'due diligence', both of which aim toward making the workplace as safe as possible for everyone.²³ The Internal Responsibility System places responsibility on the employer to take steps to ensure that all workplace participants are involved in making the workplace safe. In this way, rather than relying on legislation to dictate the steps that must be taken, it allows individual employers to meet requirements using policies that are catered to their specific workplace. In doing this, this system: establishes responsibility-sharing systems,

promotes a culture of safety, promotes best practices, helps develop self-reliance and ensures compliance. The concept of due diligence is also important for this legislation, and it means that employers are required to take all reasonable precautions to protect against injuries and accidents in the workplace. Employers must not only work toward identifying potential hazards, but they must also take action to correct these hazards.

The basic elements of all jurisdictions' Occupational Health and Safety provide rights and responsibilities for government bodies, employers and employees.²⁴ The legislation is enforced by the government, which is also responsible for inspection, education and the dissemination of information relating to workplace safety. Employers have several responsibilities that include: establishing a joint health and safety committee, taking reasonable precaution to ensure workplace safety, training employees about potential hazards, supplying protective equipment, reporting critical injuries, and training employees in the proper handling of hazardous materials. This legislation provides workers with the right to refuse unsafe work, the right to participate in workplace health and safety activities, and the right to know actual and potential dangers in the workplace. Workers are also obliged to comply with the act and its regulations, to use protective equipment, and to report hazards and dangers. In these ways, both the employer and employee are responsible for ensuring that the workplace is safe. This legislation therefore offers pregnant employees another legal avenue of protection in the workplace.

Employment Insurance Act

While entitlement to leave and related conditions are covered by labour legislation in Canadian jurisdictions, entitlement to benefits are the sole domain of the Employment Insurance Act, which is administered at the federal level.²⁵ This act provides a number of benefits that are related to pregnant employees. Women can claim up to 15 weeks of maternity benefits, and parents can claim a total of 10 weeks of parental benefits, for a total of 25 weeks. In addition to these benefits, parents can also receive 15 weeks of sickness benefits. Pregnant women and parents can use a combination of these benefits during one leave period, but the combined maximum is 30 weeks. Maternity benefits can begin at 8 weeks before the expected date of birth and can last up to 17 weeks after the actual birth date. Parental benefits can be collected by one or both parents and can be received anytime during a 52-week period following birth. The parent who is receiving benefits must be either unemployed or on leave in order to collect benefits.

Requirements for entitlement to both maternity and parental benefits are the same, as employees must have attained a minimum of 700 hours or 20 weeks of insurable work during the past 52 weeks, which includes both hours actually worked and hours of paid leave. Once an employee has been deemed eligible for benefits, there is a two-week waiting period before benefit payments begin. In terms of payment, most claimants receive 55% of their earnings with a minimum set at \$6.70 an hour. \$413 per week is the maximum that a woman on maternity or parental leave can receive. Some claimants who make higher

incomes may be required to pay back some of their benefits at tax time. Depending on the particular situation, employees might be entitled to other benefits if there are problems or complications with childbirth or the health of the child. It should be noted that although these benefits are administered through the federal Employment Insurance Act, Quebec again leads the way in helping pregnant employees through the use of employer top-ups. The Quebec government is not only considering extending leave duration and making minimum wage requirements less stringent, but it is also looking to increase benefit levels to 75% of previous earnings through the use of top-ups.²⁶ The example of Quebec can again be used by other jurisdictions to indicate the kinds of legislation and policies that can be offered to pregnant employees.

The previous discussion of benefits available through the Employment Insurance (EI) Act was applicable at the time of writing. As of December 31 2000, the EI Act and EI regulations will go through some changes, as the government attempts to make benefits more accessible, more flexible and of longer duration.²⁷ While the duration of maternity benefits will remain at a maximum of 15 weeks, parental benefits will be available for 35 weeks instead of 10 weeks. Although parental leave and benefits do not directly apply to pregnant employees, they are closely related and must be understood in order to understand the full extent of the legislation. New parents would have access to a maximum of 50 weeks of combined maternity, parental and sickness benefits. As in the past, parents can share the 35 weeks of parental benefits. In an attempt to make these benefits more accessible, claimants need to have

accumulated 600 hours on insurable earnings instead of 700 hours. For parents sharing parental benefits, there will only be one waiting period required, instead of one for each parent, which is presently the case. At the same time, claimants will be able to continue to work while receiving parental benefits and can earn the greater of \$50 or 25% of their weekly parental benefits. Any earnings above this amount would be deducted dollar for dollar from the benefits. To ensure that employees can take advantage of these extended benefit periods, the Canada Labour Code will be simultaneously altered to ensure that leave periods coincide with benefit periods. It will be up to other jurisdictions to alter their own labour legislation to correspond to the changes to EI legislation. In addition to these changes that affect the duration of the EI benefit period, other changes to EI legislation that are relevant to pregnant employees are also being made.²⁸ One such change will ensure that people collecting maternity or parental benefits do not have to repay any of these benefits. Legislation will also be changed to ensure that it is easier for employees returning to work after extended maternity or parental leave.

The government claims that these changes to both the length of benefits and related regulations will help businesses retain their employees' expertise without punishing new parents. It is also claimed that these changes will assist parents in balancing work and family responsibilities more effectively by easing their transition and giving them the flexibility to work while on parental leave. At the same time however, it must be recognized that problems continue to exist. Most importantly perhaps, despite these changes, the fact that many women in

Canada do not meet minimum requirements for entitlement to benefits due to the part-time or contingent nature of their work ensures that they do not qualify for even the most basic of benefits.²⁹ These problems indicate that steps still must be taken to ensure that women are not disadvantaged in employment as a result of their childbearing capacities.

Conclusion

This chapter has presented an overview of the Canadian public policy environment as it relates to pregnant employees. It has illustrated the range of provisions that exist, which include those relating to leave, benefits, and various forms of protection. All of the relevant legislation works together to create the base of protections and policies that are relevant to pregnant employees. While some have argued that these provisions illustrate the governments' dedication to providing for pregnant employees, others have focused on the problems that exist and the gaps that limit pregnant employees' use of provisions such as benefits. Regardless of one's opinion of the legislation that exists, how this legislation affects pregnant employees tends to rely on how it is applied by judges and boards. In order to understand the position of pregnant employees today, it is not enough just to be aware of the legislation and standards that exist. To understand where the issue of pregnant employees stands today, it must be understood how this legislation is interpreted in cases and in the real world. To

do this, this thesis will now analyze both human rights and labour arbitration cases.

Endnotes

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- ¹ Please note that throughout this chapter, sections that are based on the information from one source are referenced only once at the beginning of the particular section.
- ² "Questions and Answers on the NB Human Rights Act", www.gov.nb.ca/hrc-cdp/e/qa.htm (October 5, 2000)
- ³ *Canadian Charter of Rights and Freedoms*, section 15.(1), (Part 1, Schedule B, Constitution Act, 1982)
- ⁴ *ibid.*, section 28.
- ⁵ *ibid.*, section 1.
- ⁶ Aileen McColgan, *Women Under the Law: The False Promise of Human Rights*, (London: Longman, 2000), p.50.
- ⁷ *ibid.*, p.188.
- ⁸ *ibid.*, p.144.
- ⁹ *ibid.*, p.149.
- ¹⁰ quoted in "Human Rights Law Basics" www.cdn-hr-reporter.ca/basics.htm (October 5, 2000)
- ¹¹ 8 of 14 jurisdictions prohibit discrimination on the basis of pregnancy, often defining the prohibited ground of sex to include pregnancy. Other jurisdictions prohibit discrimination on the basis of sex, gender, family or family status.
- ¹² *Laurene Wiens v. Inco Metals Company, Ontario Division* (1988), *Canadian Human Rights Reporter*: vol. 9, D/4814.
- ¹³ "Family-Related and Other Leaves" www.labour.hrdc-drhc.gc.ca/policy/leg (October 3, 2000)
- ¹⁴ "Division of Legislative Powers" www.labour.hrdc-drhc.gc.ca/policy/leg/e/stand-e1.html (October 4, 2000)
- ¹⁵ "Who is covered by the standards of the Canada Labour Code?" www.info.load-otea.hrdc-drhc.gc.ca/lswb/lscoveen.htm (October 5, 2000)

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- ¹⁶ Laurie Schwartz, Parental and Maternity Leave Policies in Canada and Sweden, (Kingston: Industrial Relations Centre, 1988), p.36.
- ¹⁷ Cecilia Benoit, Women, Work and Social Rights, (Scarborough: Prentice-Hall Canada, 2000), p.103.
- ¹⁸ "Information on Labour Standards" www.info.load-otea.hrdc-drhc.gc.ca/-lsweb/maternen.htm (October 4, 2000)
- ¹⁹ "Division of Legislative Powers" www.labour.hrdc-drhc.gc.ca/policy/leg/e/stand-e1.html (October 4, 2000)
- ²⁰ "Family-Related and Other Leaves" www.labour.hrdc-drhc.gc.ca/policy/leg (October 3, 2000)
- ²¹ To reiterate, information regarding employment standards acts was gathered from provincial legislation and, more importantly, from "Family-Related and Other Leaves" www.labour.hrdc-drhc.gc.ca/policy/leg (October 3, 2000), which is located on the federal HRDC website.
- ²² "OH & S Legislation- An Introduction to Who Does What in Canada" www.ccohs.ca/oshanswers/legisl.html (October 17, 2000)
- ²³ "OH & S Legislation- Internal Responsibility System" and "OH & S Legislation- Due Diligence" www.ccohs.ca/oshanswers/legisl/intro.html (October 17, 2000)
- ²⁴ "Canadian Occupational Health and Safety Legislation" www.canoshweb.org (October 17, 2000)
- ²⁵ "Employment Insurance- Questions and Answers" www.hrdc-drhc.gc.ca/ei/common/budget2000.shtml (October 5, 2000)
- ²⁶ Benoit, Social Rights, p.104.
- ²⁷ "Changes to Maternity and Parental Benefits, December 31, 2000" www.hrdc-drhc.gc.ca/insur/claimant/10-00.shtml (October 5, 2000)
- ²⁸ "Proposed Changes to Employment Insurance Legislation" www.hrdc-drhc.gc.ca/common/news/insur/00-66.shtml (October 5, 2000)
- ²⁹ Benoit, Social Rights, p.104.

Chapter 2: Human Rights Case Analysis

As outlined earlier, this chapter will offer a detailed analysis of human rights cases as published since 1988. In making their decisions in these cases, human rights tribunals have not only had to interpret the facts of the case in question, but they have also had to interpret the applicable legislation and apply it to the case. In this way, these tribunals have used their own interpretation of the legislation outlined in the previous chapter to define the responsibilities of employers. Employers therefore must not only be aware of the legislation that exists, but they must also understand how tribunals have decided that this legislation should be applied in the workplace. To this end, this chapter aims at illustrating the trends that have arisen in case history relating to pregnant employees, and what these trends mean for employers and employees.

Pregnancy Discrimination vs. Sex Discrimination

Before delving into the specifics of these cases, it is important to note an important general issue that was resolved during this period. In the human rights tribunal cases studied for this thesis, specifically those in the earlier years, discrimination based on pregnancy had yet to be clearly defined as sex discrimination in the codes of all jurisdictions. This is an important point because without being explicitly defined as a prohibited ground of discrimination in human rights codes, a door was left open for tribunals to dismiss discrimination complaints put forth by pregnant employees. A brief discussion of this issue,

beginning with an overview of the human rights tribunal cases discussed in the 1990 *Journal of Business Ethics* article, will allow for an understanding of how this topic has developed.¹ Throughout the remainder of this thesis, this article will be referred to as the "1990 article".

Throughout this thesis, cases are categorized into time periods depending on when they were published rather than when they were heard or decided upon. The *Journal of Business Ethics* article studied cases that were published prior to 1988, and this thesis will pick up where this article left off and study cases published from 1988 to the present. Discussion of cases studied in the first article are therefore contained in sections entitled "Pre-1988 Developments", while cases studied specifically for this thesis are discussed in sections entitled "Post-1988 Developments" throughout the thesis. The dates listed with case titles indicate when the case was actually decided.

Pre-1988 Developments

As discussed in the 1990 article, in this period, there were a number of proponents of the view that discrimination against pregnant employees was not sex discrimination, and they often cited the 1979 *Bliss v. Attorney General of Canada* case to justify their view. This case related to a complaint that alleged a discriminatory unemployment insurance legislation policy in which pregnant employees could only claim special maternity benefits and not normal basic unemployment insurance benefits during a portion of their pregnancy. The legislation in question, specifically section 46 of the *Unemployment Insurance Act*

1971, limited pregnant employees' access to unemployment benefits by forcing them to work a lengthier period of time than other employees before qualifying. The complainant argued that this clause discriminated on the basis of sex. The tribunal agreed that pregnant employees were treated differently under the legislation, but they ruled that this differential treatment was because the women were pregnant and not because they were women. The tribunal explained that:

Assuming the respondent to have been 'discriminated against', it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.²

Using this logic, the tribunal dismissed the complaint, and in the process, excluded pregnancy discrimination from the definition of sex discrimination. Without being defined as sex discrimination, pregnancy discrimination was not explicitly included in the applicable legislation, and as a result, it could therefore be argued that it was not a prohibited ground of discrimination. Following this decision, many respondents used this reasoning to dispute the fact that they had sexually discriminated against pregnant employees.

A similar ruling took place in the 1985 *Susan Brooks v. Canada Safeway Ltd.* case, which involved Safeway's disability benefit plan. This plan made 26 weeks of disability benefits available to workers who had worked at Safeway for three months and who had to miss work for health-related reasons. However, pregnant employees were unable to collect these benefits during a 17-week period surrounding the birth of their child.³ As a result, pregnant women suffering

from non-pregnancy related illnesses during this period could not collect benefits. As in the *Bliss* case, the tribunal found that this policy discriminated against pregnant employees. Using the ruling in the *Bliss* case, the tribunal ruled that the employer had not violated the Human Rights Act because discrimination against pregnant employees was not considered to be sex discrimination, and because it was not clearly presented as a prohibited ground of discrimination within the applicable act. It was argued that the fact that other provinces had officially included pregnancy discrimination in amendments to their codes proved that it was not included in sex discrimination in codes that did not include such amendments, as was the case with Manitoba's Act. This ruling essentially implied that discrimination against pregnant employees was not a prohibited ground of discrimination.

During this period, there was some concern that rulings such as those made in *Bliss* and *Brooks* would eventually be officially incorporated into human rights codes and thereby not protect women against pregnancy discrimination. This period also witnessed rulings that allayed these fears by including pregnancy discrimination as a prohibited ground of discrimination. For instance, in the 1982 *Lorraine Tellier-Cohen v. Treasury Board and Canadian Human Rights Commission* case, it was ruled that the complainant was discriminated against because of her pregnancy when she was denied permission to use her sick leave and accumulated vacation leave for the purpose of childbirth. In this case, the tribunal ruled that this was indeed sex discrimination. Concern over the *Brooks* ruling was also put to rest in Manitoba, when the province officially

included pregnancy discrimination in its definition of sex discrimination within its human rights code. Despite rulings such as those made in the *Bliss* and *Brooks* cases, there were also decisions during this period that saw pregnancy discrimination being included in the definition of sex discrimination, and this trend would continue to develop in the future.

Post-1988 Developments

In cases specifically studied for this thesis, the trend toward defining and including pregnancy discrimination as a prohibited ground of discrimination continued and culminated in a landmark Supreme Court decision in 1989. At the beginning of the studied period, pregnancy discrimination was officially and explicitly included in human rights codes as a prohibited ground of discrimination in Quebec, Saskatchewan, Alberta, Ontario and federal government legislation. As a result of this clear inclusion, in human rights cases taking place in these jurisdictions pregnancy discrimination has been ruled to be in violation of the human rights codes in question. For instance, in *Edadeen Bird v. Norman Ross and Aphetow House Ltd.* (1987), the tribunal ruled that the complainant was discriminated against based on her sex when she was terminated for having a therapeutic abortion. The Saskatchewan Human Rights Code clearly defines sex discrimination to include discrimination based on pregnancy or pregnancy-related illness. Because legal therapeutic abortions can only be carried out in Saskatchewan if the mother or fetus is in danger, it was ruled that there must have been a pregnancy-related illness, and that firing a woman because of this

was discrimination based on sex. This case is illustrative of how these cases became much more easily resolved when human rights codes explicitly included pregnancy discrimination.

Cases that were decided in the earlier years of this period also illustrate that even when human rights codes did not explicitly include pregnancy discrimination in their wording, that tribunals were willing to interpret codes to implicitly include it as a prohibited ground. *Century Oils (Canada) and Production Supply v. Christine Marie Davies and British Columbia Council of Human Rights* (1988) relates to an appeal of a case in which Century Oils was found to have discriminated against Davies when they refused to hire her because of her pregnancy. In this appeal, Century Oils argued that because the British Columbia Human Rights Code did not explicitly refer to pregnancy discrimination that it was not a prohibited ground of discrimination, and they used the *Bliss* case to substantiate their argument. The court rejected these arguments and found that the Code should be interpreted to include pregnancy discrimination, even though it does not make this explicit. In developing this decision, it was argued that

It may be unduly restrictive and somewhat artificial to argue that a distinction based on a characteristic such as pregnancy, which is shared only by some members of a group, is not discrimination against the whole group. It is no answer to say that since pregnancy discrimination is not usually applicable to all women, it is not discrimination on the basis of sex. For discrimination which is aimed at, or has its effect upon some people in a particular group as opposed to the whole of that group, is not any the less discriminatory.⁴

These kind of decisions became increasingly accepted during this period, and they indicate tribunals' increasing willingness to recognize that discrimination

against pregnant employees should be defined as discrimination on the basis of sex, regardless of the Codes' specific wording.

In other cases from this period, tribunals were asked to make rulings on complaints that arose before amendments to human rights codes that clearly included pregnancy discrimination. This was the case in both *Lina Maria Riggio v. Sheppard Coiffures Ltd. and Tony Vitale* (1987) and *Laurene Wiens v. Inco Metals Company, Ontario Division* (1988). In these cases, tribunals found that the complainants had been discriminated against. In the *Riggio* case, the complainant had been discriminated against because her pregnancy had played a role in her termination. While in the *Wiens* case, the complainant was discriminated against when she was not hired due to her child-bearing potential. In both of these Ontario-based cases, the complaints arose before the 1986 amendment to the Ontario Human Rights Code that included pregnancy discrimination. Tribunals therefore had to rule on whether this was a prohibited ground of discrimination at the time. Illustrating their willingness to interpret the meaning of Codes, the tribunals in both cases ruled that although the Codes did not explicitly include pregnancy discrimination at the time, that it was implicitly included and was therefore a prohibited ground of discrimination. In the *Riggio* case, it was argued that:

it seems clear that dismissal for mere pregnancy would offend the very dignity that the legislation was implemented to protect. The doubt should therefore be resolved in favour of including pregnancy within the ambit of sex... common sense tells us that the ability to become pregnant is a basic area of difference between men and women. Therefore, pregnancy identifies women as a group of persons who may be excluded from employment as a result of discrimination because of pregnancy.⁵

The Supreme Court decision in *Susan Brooks v. Canada Safeway Ltd.* (1989), an appeal of the previously discussed *Brooks* case, would make the inclusion of pregnancy discrimination in human rights codes official and thereby put an end to this debate.

Susan Brooks v. Canada Safeway Ltd. (1989) was a landmark Supreme Court decision that clearly defined pregnancy discrimination as constituting discrimination on the basis of sex. Like the first *Brooks* case, the tribunal in this appeal concluded that the Safeway benefit plan clearly discriminated against pregnant employees. This tribunal also ruled that this constituted sex discrimination, which served to repudiate the ruling in the *Bliss* case. The tribunal argued that:

I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then... It is only women who bear children, no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one-half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women... As the appellants state in their factum... "A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not". Distinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly "sex-related."⁶

This decision, as a Supreme Court ruling, represented one of the final steps towards ensuring that the definition of sex discrimination would include pregnancy discrimination in Canadian legislation.

Thanks in large part to the ruling made in this case, this definition is now officially included in legislation concerning all jurisdictions. As a result of these

inclusions, along with the precedent setting decisions in cases such as those explained above, it has become impossible for employers to successfully argue that discrimination against pregnant employees is not discrimination on the basis of sex. This development has perhaps been the most important of the period, as it ensures that pregnant women have the full protection of human rights legislation.

Bona Fide Occupational Qualifications (BFOQ)

Bona fide occupational qualifications (BFOQ) and bona fide occupational requirements (BFOR) are important aspects of human rights legislation and they have often been the focal point of cases concerning discrimination against pregnant employees. As explained earlier, when applied in good faith and related to job requirements and performance, BFOQ and BFOR are legitimate grounds for discrimination and exemptions from human rights legislation. However, studying human rights cases clearly illustrate that employers must be able to clearly and specifically justify their requirements. The following section will trace how BFOQ and BFOR have been dealt with in human rights cases relating to pregnant employees.

Pre-1988 Developments

In pregnancy-related cases studied prior to the period that this thesis is primarily concerned with, human rights tribunals placed the burden on the employer to prove that qualifications and requirements were indeed bona fide.

As the 1990 article outlines, despite employers' claims, tribunals ruled that in most jobs, not being pregnant is not a BFOQ. In the process, they rejected arguments that increased costs of training alternate employees and negative customer attitudes make not being pregnant a bona fide qualification. In the 1990 article, this requirement was described especially in regards to transfers and promotions. The decisions made in these cases made it clear that as long as there is no potential harm to either mother or fetus, a pregnant employee must be given the same consideration as other employees.

Post-1988 Developments

In the human rights cases that have been heard over the course of the last decade, the issue of BFOQ and BFOR has continued to be important, with many similar arguments and decisions having been presented. As in the previously described cases, tribunals have continued to place the burden of proof on employers when it comes to BFOQ. Whether complaints have arisen as a result of a termination, a transfer, or the refusal to promote or hire, tribunals' decisions have often revolved around whether employers can prove that their requirements have been applied in good faith or are clearly related to job performance.

Of the 13 cases that directly involve the issue of BFOQ, 5 involve situations in which employers' arguments have been rejected. These include 1 case involving termination, 1 involving failure to provide light duties, and 3 involving failure to hire or rehire.

Two of these cases, *Gilhane Mongrain v. Department of National Defence and Canadian Human Rights Commission* (1990) and *Tracy Jenner and Ontario Human Rights Commission v. Pointe West Development Corp. and Dennis Laverty* (1993), involved situations in which pregnant employees were not rehired because they would not be available for a period of time in the future when they took maternity leaves. Tribunals in these cases rejected arguments that guaranteed employee availability was a BFOR for the particular jobs in question. In the *Mongrain* case, which was actually an appeal from a previous decision, the tribunal not only disagreed with the previous tribunal's application of the BFOQ rules, but also decided that the availability clause was implemented because the employer knew of the pregnancy, and not because of a BFOQ.

In *Sherry Middleton v. 491465 Ontario Ltd. and John Chang and Bill Walsh* (1991), the complainant argued that she had been discriminated against when she was fired from her job as waitress in a strip club. On one hand, the respondent argued that the termination was justified because there was the potential for dangerous situations within the bar that could harm a pregnant woman or a fetus. On the other hand, the respondent also put forth the argument that because customers prefer a waitress who is not pregnant, that the termination was legitimate. In rejecting these arguments, the tribunal ruled that not being pregnant was not a BFOQ for this job. The employer did not prove that a pregnant woman would be in danger working in the bar, and, as in past decisions, the tribunal refused to accept arguments relating to customer preference.

In *Laurene Wiens v. Inco Metals Company, Ontario Division* (1988), the complaint involved an employer's requirement that employees working in certain areas of a metal shop do not have child-bearing potential due to the potential for harm to a fetus. The complainant was not hired because of this requirement and she believed that she had been discriminated against because of this. In their decision, the tribunal ruled that the ability to become pregnant did not affect performance in the job in question and was therefore not a BFOR. Although there was the risk of exposure to dangerous gases, such a risk could be avoided by transferring women who know that they are pregnant out of the area. Because of this, the policy was deemed to be over-inclusive and discriminatory because it unnecessarily restricted the opportunities for all women who could become pregnant. Under the relevant legislation, sex discrimination included discrimination based on pregnancy or child-bearing potential, and because of this the tribunal ruled that the policy was in violation of the code.

Finally, in *Julie Lord v. Haldimand-Norfolk Police Services Board and Lee Stewart* (1995), the complainant was a police officer who, instead of being allowed light duties, was forced to go on unpaid leave during her first pregnancy and who was only offered the option of resigning her rank and seniority and accepting a clerk job during her second pregnancy. The respondent argued that they had not allowed the request for light duties because of a policy that did not make light duties available. The tribunal rejected the argument that the employer did not offer light duties, as a male officer had been given light duties due to health-related reasons a short time before. They also ruled that the general

policy of not giving light duties was not based on a BFOQ, and therefore could not be applied to pregnant employees. Like all of these cases, the burden of proof was placed on the employer to prove the existence of a BFOQ or BFOR. When they were unable to convince the tribunals that their requirements were bona fide, their requirements were found to be discriminatory and struck down.

At the same time, during this period there were 8 cases in which tribunals accepted employers' arguments about BFOQ and BFOR. For instance, in *Ontario Human Rights Commission and Kathleen Pattison v. Board of Commissioners of Police for the Town of Fort Frances, Michael Solomon and Jack Murray* (1988), the complaint arose when a police officer was refused the opportunity to wear civilian clothes while on duty and forced to wear her uniform and gun belt. In this appeal of a previous decision, the tribunal upheld the decision stating that a police uniform and gun belt were BFORs for a police constable. As a result, it was also ruled that the Police had not discriminated against Pattison. In *Theresa Mack v. Wasył Marivstan, Maria Marivstan and Bukovina Ukrainian Restaurant* (1989), the complainant argued that she had been discriminated against when she was not hired for a job as a kitchen helper. However, the tribunal found that not being in the latter months of pregnancy was a BFOR for the job in question, as it involved the task of lifting heavy objects, which a pregnant woman would have a difficult time doing. *Michaela L. Armstrong v. Crest Realty Ltd.* (1996) related to a situation in which a woman was hired for a receptionist position but was fired once she informed her employer that she was pregnant. The tribunal accepted the employer's argument

that for the particular job in question, being available for long-term commitment was a BFOR. At the same time however, it was ruled that this rule adversely affected pregnant women, and that the complainant could have been accommodated.

Along with these rather straightforward cases of tribunals accepting employers' arguments about BFOQ are cases in which neutral rules were also upheld as acceptable. Much the same as BFOQ, if a particular rule put in place by an employer causes direct discrimination it will be struck down, but if the employer can prove that the rule is necessary, a tribunal could rule that it is bona fide. In three cases heard during this period, employers were able to establish that their rules were indeed neutral and therefore acceptable to the tribunals. The tribunal in *Donna Marie Brown and Canadian Human Rights Commission v. Department of National Revenue (Customs and Excise)* (1993) accepted a neutral rule that required employees to work on rotating shifts. In *Elizabeth Jodoin and Ontario Human Rights Commission v. Ciro's Jewellers (Mayfair) Inc. and Morris Nash* (1996), a store rule that required employees to work 12 hour shifts was deemed acceptable. *Melissa Bonetti v. Escada Canada Inc. doing business as Plaza Escada* (1995) related to a neutral requirement for stability, which the tribunal also ruled to be acceptable. In all of these cases, the rules in question resulted in discrimination, but because the rules were held to be bona fide, they were not struck down and tribunals ruled that they were cases of adverse effect discrimination. This issue of adverse effect discrimination is

related to employers' responsibilities to accommodate, and each of these cases involved this issue, which will be discussed in the next section.

In one rather unique case involving BFOQ, *Manuela Casagrande v. Hinton Roman Catholic Separate School District No. 155* (1987), an unmarried pregnant teacher at a Roman Catholic school complained that she had been fired because she had become pregnant. The tribunal upheld a previous decision in which it was ruled that she was terminated for a bona fide cause. It was not because not being pregnant was a bona fide requirement, but because of a bona fide denominational cause. It was ruled that the school had the right to make decisions on what teachers to hire and fire based on their suitability as role models in a Roman Catholic school. The Roman Catholic religion prohibits premarital sexual intercourse, and Casagrande's pregnancy proved that she was having premarital sex, thus making her an unsuitable role model for the students. In this particular case, the Charter right to establish denominational schools took precedence over the issue of pregnancy discrimination.

The cases analyzed above illustrate how BFOQ and BFOR have been dealt with by human rights tribunals in cases relating to pregnant employees. This analysis makes it clear that whether an employer is planning on terminating, hiring, transferring or promoting an employee, they must ensure that their contemplations are based on bona fide requirements, or, as these cases have illustrated, they will be punished. While tribunals have refused to accept employers' superficial arguments about customer preference, they have also rejected arguments that seem based on the employee's well being, such as

those relating to the employee's workplace safety. The simple point is if a woman's pregnancy does not affect her ability to perform her job safely or if a requirement was not applied in good faith, tribunals have rejected arguments that not being pregnant is a BFOQ. Employers can look at these cases to understand the kind of scrutiny that their requirements will be under, and how they must be able to clearly prove that their requirements are bona fide.

Accommodation

As discussed earlier, in cases in which BFOQ and BFOR have been accepted as bona fide but result in adverse effect discrimination, employers must work to accommodate the affected employees to the point of undue hardship. Before discussing relevant cases, it must be noted that all cases that involve BFOQ or BFOR that have created adverse effect discrimination do not necessarily involve the issue of accommodation. In some cases that involved accepted BFOQ, the issue involved a termination or a refusal to hire, and because of this the issue of accommodation was not discussed in the case. The cases discussed in the following section are those in which accommodation played a direct and important role in the complaint or the final decision. The cases that will be analyzed in the next section cover a range of situations involving accommodation, and can shed light on what employers must be prepared to deal with.

Pre-1988 Developments

As discussed in the first article, albeit briefly, BFOQ is tempered by the requirement that employers use reasonable accommodation wherever possible. This article discusses the 1987 case *Kathleen Pattison v. Board of Commissioners of Police* (the appeal to this case was discussed earlier) in which it was ruled that the employer had failed to accommodate a pregnant employee when she could no longer fit her uniform, which was an established BFOR.

Post-1988 Developments

In the cases that were heard during the period that this thesis is concerned with, there were nine that dealt directly with issues of accommodation. eight of these cases were decided in favour of the employee, and many of these were rather straightforward decisions for the tribunal.

In four cases, the tribunal ruled that employers did not attempt to accommodate pregnant employees who were adversely affected by BFOQ or BFOR. A typical case was *Mira Heincke v. Kenneth Brownell and Emrick Plastics* (1990) in which a pregnant employee was forced to go on leave of absence without pay when her job as a spray painter was deemed dangerous for the fetus due to paint fumes. In this case the tribunal ruled that the employer did not reasonably accommodate the employee by transferring her to another position (in this case a packer position), which could have been done easily. The tribunal rejected the employer's argument that there was a danger of paint fumes in all areas.

In *Elizabeth Jodoin and Ontario Human Rights Commission v. Ciro's Jewellers (Mayfair) Inc. and Morris Nash* (1996), a case that was discussed earlier, the tribunal ruled that the complainant had been discriminated against when she was fired because she could not work 12 hour shifts, which was a BFOR. It was ruled that her pregnancy could have been accommodated easily without undue hardship by offering her shorter shifts.

In *Commission des droits de la personne du Quebec et Marie-Ange Dabel v. Lingerie Roxana Ltee* (1995), the complainant had been terminated because she was late for work several times due to medical visits relating to her pregnancy. The tribunal ruled that because the complainant was recovering from her pregnancy that she should have been accommodated and that her accumulated lateness should have been accepted.

Finally, in *Michaela L. Armstrong v. Crest Realty Ltd. doing business as Re/Max Crest Realty* (1996), another case that was discussed earlier, the complainant was refused a receptionist position because she was pregnant and therefore could not meet the employer's requirement of long-term stability. As stated earlier, the tribunal accepted the BFOR of long-term stability, but because this rule adversely affected pregnant employees, the employer was required to accommodate. The tribunal ruled that the employer could have hired a temp for the period in which the complainant would have been on leave and that this would not have caused undue hardship. All of these cases involved rather straightforward situations in which employers who had established BFOR or

BFOQ that adversely affected pregnant employees had failed to offer reasonable accommodation.

In three cases from this period, tribunals eventually ruled that reasonable accommodation had not taken place, but these decisions involved different twists. In *Julie Lord v. Haldimand-Norfolk Police Services Board and Lee Stewart* (1995), the respondent argued that they could not accommodate a pregnant officer by giving her light duties because this would go against the Police Services Act, which they argued tied their hands. The tribunal ruled that the Police Services Act could not take precedence over human rights legislation and rejected this argument, deciding that the officer should have been accommodated.

Maria Mazuelos v. Mary Jo Clark (2000) involved a live-in caregiver who had become pregnant. Instead of deciding that the employer could have accommodated the employee, the tribunal ruled that the employer had failed to initiate an adequate process to decide whether or not she could have accommodated the employee. The decision therefore went against the employer.

In *Donna Marie Brown and Canadian Human Rights Commission v. Department of National Revenue (Customs and Excise)* (1993), it was decided that the employer had made some attempts to accommodate a pregnant employee who was adversely affected by a BFOR that required rotating shifts, but that these attempts were not enough. In the case of the employee's first pregnancy, she was only permitted to work straight day shifts after three months

of attempting to change her shifts. During her second pregnancy, she was not given this option and was placed on unpaid leave. In the tribunal's mind, this was a lack of reasonable accommodation and therefore discrimination.

Out of the nine cases that dealt directly with issues of accommodation, only one was decided in favour of the employer. In *Melissa Bonetti v. Escada Canada Inc.* (1995), a BFOR of stability in a clothing department had been established, which was discussed earlier. A pregnant employee complained that she had been discriminated against when she was transferred to another department because she would be going on maternity leave and could not meet this requirement of stability. The tribunal ruled that the BFOR in question created adverse effect discrimination, but dismissed the complaint because it was decided that the employer had reasonably accommodated the employee. It ruled that transferring the employee to another department with equal pay was reasonable, and that keeping the employee in the same department would have been undue hardship.

In one rather unique case, which was an appeal from a previous case discussed in the 1990 article, the tribunal came up with a rather odd decision. In *Ontario Human Rights Commission and Kathleen Pattison v. Board of Commissioners of Police for the Town of Fort Frances* (1988), the tribunal upheld a decision that the police uniform was a BFOR. Although there would normally be a duty to accommodate an employee who is adversely affected by such a BFOR, this tribunal ruled that there was no duty to accommodate in this case due to the employee's confrontational and hostile behaviour. The complainant had

not only been confrontational and hostile with her employer, but she had also made comments alluding to her attempts at taking advantage of the relevant legislation.

These cases are a clear indication of the importance of accommodating employees who are adversely affected by a bona fide requirement. It has been made clear that an employer's responsibility to their employees does not end when neutral rules or requirements are established. An employer must be aware of how these rules and requirements affect their employees and ensure that negative effects are dealt with. Cases during this period have illustrated that when accommodation has not been attempted, employers are often found to have discriminated. This is regardless of the reasons for the lack of attempt, be it an appeal to another act of legislation or an appeal that seems based on the health and safety of the pregnant employee in question. Simply put, the onus is clearly placed on the employer to ensure that they have done everything to the point of undue hardship to accommodate a pregnant employee who has been adversely affected. Without doing this, these cases illustrate that employers have found it very difficult, if not impossible, to justify their position.

Benefits and Leave

The issues of benefits and leave have been and continue to be very important when it comes to the treatment of pregnant employees. As discussed earlier, each jurisdiction in Canada has legislation dealing with leave for pregnant employees, while benefits are administered by the federal government according

to the Employment Insurance Act. At the same time, policies of individual companies are also in place, many of which offer pregnant employees additional benefits. In creating and carrying out benefit and leave policies, employers must be aware of human rights issues, and the analysis of cases that follow shows where the issue currently stands in terms of employers' responsibilities.

Pre-1988 Developments

Prior to 1988, this issue continually appeared in human rights cases. A key issue that continued to develop during this period related to whether or not pregnancy should be considered an illness, and in return whether or not a pregnant employee should be entitled to sick leave benefits while on maternity leave. As the article discusses, tribunals ruled that if an employee was absent for reasons related to her pregnancy, then she would usually not have access to sick leave benefits. However, if the pregnancy was in some way abnormal or accompanied with some form of disability, then sick leave benefits should have been available.

Like many other issues relating to the topic of pregnancy discrimination in general, the move towards including pregnancy discrimination within the definition of sex discrimination has been closely tied to the issue of benefits and leave. Key cases that have defined the issue of discrimination against pregnant employees in general have had issues of benefits and leave at their base. Most importantly perhaps, the *Bliss* and *Brooks* cases discussed earlier both involved complaints alleging discriminatory benefit policies and legislation. In the cases

studied for this thesis, these issues would further evolve and develop, as cases relating to benefits and leaves became the most common.

Post-1988 Developments

As discussed earlier, *Susan Brooks v. Canada Safeway Ltd.* (1989) was a very important case for its role in ensuring that pregnancy discrimination was defined as being discrimination on the basis of sex. Generally speaking, in this case it was ruled that failing to compensate pregnant employees for legitimate health-related absences went against the purpose of human rights legislation. Despite these advances, the tribunal in this case did not offer clear guidelines for how their decision should be applied to benefit and leave policies. These guidelines would be clearly laid out in a case decided several years later.

Susan Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No. 15 and United Nurses of Alberta, Local 002 and Alberta Hospital Association (1991) began with a complaint alleging a discriminatory benefit policy that required pregnant employees to fully prepay their benefits for maternity leave, a condition that was only applied to pregnant employees. Rather than simply deciding on the case, the tribunal decided on the wider issue of how the *Brooks* decision should be applied to employee benefits for pregnant women. In deciding on the specifics of the case, the tribunal ruled that the complainant was discriminated against because she was forced to prepay her benefits while other employees absent for health-related reasons were not. Using the *Brooks* decision, it was ruled that this pregnancy discrimination was

discrimination on the basis of sex, and that the employer had breached the human rights code.

The *Parcels* case was important not only because it was the first to apply the decision made in *Brooks*, but also for its discussion of how *Brooks* should be applied. With this discussion, the tribunal laid down a number of guidelines for the application of *Brooks*, which are summarized briefly below.⁷ In terms of the degree of compensation, employers must ensure that when pregnant employees are absent for health-related reasons that they receive the same amount of compensation as other employees absent for health-related reasons. These benefits paid to pregnant employees must be paid for the entire length of the health-related absence, regardless if it occurs before or after childbirth. Because there are so many variations in women's experiences with pregnancy, employers cannot define the period for the beginning and end of this health-related leave. As a result of this, in order to establish their entitlement to these benefits, women must follow current proof of claims procedures. The tribunal in this case also found that pregnant employees are entitled to take voluntary leave in conjunction with a health-related leave of absence. Taking a voluntary leave does not disentitle a pregnant woman from collecting benefits for the part of her leave that is health-related, even if it falls directly before or after a voluntary leave. As long as employees do not receive less than they would under the normal benefit plan, employers can use Unemployment Insurance Supplementary Unemployment Benefit plans in conjunction with employer top-ups to compensate pregnant women during their leave. In interpreting the decision in *Brooks*, these are the

key decisions and guidelines that the *Parcels* tribunal created. These guidelines were put in place to assist both employers and future tribunals in their assessment of benefit cases relating to pregnant employees.

In addition to the important *Brooks* and *Parcels* cases, this period contained a number of cases relating to benefits and leave for pregnant employees, which involved a range of issues and complaints. Out of the fifteen cases relating to benefits and leave, five involved situations in which pregnant women became sick and were forced by their employer to go on maternity leave early or to extend their maternity leaves longer than expected. As a result, instead of receiving sick leave benefits, they were placed on unpaid leaves. In *Saskatchewan Human Rights Commission and Arlene Stagg v. Intercontinental Packers Limited and Diane Moore* (1992), the complainant was forced to stop work prior to her scheduled maternity leave due to antenatal bleeding. Although she applied for and began to receive short-term disability benefits, before her entitlement to these benefits expired, her employer stopped them and placed the complainant on maternity leave. The tribunal ruled that the complainant had been discriminated against because she was entitled to the weekly indemnity benefits and because she was improperly denied access to long-term disability benefits.

In *Nancy Sievert v. Roycom Realty Limited and/or Philip E. Rossiter* (1994), the complainant had been forced by her employer to take disability leave prior to her scheduled maternity leave. The complainant had been advised by her doctor to take a few days off work for health related reasons, and she

informed her employer of this. Instead of granting her a few days, the employer forced her to go on disability leave and ignored the doctor's explanation of the problem and the requirements. The board found that this was discrimination on the basis of sex.

Juanita Crook and Ontario Human Rights Commission v. Ontario Cancer Treatment and Research Foundation and Ottawa Regional Cancer Centre (1996) began with a complaint that the employer had improperly placed the complainant on unpaid maternity leave after the birth of her child due to sickness. The board ruled that the complainant had a valid health-related reason for her absence and that by placing her on maternity leave, the employer had improperly denied her access to sick leave benefits, which was discriminatory. The board rejected the employer's argument that the reason for the leave was immaterial, and ruled that the employer treated employees absent for health-related reasons after childbirth differently from all other employees absent for other health-related reasons. The employer attempted to appeal the order that they stop excluding women from sick leave benefits during the period after childbirth when they are absent for health related reasons. This board rejected the appeal and also found that this exclusion of women from sick leave benefits around the time of childbirth, including normal recovery, is indeed discriminatory.

Connie Wight and Ontario Human Rights Commission v. Office of the Legislative Assembly and Attorney General of Ontario (1998) was a case in which the complainant was denied sick leave benefits during the period in which she could not work as a result of a high risk pregnancy. In this way, this case

related to the health-related component of leaves of absence for pregnancy. The board found that denying access to sick leave benefits under these circumstances was indeed discriminatory.

Taken together, these cases serve to illustrate several points. First of all, under most circumstances, it is only the pregnant woman that can decide the timing and length of her maternity leave, as long as it is in accordance with legislation. In normal circumstances, employers do not have the authority to force a pregnant woman to take maternity leave early or to extend it. Secondly, as argued in the *Parcels* case, these cases illustrate that pregnant women who are absent for a health related reason must be compensated in the same manner as other employees absent for health-related reasons. They must also be compensated for the entire length of health-related absence, which is a period that cannot be defined by the employer. In the cases analyzed above, employers failed to heed these requirements and were therefore found to have discriminated.

In addition to the outright refusal of sick leave benefits, four cases from this period involved the denial of certain benefits while women were on maternity leave. In *Heather Schumacher v. McDermaid Agencies Limited* (1991), the board did not have to decide on a complaint, but had to ratify the terms of a settlement between an employer and employee. This related to a situation in which a woman on maternity leave did not receive commissions on her client's accounts. The terms of this settlement indicated that this was not acceptable, and the board ruled that in the future, the employer should pay its employees on

maternity leave 60% of any bonus or commission that is received from their clients during their leave.

Jo-Ann Dumont-Ferlatte et al and Suzanne Gauthier et al and Canadian Human Rights Commission v. Canada Employment and Immigration Commission, Department of National Revenue (Taxation), Treasury Board and Public Service Alliance of Canada (1996) involved the complaints of 103 employees who claimed that they were discriminated against when they were not allowed to accrue annual leave, sick leave credits, or their entitlement to a monthly bilingual bonus while they were on their maternity leave. The tribunal dismissed this complaint after ruling that women on maternity leave were treated exactly the same as all other employees on health-related unpaid leaves of absence. In an appeal to this case, the decision was upheld by the tribunal who argued that the policy in question was applied identically to all forms of unpaid leave, and that the original board was justified in comparing maternity leave to these other forms of leave in order to come to its decision.

In *Commission des droits de la personne du Quebec et Line Bourdon et Carole Bilodeau v. Ville de Montreal et Syndicat canadien de la fonction publique* (1997), the complaint related to a policy in which employees had to work 520 hours of probationary work within 12 consecutive months in order to get their permanent status. Employees who did not have permanent status were not entitled to receive full benefits. This requirement made it very difficult for women on maternity leave to establish their seniority, and the tribunal ruled that this constituted adverse effect discrimination.

This period also contained a number of cases in which complainants believed they had been discriminated against when the nature of their job requirements were altered as a result of their pregnancy leaves. Out of the three cases in which this situation occurred, in only one did the tribunal find that discrimination had taken place. In *Violet Rancourt (Sikora) v. Alfredo's Holdings Ltd. and Fred Scofi* (1996) the complainant argued that she had been discriminated against when her hours were reduced prior to her scheduled maternity leave. The employer argued that this reduction in hours was not because of the employee's pregnancy, but because a student had been hired and that this necessitated the reduction in some staff's hours. The tribunal accepted this argument, but ruled that the employer's decision to choose the complainant to have her hours reduced related to her upcoming pregnancy leave, which was discriminatory.

In two other cases from this period, tribunals dismissed complaints that claimed discrimination when job requirements had been changed. *Melissa Bonetti v. Escada Canada Inc. doing business as Plaza Escada* (1995) related to an employer's decision to transfer the complainant due to her upcoming maternity leave based on the requirement of stability in the department. As discussed earlier, the tribunal accepted that this was acceptable accommodation given the situation and that keeping the complainant in the same position would have constituted undue hardship. Similarly, in *Commission des droits de la personne du Quebec et Giuseppina Gagliano v. Systemes Internationaux de fret Dillon Reid Inc. et Joseph Courdi* (1996) the complainant had been changed to

part-time from full-time following her maternity leave. The tribunal accepted the employer's argument that this change was solely based on economic considerations and therefore dismissed the complaint. These cases indicate that employers must ensure that their decisions to alter an employee's job requirements have nothing to do with an employee's pregnancy or maternity leave.

This analysis of cases that relate to leave and benefit issues for pregnant employees can shed light on the developments that have taken place in regard to employers' responsibilities. During this period, the decisions made in the *Brooks* and *Parcels* have been perhaps the most important for determining pregnant employees' entitlement to benefits and they have gone some way in improving pregnant women's situation. The *Parcels* case was particularly important for setting guidelines that would be used by later tribunals in making decisions. In addition to these cases, other relevant cases from this period indicate that tribunals have held strong to the idea that women on maternity leave must be treated in an identical manner to other employees on health-related leaves of absence. They are unwilling to accept situations in which these women are negatively affected compared to other employees, but they are also unwilling to find discrimination in cases where women on maternity leave are treated similarly to others. Tribunals have also ensured that women are not forced to take maternity leave as a result of health related absences. Women are entitled to sickness benefits, as are all other employees who become sick, regardless of when pregnancy or maternity leave falls. Similarly, requirements or policies

relating to the entitlement to benefits cannot make it more difficult for pregnant employees to gain entitlement, or tribunals will find adverse effect discrimination.

Termination

Even without considering the issue of human rights, the termination of employees is a very serious and emotional issue. Employers must not only be prepared to deal with the emotions involved, but these cases offer examples of what can happen when employers fail to consider human rights issues when carrying out terminations.

Pre-1988 Developments

In the cases studied in the 1990 article, 7 involved the termination of employment. In several of these cases, the tribunals ruled that employer attitudes or customer preferences were not acceptable reasons for firing a pregnant employee. As the article outlines, employers involved in these cases have argued that other reasons were behind termination, such as poor performance or the lack of business, but tribunals did not accept these arguments. If the pregnancy of an employee played a role in the termination, it was ruled to be discrimination. Simply put, cases from this period illustrated that pregnant employees should be allowed to work up until they decide that they wish to go on maternity leave, as long as the pregnancy does not affect their performance on the job.

Post-1988 Developments

In cases that were heard during the scope of this study, similar developments and decisions continued to take place. This period saw 13 cases emerge that related to termination of employment due to pregnancy. As in earlier cases, tribunals continued to reject arguments of customer preference and employer attitudes as acceptable reasons for termination. For example, as discussed earlier, in *Sherry Middleton v. 491465 Ontario Ltd.* (1991), the employers' argument that strip club patrons prefer a waitress who is not pregnant was rejected as an acceptable reason for terminating a pregnant employee.

Employers have attempted to use several excuses to explain why a pregnant employee was terminated. For example, in *Lyne Leclair v. Arnel Roberge* (1993), the respondent argued that a pregnant employee was terminated because his wife would be taking over the position. While in *Commission des droits de la personne du Quebec et Marie-Ange Dabel v. Lingerie Roxana Ltee.* (1995), the respondent argued that a pregnant employee was terminated because she was constantly late. In these cases and several others, tribunals rejected these arguments and ruled that the employee was indeed terminated because she was pregnant.

Tribunal decisions during this period also continued to reassert the fact that pregnancy can not play any role, no matter how small, in the termination of an employee. This was most clearly displayed in *Tami Hurd v. Soo Kwan Cho* (1990) where a pregnant employee was terminated. Upon purchasing the store that the complainant worked at, the respondent had planned to terminate several

employees. Indeed, three other store employees were laid off in the two months following the complainant's termination. Nevertheless, the tribunal ruled that the complainant's pregnancy did play a role in the respondent's choice to terminate her first, and therefore ruled that this was a case of discrimination. Similarly, in *Teresa Lynn Rachwalski v. E.C.S. Electrical Cable Supply Ltd.* (1996), the respondent argued that the changes that affected the duties of a pregnant employee were caused by economic factors and restructuring and that they had affected other employees as well. Once again however, the tribunal ruled that the complainant's pregnancy did play a role in the changing of her duties and that this was also discrimination.

This period witnessed termination cases that were much the same as those studied for the previous period. In much the same manner, tribunals continued to refuse to accept superficial arguments about why pregnant employees were terminated. Tribunals thereby illustrated that they are not willing to support employers' decisions to terminate a pregnant employee unless they can prove that their decision had absolutely nothing to do with their employees' pregnancy. Based on these cases and the seriousness of the issue, employers would be well advised to ensure that they can completely justify their decision to terminate on legal terms.

Conclusion

In offering this analysis of human rights cases, this chapter has aimed at presenting the key decisions and developments that have occurred as they relate

to pregnant employees. This period has witnessed the evolution of developments that were important in cases published prior to 1988 and also the development of new issues. Therefore, key conclusions from this period tend to reinforce those made earlier. Perhaps the most important development during this period was the official inclusion of pregnancy discrimination in the definition of sex discrimination. Employers must now be aware that any discrimination against pregnant employees will be considered to be discrimination on a prohibited ground. In terms of BFOQ issues and accommodation, cases from this period reinforced the idea that the onus is on the employer to prove that their requirements are bona fide and that their attempts to accommodate were carried out to the point of undue hardship. In deciding on these issues, boards reject most superficial arguments from employers, even if they seem based on the employee's well being. If an employer cannot clearly prove that they carried out their responsibilities, they will find it very difficult to justify their position. Cases from this period clearly illustrated the scrutiny that boards place on employers.

In terms of benefit and leave provisions, the key conclusion for employers from case analysis is that pregnant employees who are absent for health-related reasons must be treated in exactly the same manner as all other employees absent for health-related reasons. The landmark *Parcels* case made employers' responsibilities in this regard clear, as the decision created guidelines to ensure that pregnant women receive benefits during their entire illness and that employers do not dictate when maternity leave begins or ends. In cases from this period relating to termination, boards made it clear that pregnancy can have

absolutely nothing to do with the decision to terminate. In these ways, cases from this period served to both offer new information for employers while also reinforcing longer standing trends and requirements.

These cases have made it clear that when employers are making decisions that could negatively affect pregnant employees, they must ensure that they are fully aware of the relevant legislation and that they have taken care of all of their responsibilities. The analysis offered in this chapter can be used to give employers an understanding of the kinds of issues that they must consider and what can happen if they do not. This chapter avoided discussion of the remedies and awards offered in these cases, as they will be discussed in comparison to labour arbitration cases in a later chapter.

Endnotes

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- ¹ Please note that unless otherwise referenced all information in this thesis relating to the pre-1988 period is from: Palaniappan Andiappan, Martha Reavley and S. Silver, "Discrimination Against Pregnant Employees: An Analysis of Arbitration and Human Rights Tribunal Decisions in Canada", Journal of Business Ethics 9 (1990), pp.143-149.
- ² Susan Brooks v. Canada Safeway Ltd., and Patricia Allen and Patricia Dixon and the Manitoba Human Rights Commission v. Canada Safeway Ltd. and Women's Legal Education and Action Fund (L.E.A.F.) (1989), *Canadian Human Rights Reporter*. vol.10, D/6199.
- ³ This period lasted from 10 weeks before the expected week of delivery until six weeks after the actual week of delivery, and was therefore referred to as the '10-1-6' period.
- ⁴ Century Oils (Canada) Inc. and Production Supply v. Christine Marie Davies and British Columbia Council of Human Rights (1988), C.H.R.R.: vol.9, D/4661.
- ⁵ Lina Maria Riggio v. Sheppard Coiffures Ltd., carrying business under the name of Joseph's Coiffures, and Tony Vitale (1987), C.H.R.R.: vol.8, D/4526.
- ⁶ Brooks v. Safeway, C.H.R.R., D/ 6199
- ⁷ Susan Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No. 15 and United Nurses of Alberta, Local 002 and Alberta Hospital Association (1991), C.H.R.R.: vol.15, D/257.

Chapter 3: Labour Arbitration Case Analysis

In addition to the human rights cases that were discussed in the previous chapter, an analysis of labour arbitration cases will allow for an increased understanding of where the issue of discrimination against pregnant employees stands today by offering a different perspective. Unlike human rights boards of inquiry, which decide on cases based on a range of applicable legislation, labour arbitration boards are most concerned with the interpretation of individual collective agreements. While the legislation discussed earlier provides minimum standards, negotiation of collective agreements often leads to the creation of more extensive provisions. For pregnant employees, these extra provisions often provide extended periods of maternity and parental leave along with increased levels of protection, which is partly the result of employees having access to a grievance arbitration process. Additional benefits are also made available in some contracts, often through the use of employer top-ups and Supplementary Unemployment Benefit (SUB) plans.¹ Obviously, legislation and human rights codes play an important role in these cases, but the addition and importance of individually negotiated collective agreements creates a different twist to these cases and the decisions made. In this way these decisions can shed a different light on the responsibilities of employers when it comes to the treatment of pregnant employees.

This chapter will begin with an analysis of issues and cases discussed in the 1990 *Journal of Business Ethics* article. The second section will not only

work to update the issues discussed in the first article, but it will also offer a more detailed analysis of the common themes and trends arising in cases from this period. The final section will offer recommendations and suggestions for employers in terms of the responsibilities and requirements that they must be aware of based on these labour arbitration cases.

Pre-1988 Developments

Although this thesis' focus is on cases published after 1987, in order to fully understand the developments and cases that have happened during this period, it is important to understand what has happened in the past. The 1990 article analyzed labour arbitration cases that were published between 1980 and 1987 and included a discussion of the different perspectives that arbitrators have taken. The following section offers a summary of these perspectives.

During this period, 20 out of 29 cases that related to pregnant employees had to do with the refusal of sick leave or disability benefits, and it is on these cases that the article focused. Employers' refusal to grant sick leave and disability took a number of forms during this period, and many involved the interplay between maternity leave and sick leave and what this interplay meant for employees' entitlement to benefits. As is the case with most labour arbitration cases, the key factor in these benefit cases related to the wording and interpretation of the individual agreements. Specifically, many of these cases were decided based on the definitions of normal and abnormal pregnancy, and the distinction and relationship between the illness in question and pregnancy.

Depending on the wording of the collective agreement in question, boards came to a number of decisions about pregnant employees' entitlement to benefits.

In many of the cases from this period, boards were asked to rule on the nature of the pregnancy in question, and whether or not the characteristics of the pregnancy entitled the pregnant employee to sick leave benefits according to the related agreement. In 55% of the relevant cases, boards found that a normal pregnancy and the conditions that accompany a normal pregnancy could not be defined as an illness and therefore did not entitle the pregnant employee to sick leave benefits. Nevertheless, depending upon the wording of the individual agreement, other boards found the opposite, which illustrates the importance of judging each case on its individual merits. When boards ruled on cases in which the collective agreements in question included separate clauses relating to pregnancy and illness, they did not have to rule on the above issue. Instead, in deciding whether the employee should have access to maternity or sick leave, these boards had to decide on the nature of the illness in question and whether it was directly related to pregnancy or something else. Rulings offered in these cases showed that if the sickness in question was not pregnancy related, that the employee was entitled to sick leave benefits.

In cases in which the pregnancy in question was abnormal as a result of complications or related illnesses, boards during this period often found that collective agreements allowed these pregnancies to be classified as illnesses, even if they were not accompanied by pre-existing problems. As a result of the wording of certain collective agreements, boards often had the task of

distinguishing between normal healthy pregnancies and abnormal ones when determining whether an employee was entitled to sick leave benefits. These cases indicated that decisions were based on the general principle that if the pregnancy was in any way abnormal and that this forced the employee to be absent from work, that the employee was entitled to sick leave benefits.

Most cases relating to pregnant employees during this period have involved debates surrounding entitlement to sick leave and maternity leave benefits and the interplay between these benefits. In these cases, boards have had to interpret collective agreements and make rulings on the nature of the illness in question in order to establish entitlement to benefits. Based on this case analysis, it was possible to conclude that in order to ensure against discrimination and the punishment of women for their childbearing capacity, any illness relating to pregnancy should entitle an employee to sick leave benefits, which was the authors key recommendation for employers based on these labour arbitration cases.

In all of these cases, the key point to remember is that each case was judged on its individual merits according to the collective agreements in question. Although certain trends were discerned from these cases, these trends do not set precedents and do not have an authoritative impact on decisions that will be made in the future. It is only the specific wording of the collective agreement that each organization has agreed to that will determine its employees' entitlement to sick leave benefits in certain situations. Although cases must be judged on their individual merits, some of the discernible trends that were outlined in the

previous section can be used to understand the general nature of the decisions that were made during this period. By using this information as a background understanding for the cases studied specifically for this thesis, it will be easier to understand the evolution of current developments and what they mean for employers.

Post-1988 Developments

In cases heard in this period, a range of issues came up in relation to pregnant employees, and in many ways these were similar to those analyzed in the first article. During this period, boards have had to rule on complaints relating to benefits, leave, termination, and jurisdiction, and the range of decisions in these cases have involved new trends and developments that must be understood. Each of these issues will be developed separately in the following section with a detailed analysis of relevant cases, which will ultimately allow for the creation of suggestions and recommendations for employers based on more recent trends.

Benefits

As in the last period, the majority of cases relating to pregnant employees published after 1987 had something to do with benefits. Again, boards have had to make decisions and interpretations relating to the nature of pregnancies, the nature of illnesses, and the relationship between illness and pregnancy. Cases relating to benefits during this period dealt with a range of different complaints, and they can be categorized into three distinct issues: the refusal of benefits, the

accrual of benefits and the prorating of benefits. By studying cases relating to each of these issues separately, this section can shed light on new perspectives and interpretations that boards have made.

Refusal of Benefits

The following section will discuss cases in which pregnant employees were denied sick leave benefits. In these cases, boards have not only had to rule on more general issues such as the relationship between sickness and pregnancy, but they have also been faced with applying the terms set forth in collective agreements to more specific issues. These issues include the timing of leaves, the nature of actual sicknesses, the wording of collective agreements, and situations in which pregnant women have been forced to take maternity leave early due to sickness.

In two of the cases that related to the refusal of sick leave benefits, boards had to decide whether employees should have been placed on sick leave or maternity leave based on the nature of the specific illness in question. Although these cases were rather similar, the wording of the different collective agreements resulted in contrasting decisions. In *Ross Memorial Hospital and Ontario Public Service Employees' Union* (1990), the grievor claimed that she was improperly denied sick leave benefits and placed on extended maternity leave while she was recovering from a caesarian-section childbirth. Under the illness provisions of the collective agreement, the board ruled that she had been properly characterized as being on maternity leave, as the period that she was

absent was the necessary period for recovery after a C-section and therefore not classified as a sickness.

Government of British Columbia (Ministry of Social Services) and British Columbia Government and Service Employees' Union (1996) also related to a case in which the grievor complained about improper denial of sick leave benefits when she was absent from work after her scheduled maternity leave, in this case due to post partum depression. In this case however, the adjudicator rejected the argument that she was correctly placed on extended maternity leave, as the collective agreement did not stop an employee from claiming sickness benefits when the sickness was related to pregnancy. In this case, the agreement allowed her to collect seven months of benefits, and the grievor was therefore entitled to receive these benefits from the end of her scheduled maternity leave to the end of this seven-month period. In these two cases, although fairly similar, the interpretation and wording of the collective agreements resulted in different outcomes.

In two other cases, boards had to rule on whether sick leave or maternity leave was appropriate based on the timing of the leaves in question. The decisions in both of these cases clearly illustrate that employers cannot expect to dictate the timing of a maternity leave. *Black Diamond Cheese, Unit of Canada Packers Inc. and Black Diamond Cheese Employees Independent Union, Local 555 (1989)* involved two grievors who could not return to work following their maternity leaves because of non pregnancy related illnesses. Both women filed complaints when they were refused sick leave benefits for this period of illness

because they were considered to have taken extended maternity leaves. Their employer put forth the argument that the women were not entitled to sick leave because they had not submitted the necessary documentation to inform them that their maternity leaves would be ending. The board rejected this argument and ruled that according to the Employment Standards Act that such a note was not required. It was ruled that the two grievors did not lose their benefits simply because their illnesses occurred after their scheduled maternity leaves and they were therefore entitled to sick leave benefits.

Government of Province of Alberta and Alberta Union of Provincial Employees (Conroy-Rossall) (1991) related to a situation in which the grievor had become ill at the same time that her maternity leave was to begin. She believed that her maternity leave should have begun after her illness had cleared up. Her employer argued that she was not entitled to sick leave because she had already committed to a date for her maternity leave to begin and that this could not change. They also argued that sick leave benefits were to cover for lost income, and that the fact she was going to be on maternity leave when she became sick meant that she would not have been losing any income due to her illness. In this case, the collective agreement distinguished between absence due to illness and absence due to pregnancy, so the board had to decide on the reason for her absence, sickness or pregnancy. The board made two key points in their decision. First of all, they decided that the grievor had not officially committed to a date for her maternity leave to begin and that the employer could not choose this date for her. Secondly, they used the fundamental reason for

absence doctrine, which states that the reason for the leave of absence is to be defined by the reason that arose first and that initiated the leave. Using this doctrine, they argued that her entitlement to general sickness benefits began before her maternity leave and that her time off should have therefore been classified as sick leave until the illness had cleared up. The decisions in these cases illustrate that employers cannot dictate the timing of maternity leaves, and that they must respect their employees right to sick leave benefits, regardless of when these sicknesses occur.

Other cases from this period were not quite as straightforward as those above in terms of what the boards had to rule upon. Two cases involved situations in which boards had to rule on the interplay between timing and the nature of illness when deciding whether the grievors were entitled to sick leave benefits. In both *City of Barrie Police Services Board and Barrie Police Association* (1992) and *Board of Education of the County of St. Paul, No.1 and Alberta Teachers' Association* (1996), grievors complained that they had become sick before their scheduled maternity leave, but instead of receiving sick leave for this period of illness, they were forced to take early maternity leaves. In both of these cases boards had to decide on both the timing of the illnesses and the actual nature of the illnesses in question in order to decide whether there was entitlement to sick leave. The boards in these cases made similar decisions and ruled that according to the collective agreements in question, that up until the time set by the woman for a maternity leave, she is entitled to sick leave benefits if she becomes sick and the employer has no authority to place her on maternity

leave early. At the same time, it must be remembered that according to some collective agreements the employer may have this right. For instance, in *Brantwood Residential Development Centre and Service Employees International Union, Local 204 (1988)*, there was a clause in the agreement that if the employer could not carry out regular duties that she could be placed on early maternity leave. The board therefore ruled that the employer had not acted incorrectly when they placed the woman on maternity leave early. Taken together, these decisions make it clear that if an employee becomes ill before maternity leave, and that there is no legitimate reason for putting them on maternity leave explicitly stated in codes or agreements, that they are entitled to sick leave.

In addition to benefit refusal cases in which boards have had to make decisions about whether certain actions violated the terms of collective agreements, there was also one case in which they had to rule about the nature of the agreement itself. In *Kootenay Savings Credit Union and United Steelworkers, Local 9090 (1991)*, the collective agreement in question excluded pregnant women from weekly indemnity benefits during a period of 10 weeks prior to delivery. The board ruled that such an exclusionary policy went directly against the ruling made in the human rights *Brooks* case, and as a result was not acceptable. In this case, even though the policy originated with the insurance company that the employer had contracted, the employer was still found to be responsible for the insurance company's actions. This ruling makes it clear that employers must ensure that all policies relating to their employees do not serve

to disadvantage any group and therefore must be reticent of any policy that covers their employees.

In a case discussed earlier, the wording of the collective agreement made it possible for a board to rule that a woman was entitled to sick leave benefits as a result of the conditions of a normal pregnancy. The board in *Dufferin-Peel Roman Catholic Separate School Board and Ontario English Teachers' Association* (1998) ruled that an employee on pregnancy leave is entitled to sick leave benefits during the period of actual physical disability that accompanies normal childbirth. This decision has important implications for employers and employees who are bound by similar collective agreements. Employers must be aware that these kind of decisions are possible given the wording of certain collective agreements.

During this period, many of the cases relating to the refusal of benefits involved decisions on the interplay between sickness and pregnancy and how this interplay relates to specific collective agreements. Although every collective agreement is different, decisions from these cases can shed light on employers' responsibilities when it comes to their employees' entitlement to sick leave and its relationship with pregnancy. It is clear that unless a certain action is clearly warranted by the collective agreement, that boards will vigorously protect women's entitlement to sick leave benefits and their right to choose the timing and length of their maternity leave.

Accrual of Benefits

In addition to cases that involved the outright denial of benefits, this period also witnessed several cases relating to the accrual of benefits during periods of maternity leave. Generally speaking, it is accepted throughout legislation and many collective agreements that employees on leaves of absence are entitled to continue accruing certain benefits, such as seniority and wage increases. The specific benefits that employees will continue to accrue above and beyond those outlined in human rights and employment standards legislation depend upon the wording of the collective agreement. In five cases heard during this period, boards have had to interpret collective agreements to decide on whether an employee is entitled to the accrual of certain benefits while on maternity leave.

In two of these cases, boards have ruled that according to the collective agreements in question that employees on maternity leave should have accrued certain benefits that the employer had denied them. *Regional Municipality of Halton and Ontario Nurses' Association* (1995) relates to a complaint in which the grievor claimed that she was improperly denied the accrual of seniority and wage increments during her maternity leave. The board ruled that pregnancy leave in this case was to be granted according to the Employment Standards Act so that women on maternity leave are to receive wages and increases that they would have received had they kept working. Similarly, in *Regina General Hospital, on behalf of Hospital Laundry Services of Regina and Retail, Wholesale and Department Store Union, Local 568* (1991), the board had to decide whether the collective agreement entitled employees on maternity leave to continue to accrue

sick leave days, vacation days, and seniority. The board ruled that this accrual should have taken place because the collective agreement stated that accrual should continue while the employee is employed, which did not mean that they had to be in active service to accrue these benefits. In other words, these benefits were not service-driven, and an employee on leave was therefore not disentitled.

In two other cases during this period, the concept of service-driven benefits would play a decisive role for boards in determining whether employees on maternity leave were entitled to accrue benefits. *British Columbia Public School Employers' Association (Vancouver School Board) and British Columbia Teachers' Federation (Vancouver Teachers' Federation)* (1998) began with a complaint in which it was grieved that women on maternity leave were being improperly denied the accrual of sick leave credits. This related to a service benefit that all employees were entitled to based on the number of hours that they had worked. Based on the fact that this was clearly delineated as a service driven benefit within the collective agreement, the board ruled that this was not discriminatory and dismissed the complaint. In deciding this, they argued that

the loss of a service driven benefit that is available to all employees on the basis of hours worked, by reason of absence from work for whatever reason, including pregnancy, does not constitute a 'penalty or restrictive condition' on an individual or group of individuals...Here, the negotiated standard is at least some active service in the given month. Thus, under the collective agreement, the accrual of sick leave credits is not, as a general rule, simply an incident of employee status; rather, it is a benefit which is earned by service in one degree or another.²

A similar decision took place in *Melfort School Division No. 100 and Canadian Union of Public Employees, Local 2554* (2000), which related to a

policy of not including the period a woman spends on maternity leave toward wage increments. Again, it was ruled that this did not offend against the collective agreement or other legislation because it was clearly stated that this was a service driven benefit. This kind of ruling can also be found in other cases from this period that do not specifically relate to issues of accrual. For instance, *Windsor Western Hospital Centre and Service Employees' Union, Local 210* (1993) involved a policy in which the employer did not include money paid as benefits when calculating unemployment insurance top-up payments for part-time employees on maternity leave. In this case the board ruled that these payments were clearly paid for time worked and therefore should not be available for those on leave. All of these cases indicate that according to agreements in which certain benefits are clearly presented as service-driven and when this policy is applied to all employees equally, women on maternity leave are not entitled to accrue those benefits.

In one particularly unique ruling from this period, it was ruled that it was acceptable that women on maternity leave do not accrue seniority because other elements of the agreement give these same women positive benefits, which works to balance the negative elements. In *Town of Ajax and Canadian Union of Public Employees, Local 54* (1991), the board argued that "the board must determine whether an article that, at the same time, bestows additional benefits and takes away an existing right amounts to improper discrimination based on sex...In our opinion we must look at the article as a whole and consider the positive and negative implications of the article", and in doing so the complaint

was dismissed.³ The case includes a strong dissent in which it is argued that the decision was wrong, in that a collective agreement should not be viewed as a balance scale. The dissenter argues that despite other benefits that pregnant women receive from the collective agreement that “the discrimination remains in that a right granted for all others is denied to women”.⁴ If anything, the decision in this case illustrates how boards’ interpretations of collective agreement can differ.

In all of the cases relating to the accrual of benefits during maternity leave, it is clear that the specific wording of the collective agreement is of key importance. Although human rights and employment standards legislation define minimum requirements and therefore must be considered, the specific benefits that are to be accrued are often defined by the collective agreement. Most importantly perhaps, it would seem that in these cases the key issue has been whether or not the agreement clearly delineates a benefit as service driven. In their negotiations, employers must be aware of this distinction in order to avoid the problems that have arisen in these cases.

Prorating of Benefits

A similar issue to the accrual of benefits that has arisen in several cases from this period is the prorating of benefits for those on maternity leave. In many cases, those employees on some sort of leave often have their benefits adjusted to account for time missed. In three cases from this period, boards have had to apply collective agreements to decide whether women on maternity leave should have had their benefits prorated. In these cases, the deciding factor has involved

the choice of which group women on maternity leave should be compared with in deciding whether they have been unjustly disadvantaged.

The first case that involved this issue was *Glen Haven Manor Corp. and Canadian Union of Public Employees, Local 2330* (1991). In this case, the policy in question was one in which all employees on unpaid leaves had their vacation benefits prorated. After considering human rights rulings such as *Brooks* and *Bliss* along with definitions and legislation relating to discrimination in general, the board ruled that this policy was not discriminatory against pregnant employees. The board ruled that "no obligations, penalties, or restrictive conditions are imposed on either the Grievor or on pregnant females or on females generally that is not imposed on everyone in the bargaining unit".⁵ Similarly, in *Canadian Airlines International Ltd. and Canadian Union of Public Employees, Airline Division* (1993), a complaint arose in which a policy of prorating flight attendants' vacation entitlements after their initial 18 weeks of leave was brought into question. In this case, the board simply compared this prorating treatment to other employees who were absent for health-related reasons and found that those on maternity leave were actually treated more favourably. As a result, the board dismissed the grievance and argued that the Human Rights Act only requires employers to treat pregnant employees in the same manner as others who are absent from work for health-related reasons. The ruling in *Regional Municipality of Durham and Canadian Union of Public Employees, Local 132* (1995) was similar, in that because the prorating of

vacation entitlements was applied equally to all unpaid leaves, pregnancy leave was not singled out.

In all of these cases relating to the prorating of benefits, the issue of comparator groups was key. It is clear that in deciding on these cases, boards have simply compared the treatment of women on maternity leave to those on other health-related leaves of absence to determine whether discrimination has taken place. As long as those on maternity leave are not treated any differently than others on health-related leaves of absence, then boards have ruled that the policies do not disadvantage pregnant women. *Victoria County Memorial Hospital and Canadian Auto Workers, Local 607 (1994)* can be used as an illustration of how boards tend to rule when women on maternity leave are treated differently in terms of the benefits they receive or accrue. In this case, women on maternity leave were forced to pay full premiums in order to maintain their benefits, while those who were absent for other health-related reasons were not. The board allowed the grievance because of this. Decisions made in this regard have therefore clearly indicated that boards tend to find discrimination only if pregnant women are treated differently from those on other health-related leaves of absence.

The debate over comparator groups has been an important one, and in the past, boards have been unwilling to accept arguments that women on maternity leave should be compared with those in active service. In disputing this argument, the board in *British Columbia Public School Employers'*

Association (Vancouver School Board) and British Columbia Teachers' Federation (Vancouver Teachers' Federation) (1998) argued that this

logically presumes a legislative intention that at least in some cases, employers will be required by operation of the Human Rights Code to pay full wages and benefits to employees absent from work on maternity leave...There are certain basic assumptions underlying the employer-employee relationship. The core assumption is that the employee will render service in exchange for which the employer will pay wages and benefits.⁶

In this way, boards have upheld the idea that those on maternity leave should be compared with those on other health-related leave of absence, and with this, employers have a standard on which to base their treatment of maternity leave.

Leave

In addition to the issue of benefits, a number of cases from this period relate to complaints about maternity leave. Although these cases involve a number of different complaints, the common element in the complaints is the fact that employers have forced pregnant women to take their maternity leave earlier than the scheduled date. An analysis of these cases will allow for an understanding of how boards have interpreted collective agreements in this regard.

Out of the six cases that related directly to issues of maternity leave, three involved the employer refusing the employee light duties during the latter portion of their pregnancies and forcing them to take maternity leave early. Although the three complaints were very similar, they resulted in three very different rulings as a direct result of the wording of the collective agreements in question. In *Brantwood Residential Development Centre and Service Employees*

International Union, Local 204 (1988), the grievor began to experience stress-related abdominal pains and therefore could not perform her regular duties prior to her maternity leave, instead she requested light duties. When her employer refused this request and placed her on maternity leave, she made her complaint. In deciding whether the employer had a right to place the woman on maternity leave early, the board referred to a section of the collective agreement which stated that "the employer may require the employee to begin the leave of absence at such time as in its opinion the duties of her position cannot reasonably be performed by a pregnant woman or the performance of her work is materially affected by the pregnancy".⁷ Based on this clause and the fact that the grievor herself claimed that she could not perform regular duties, the board ruled that the employer acted properly and the grievance was dismissed.

In *Orangeville Police Services Board and Orangeville Police Association* (1994), the board had to make a decision about a similar complaint in which the grievor was refused light duties and placed on maternity leave early. Once again, the board referred to the collective agreement in question and found that the employer had a contractual obligation to accommodate their police officers with alternative assignments where possible. The board found that the employer had accommodated other employees for health-related reasons in the past and rejected the employer's argument that there were no alternative assignments available. The board therefore ruled that the employee could have been accommodated without undue hardship and that she should not have been placed on maternity leave early.

Haldimand-Norfolk Police Services Board and Haldimand-Norfolk Police Association (1993) also originated with a complaint that a police officer was refused light duties and forced to go on maternity leave early. It was argued that this violated both the Police Services Act and the Human Rights Code. In this case, the board did not make a ruling on the wording of the collective agreement, but on the wording that the agreement did not include. The collective agreement that was negotiated between the two groups made no mention at all of sex discrimination. As a result, the board ruled that it could not make a decision on the complaint because they did not have the authority to import other legislation into the collective agreements when the actual agreements are completely silent on the issue in question.

These three cases clearly indicate that the wording of the collective agreement is a key factor in deciding whether employers have the authority to place employees on maternity leave early. If the agreement discusses the issue but does not include provisions allowing employers to force employees to take maternity leave early, then employers must allow their employees to choose when they will take leave according to human rights legislation. This was also made clear in *Board of Education of the County of St. Paul, No.1 and Alberta Teachers' Association* (1996) when the board ruled in favour of a grievor who had become ill two weeks before her scheduled maternity leave and was forced to take maternity leave early. In this case it was ruled that only the pregnant woman can decide when she should go on maternity leave.

In another rather unique case from this period, the board ruled that an employee who was not eligible for maternity leave was unjustly discharged. *Thousand Islands Duty/Tax Free Store Ltd. and Ontario Liquor Boards Employees' Union* (1990) involved a pregnant employee who had not worked long enough to be eligible for maternity leave. She discussed her options with her employer and was told that there was nothing she could do. As a result of this, the employee submitted a letter to her employer that the employer believed was a letter of resignation, at which point the employee filed a complaint. The board in this case found that there was miscommunication about the 'resignation' letter, but also ruled that the collective agreement was breached due to the employer's misinterpretation of the pregnant employee's options. The board ruled that the woman was indeed eligible for discretionary leave benefits and that when she was not considered for such leave, the agreement had been broken. This rather unique case indicates employers' responsibilities in understanding the collective agreement and ensuring that they offer the proper options.

The final issue that arose in cases relating to leave was that of the conditions of reinstatement. *CFRN-TV and Communications, Energy and Paperworkers Union of Canada* (1997) relates to a grievance in which a woman complained that her employer breached their collective agreement and the Canada Labour Code when they refused to reinstate her in a similar position after her maternity leave. This board rejected the employer's arguments that it was enough that the grievor was reinstated in a position with the same title as her previous position, and ruled that she was to be reinstated in a "position

having at least the same duties and responsibilities, status, working conditions, and benefits that she enjoyed when she commenced maternity leave".⁸ It was not enough to offer her a position that sounded similar to her earlier position, as it was required that the job be as good as the aggregate of the key elements of the job that she left to go on maternity leave. This case illustrates the board's unwillingness to resort to a play of words and their concern with applying agreements and legislation for the benefit of pregnant women that have been disadvantaged.

Cases relating to leave heard during this period have made it clear that beyond the responsibilities laid out in human rights codes and legislation, it is the specific wording of the collective agreement that is the key factor in determining the acceptability of certain actions. Although boards have shown a concern for protecting pregnant employees' rights, they are bound by the letter of the collective agreement and are unwilling to go beyond the collective agreement when deciding cases. As a result of this, employers must ensure that the collective agreements they negotiate are inclusive and detailed when it comes to issues that they deem important.

Termination

As was the case with the human rights cases discussed in the previous chapter, labour arbitration cases involving the termination of employees are often very emotional for the grievor, and boards have taken the importance of the

situation into account. During this period, labour arbitration boards heard seven cases that related to the termination of a pregnant employee.

Three of these cases involved situations in which boards ruled that it was unacceptable for the women involved to be laid off during their maternity leave. In all of these cases, boards had to decide on the relationship between an employer's right to lay-off employees on one hand, and the employee's right to maternity leave and the benefits that come with this leave on the other. In *Participating Hospitals and Ontario Nurses' Association* (1998), the board ruled that according to the collective agreement the employer could not lay off an employee who is on pregnancy or parental leave. Similar decisions were made in *City of Toronto and Canadian Union of Public Employees, Local 79* (1999) and *City of Toronto and Canadian Union of Public Employees, Local 416* (1998). In all of these cases the boards relied on the wording of the collective agreements to come to their decision. Nevertheless, it has not gone unnoticed that these rulings seem to give pregnant women an advantage over other employees. In a dissent to one of the previous cases, the dissenter argued that

the issue in this case is whether, pursuant to the collective agreement or statute, women at a particular point in their pregnancy are intended to have greater job and income protection rights than other employees. In my respectful opinion, neither the collective agreement nor any applicable legislation was intended to create a form of super seniority for women whose pregnancy occurs at a particular point in time.⁹

Despite the fact that interpretation is key in these cases, board members have also imported arguments relating to the intention of the collective agreements in order to make decisions in these cases.

The argument put forth by the dissenter in the case last mentioned relates to the one case from this period in which a lay-off during maternity leave was held to be acceptable. *Board of Governors of the University of Alberta and University of Alberta Non-Academic Staff Association (1999)* began with a grievance alleging an improper termination prior to a scheduled maternity leave. In this case, it was argued that the grievor was discriminated against when she was fired due to her pregnancy. The board ruled that no discrimination took place because there was no proof of the employer's discriminatory motivation and no proof that the adverse employment decision was because of, or on the basis of, the pregnancy. The grievor also argued that because she could not find alternative employment that she was discriminated against, but the board also rejected this argument and dismissed the grievance. By making this decision, this board illustrates that boards are willing to interpret both the wording of the agreement and its underlying intentions when making a decision. Nevertheless, in another revealing dissent to this case, a dissenter argued that

the layoff of Ms. Chin was discriminatory because it caused Ms. Chin to be in a position of looking for work while being pregnant... Being pregnant left Ms. Chin open to a societal attitude which limited her individual capacity to find employment... The question 'Did the decision to lay off Ms. Chin have a discriminatory effect on a prohibited ground?' I would have answered in the affirmative, as I believe is evidenced by Ms. Chin's lack of ability to find another position...The Employer ought to have known that pregnant women have extreme difficulties finding work and proceeded to accommodate Ms. Chin, until she left maternity leave in June.¹⁰

This dissent not only illustrates the importance of interpretation, but also how board members are willing to consider a larger range of evidence and information

over and above the specific wording of the collective agreement when dealing with issues of termination.

Along with these rather straightforward cases of termination, two cases from this period involved interesting twists that might shed light on how boards tend to interpret these cases. In a case discussed earlier, *Thousand Islands Duty/Tax Free Store Ltd. and Ontario Liquor Boards Employees' Union* (1990), the grievor was effectively discharged as a result of miscommunication and a misinterpretation of the collective agreement. While the board in this case ruled that both the employer and employee were responsible for the miscommunication that led to the termination, they ruled that by failing to consider the grievor for a discretionary leave that they breached the collective agreement in question.

In another interesting case of termination, *Schlumberger Industries, Electricity Division and International Association of Machinists & Aerospace Workers, Lodge 1755* (1991), the grievor was laid off for extensive innocent absenteeism. A day after the termination, the grievor found that she was a habitual aborter and that this was the cause of her problems with pregnancy, and she then informed her employer of this problem for the first time. In this case, the board ruled that although the termination itself was based on proper grounds, the grievor should be reinstated because the cause of the previous absenteeism was now gone. Although the employer argued that information divulged after the fact should not have been considered, the board argued that considering that the grievor's livelihood was at stake, that the decision was necessary.

It is clear that cases involving termination are not as easy to solve as simply referring to the specific wording of the collective agreement. In all of these cases, the grievors have been put in a situation in which their very livelihood is at stake, and as a result boards and dissenters have been willing to include and consider a wider range of evidence and detail. The wording of the collective agreement in question still remains important, but decisions have gone beyond simple wording in order to ensure that grievors are protected against serious problems that could be avoided without overly punishing the employer. Employers therefore must be aware of this, and must be fully prepared with detailed explanations of what they have considered when making the decision to lay off a pregnant woman or a woman on maternity leave. It is not enough to rely on the wording of the collective agreement, but employers would be well advised to place the employee's well being ahead of trivial specifics.

Conclusion

Labour arbitration cases heard during this period covered a range of different issues, which allows for some good insight into employers' responsibilities under a range of circumstances. The most obvious conclusion that can be garnered from this analysis is that the wording of the specific collective agreement in question continues to be of primary importance. In each case, adjudicators have based their decisions on the individual merits of the case, and as a result, cases that appeared to be very similar were decided very differently. Employers therefore should not base their actions or policies on

decisions made in previous cases in the hope that these actions will also be acceptable according to the collective agreement that they have negotiated. While adjudicators have tended to strictly focus on the wording of the agreement, in some circumstances, they have also considered the severity of the situation in order to come to a decision.

Although cases are judged on their individual merits, there are some general trends that can be discerned from the case analysis. During this period, decisions in these cases served to reinforce the trends and conclusions that were found in earlier periods. Most importantly, employers would be wise to ensure that any illness relating to pregnancy is accompanied by sick leave benefits. Cases indicate that employers must respect this entitlement to sick leave no matter when the illness occurs, and they cannot dictate when this official period of illness should begin or end. Unless a certain action or policy is clearly warranted by the collective agreement, adjudicators have proven that they will vigorously protect pregnant women's entitlement to sick leave and their right to choose when their maternity leave should begin and end.

If employers take only one conclusion away from the analysis presented in this chapter, it should be that they should treat employees on maternity leave in exactly the same fashion that they would treat any other employee on a health-related leave of absence. Many cases have illustrated that in making decisions in these cases, adjudicators will compare the treatment of pregnant employees to other employees on health-related leaves. This was especially visible in cases relating to the accrual and prorating of benefits, in which if the concept of a

service-driven benefit was applied equally to all employees, that it was ruled acceptable to apply the concept to women on maternity leave. Although collective agreements can be interpreted differently, case analysis has shown that matching treatment of employees on maternity leave with employees who are on other health-related leaves will help employers avoid many problems.

By understanding how their actions and policies are scrutinized in labour arbitration cases, employers can ensure that they do not create a situation in which they are faced with a discrimination complaint. Together with human rights case analysis, employers can understand their responsibilities as they have been defined in two different legal venues. The following chapter will add detail to this understanding by offering a comparison of some of the elements of human rights and labour arbitration cases.

Endnotes

- ¹ Laurie Schwartz, Parental and Maternity Leave Policies in Canada and Sweden, (Kingston: Industrial Relations Centre, 1988), p.47.
- ² British Columbia Public School Employers' Association (Vancouver School Board) and British Columbia Teachers' Federation (Vancouver Teachers' Federation) (1998): Labour Arbitration Cases (4th), vol.72, p.226.
- ³ Town of Ajax and Canadian Union of Public Employees, Local 54 (1991): L.A.C. (4th), vol.23, p.77.
- ⁴ ibid., p.84.
- ⁵ Glen Haven Manor Corp. and Canadian Union of Public Employees, Local 2330 (1991): L.A.C. (4th), vol.19, p.16.
- ⁶ British Columbia Public School Employer' Association and British Columbia Teachers' Federation, L.A.C., p.224.
- ⁷ Brantwood Residential Development Centre and Service Employees International Union, Local 204 (1988): L.A.C. (4th), vol.1, p.48.
- ⁸ CFRN-TV and Communications, Energy and Paperworkers Union of Canada (1997): L.A.C. (4th), vol.69, p.37.
- ⁹ City of Toronto and Canadian Union of Public Employees, Local 416 (1998): L.A.C. (4th), vol.73, p.254.
- ¹⁰ Board of Governors of the University of Alberta and University of Alberta Non-Academic Staff Association (1999): L.A.C. (4th), vol.82, p.56.

Chapter 4- Comparison of Human Rights and Labour Arbitration Cases

The previous two chapters have presented an analysis of legal proceedings from two different venues relating to discrimination against pregnant employees. This analysis of human rights and labour arbitration cases illustrates that cases from each venue are judged according to different standards and from different perspectives. Most obviously, while human rights tribunals base their decisions on human rights legislation, labour arbitrators focus on the interpretation of the collective agreement in question. This key difference ultimately gives each kind of case its own character, with different complaints, different evidence and information being considered, and different decisions and remedies being created. This chapter will offer a more detailed comparison of these elements in order to clearly illustrate the differences between human rights and labour arbitration cases and what these differences mean for employees and employers.

Nature of the Complaints

Because human rights and labour arbitration cases deal with the application of a different set of standards, the nature of the complaints relating to pregnant employees that come before each board also tends to be different. The first article focused on human rights cases published between 1980 and 1987, and labour arbitration cases published between 1970 and 1987.¹ In this period, there were 16 human rights cases and 29 labour arbitration cases relating to

pregnant employees. This amounted to 2.29 human rights cases per year, and 1.71 labour arbitration cases per year. The nature of the complaints from these cases are summarized in the following chart:

Reasons for placing complaints with the board of inquiry/ arbitration				
	C.H.R.R.		L.A.C.	
	#	%	#	%
Dismissal from employment due to pregnancy	7	44	1	3
Refused sick leave/disability benefits due to pregnancy	4	25	20	69
Failure to promote or denied position due to pregnancy	5	31	2	7
Refused vacation pay during maternity leave	-	-	4	14
Employee required to take maternity leave before designated commencement date	-	-	2	7
TOTAL	16	100	29	100

These statistics illustrate that pregnancy-related complaints in the 16 human rights cases were fairly evenly distributed across three categories: dismissal (7 cases or 44%), the refusal of sick leave/disability benefits (4 cases or 25%) and the failure to promote or hire (5 cases or 31%). On the other hand, the great majority of the complaints in the 29 labour arbitration cases (20 cases or 69%) related to the refusal of sick leave/disability benefits. The number of complaints in the other categories were minimal: dismissal (1 case or 3%), failure to promote or hire (2 cases or 7%), refused vacation pay (4 cases or 14%) and forcing early maternity leave (2 cases or 7%). This marked difference between human rights and labour arbitration complaints is partly a result of the fact that collective agreements focus more on benefit issues than they do on the other categories. The other categories of complaint are therefore less relevant, because labour arbitration boards are primarily interested in the interpretation of collective agreements. If a discrimination complaint does not relate to the collective agreement, the complainant would be better served taking the human rights route.

Analysis in this thesis involved human rights and labour arbitration cases published between 1988 and 2000. During this period, there were 49 human rights cases and 31 labour arbitration cases relating to pregnant employees. Of the 49 human rights cases, there were 8 appeal cases, meaning that there were 41 individual cases. Therefore, in the statistics and calculations in this chapter, a total of 41 human rights cases were included in order to avoid double counting. With this in mind, these totals mean that there was an average of 3.42 human rights cases per year, and 2.58 labour arbitration cases per year. For both human rights and labour arbitration cases, this represents an increase of approximately one case per year, a significant increase.

The nature of the complaints from this period are summarized in the following chart:

Reasons for placing complaints with the board of inquiry/ arbitration				
	C.H.R.R.		L.A.C.	
	#	%	#	%
Dismissal from employment due to pregnancy	14	34	7	23
Refused sick leave/disability benefits due to pregnancy	12	29	19	61
Failure to promote or denied position due to pregnancy	14	34	1	3
Refused vacation pay during maternity leave	-	-	1	3
Employee required to take maternity leave before designated commencement date	-	-	3	10
Other (ratification of a settlement)	1	3	-	-
TOTAL	41	100	31	100

Sources: Canadian Human Rights Reporter (1988-2000)
Labour Arbitration Cases (1988-2000)

During this period, this table indicates that the complaints from the 41 human rights cases were evenly distributed across three categories: dismissal (14 cases or 34%), the refusal of sick leave/disability benefits (12 cases or 29%) and the failure to promote or hire (14 cases or 34%). One case from this period (3%) involved the ratification of a settlement. This even distribution can be contrasted with complaints from the 31 labour arbitration cases from this period, where a

majority of the complaints (19 cases or 61%) related to the refusal of sick leave/disability benefits. Other complaints related to dismissal (7 cases or 23%), forcing an employee to take maternity leave early (3 cases or 10%), failure to promote or hire (1 case or 3%) and the refusal of vacation pay (1 case or 3%). Like the cases studied in the 1990 article, the difference between human rights and labour arbitration cases can be explained by the nature of collective agreements.

In comparing the complaint statistics from this period and those discussed in the 1990 article, similarities are obvious. The only category to change significantly is the increase in dismissal complaints in labour arbitration cases. The fact that the basis for complaints has remained quite stable over the past several decades has some implications for employers. Although employers should ensure that all policies and programs are free from discrimination, statistics indicate that they should pay special attention to their policies and actions relating to their employees' entitlement to benefits. Other important issues include the nature of hiring processes and terminations. Statistics indicate that most complaints in human rights and labour arbitration cases are related to these issues. At the same time, the increase in the number of complaints brought forth in both venues illustrates that it is becoming increasingly important for employers to review existing policies.

Relevant Evidence

When human rights boards and labour arbitration adjudicators make decisions on these complaints, they concern themselves with the interpretation and application of different documents or legislation. As explained earlier, where human rights tribunals interpret legislation to decide on whether a discriminatory violation took place, labour arbitration adjudicators interpret collective agreements to decide on whether both sides lived up to the agreement. Because of this fundamental difference, decision makers in each venue are willing to consider different evidence and information in coming to their decisions.

Generally speaking, in human rights cases, interpretation of relevant legislation, such as that outlined in the first chapter, is key for boards and this tends to be their primary interest and consideration. Boards interpret this legislation and apply it to the particular complaint of discrimination in order to determine whether a violation took place. Due to the nature of the law, not only is the particular wording of a piece of legislation important, but how it has been interpreted in the past is also important, because these previous interpretations set precedents for later boards to follow. As a result, human rights boards are also willing to consider how legislation was interpreted under similar circumstances in the past.

In labour arbitration cases, adjudicators' primary concern is the interpretation and application of collective agreements to the specifics of the complaint in question. Because collective agreements are negotiated by each bargaining unit, adjudicators largely concern themselves with the interpretation of

the specific wording of each agreement. Although this is their primary concern, this does not mean that legislation such as human rights codes does not play a role. In many cases, agreement negotiations result in certain pieces of legislation being directly imported into the collective agreement. In these cases, adjudicators will include their interpretation of this legislation in their deliberations. In other cases, collective agreements are completely silent on the legislation and do not contain their own clauses relating to the kinds of protections that legislation often affords. In these cases, adjudicators have ruled that they do not have the authority to import legislation into their deliberations because the collective agreement is silent. The way that the legislation enters into adjudicators' decisions therefore depends on how it is included in the individual collective agreements. In deciding cases relating to pregnant employees, because collective agreements apply to all members of the bargaining unit equally, labour arbitrators will often consider evidence and information relating to how other members of the bargaining unit are treated under similar circumstances. In doing this, they can decide whether an employer violated the agreement by treating pregnant employees differently. Labour arbitrators are willing to consider evidence that will help them decide whether collective agreements have been honoured.

In analyzing the kinds of information that human rights boards and labour arbitration adjudicators are willing to consider, it is clear that because decisions in each venue are based on different standards, that different information will be considered. Two key differences should be noted. As illustrated, in human rights

cases, decisions made in the past have a clear bearing on the outcome of the case, while in labour arbitration cases, past decisions often do not have relevance to the particular collective agreement in question. For employers, this means that they have more direction and insight into how their actions will be interpreted in the human rights venue, as clearer trends and evolutions tend to emerge. Employers must be aware of how their actions and policies will be interpreted in both venues, which requires them to have a solid understanding of their individual collective agreement.

Another difference to note in this comparison is that where collective agreements tend to generally cover a whole bargaining unit together, elements of legislation tend to be more specific in their treatment of pregnant employees. As a result, in human rights cases, boards tend to focus their attention on what happened with the specific employee, without much reference to the treatment of other employees. As a result, decisions in human rights cases are usually not based on a comparison with other employees' experiences, as it is the individual case of discrimination that is deemed most important. In contrast, labour arbitration case analysis illustrated that information relating to comparator groups tends to be much more important. This is because arbitrators are attempting to decide on whether a certain group within the bargaining unit was treated differently than others. Because each collective agreement is different, instead of relying on the standards outlined in legislation that stand by themselves, adjudicators' only standard of reference is other members of the bargaining unit. These differences indicate that employers must not only meet the requirements

of legislation, but they also must make sure that equal treatment and opportunity exist, so that they meet the standards of both human rights boards and labour arbitration adjudicators.

Success Rates

Based on the comparison between human rights and labour arbitration cases, another key area that employers should be aware of is the success rates that complaints have had. Human rights cases studied in the previous period prior to the last decade had a 75% rate of success (12/16), which was high compared to 66.4% success rate for sex discrimination cases in general between 1956 and 1984. During the period studied for this thesis, the success rate for human rights cases was 80% (32/40)², while for labour arbitration cases it was 61% (19/31). The 80% success rate of human rights cases represents a 5% increase from the period studied in the 1990 article. This is an increase over a 75% rate that was already considered to be quite high.³ Comparing the rates in human rights and labour arbitration cases shows that human rights cases were almost 20% more successful. Perhaps this can be explained by the fact that the results of labour arbitration cases are much more difficult to predict because each collective agreement is negotiated differently.

In terms of the kinds of complaints that were most successful, the following table illustrates the success rates for each kind of complaint along with totals for the period studied in this thesis:

Success Rates of Human Rights and Labour Arbitration Complaints				
Nature of Complaint	Human Rights Cases		Labour Arbitration Cases	
	#	%	#	%
Dismissal	12/14	86	6/7	86
Refused sick leave/disability benefits	11/12	91	10/19	53
Failure to promote or denied position	9/14	64	1/1	100
Refused vacation pay during maternity leave	-	-	1/1	100
Employee required to take maternity leave before designated commencement date	-	-	1/3	33

For categories of complaints that have significant numbers (ie. those with over 5 complaints), these statistics can be useful for employers. In both human rights and labour arbitration cases, success rates for complaints involving termination are high. Based on case analysis, it would seem that this can partly be explained by the fact that boards and arbitrators are guided by clear cut standards when it comes to terminations. In labour arbitration cases, many collective agreements have clear clauses that prohibit employees on maternity leave being laid-off, dismissed or suspended. In human rights cases, employers have found it difficult to justify that their decision to terminate a pregnant employee had absolutely nothing to do with the employee's pregnancy. Employers therefore must take this into consideration and ensure that their decisions relating to the termination of pregnant employees can be clearly justified in both venues.

In human rights cases, complaints relating to the refusal of sick leave/disability benefits have also had very high success rates. This is in contrast to the 53% success rate that similar complaints had in labour arbitration cases. The focus that human rights boards place on precedent setting decisions from the past offers some insight into how certain complaints will fare, which might ensure that only strong cases are brought before the boards.

Nevertheless, the 91% success rate in human rights cases should encourage employers to review their policies.

The most obvious implication from the table is that most complaints meet with high success rates, especially in human rights cases. This is a clear reinforcement of the fact that employers should work toward ensuring that their policies or actions do not lead to a complaint. Statistics indicate that if a complaint survives to the point of a hearing, employers will face an uphill battle to justify their position. Although rates in human rights and labour arbitration cases are different in some respects, complainants have had comparatively high success rates, which should be noted by employers. This recognition is especially important when it is considered that the number of complaints is also increasing, which should give added incentive to employers.

Remedies

In comparing human rights and labour arbitration cases, the nature of the remedies and awards offered by boards and adjudicators is perhaps the most important issue for employers. Remedies do not only relate to monetary damages, but also to orders to change policies and rules, and they illustrate the implications of not meeting requirements. This section will begin with analysis of what happened in terms of remedies prior to the past decade, and it will then move into recent developments.

When human rights cases discussed in the first article were decided in favour of the complainant, the remedy was most often compensation for

damages and lost wages. However, in 1987 a precedent was set when a board awarded damages for mental anguish. As it stands today, boards have the power to award both punitive and compensatory damages, and as will be seen shortly, these awards can reach significant amounts. On the other hand, during this period, labour arbitrators did not have the same kind of powers, and could only make compensation for lost wages or employment status based on the violation of a collective agreement. Similarly, where human rights boards could force employers to take steps to ensure that discriminatory behaviour ceases, labour arbitrators were limited by the scope of the collective agreement in question. It was therefore concluded that if a grievor wishes to see a change in behaviour, they should take their complaint the human rights route. Given that labour arbitrators only have the power to ensure that employees who have been negatively affected by a collective agreement violation receive what they would have received if the violation had not taken place, awards in these cases have remained stable and predictable over the last several decades. On the other hand, as a result of human rights boards' wider range of powers, which include the power to offer damages and to correct certain behaviours, important increases and trends have taken place, which will be discussed in the next section.

To begin a discussion of the remedies offered in human rights cases from the period studied in this thesis, Appendix A summarizes the rewards from each case in which awards were offered, be they for lost wages, damages, or corrective measures. The most important and perhaps most obvious conclusion

that can be taken from these statistics is that awards have been significantly increasing. Boards are becoming increasingly willing to award grievors substantial monetary awards for lost wages and for damages. As indicated by the following quotation included in the very first case published during this period, boards are growing more willing to ensure that awards represent the importance of the issue. Not only are awards for lost wages becoming larger, but damage awards have also seen significant increases. In *Lina Maria Riggio v. Sheppard Coiffures Ltd.* (1987), the board included the following quote from another case which it used to justify the size of the reward:

There is a presumption in favour of the making of an award of special and general damages in Human Rights cases...Although damage awards in human rights cases historically were small in size they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not be minimal, but ought to provide true compensation, other than in exceptional circumstances...An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity and employment. This is based upon the recognition that independent of the actual monetary or personal losses suffered by the complainant, whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury.⁴

This attitude has permeated many boards' award decisions, which has caused significant increases in award amounts. From the very beginning of this period, boards have sent a message to employers that they will be severely punished for their discriminatory violations. With precedents being set in this regard, further increases will no doubt take place, which should encourage employers to avoid being involved in one of these cases.

Conclusions

This comparison of human rights and labour arbitration cases has illustrated several important points about the nature of these cases. Comparing the nature of complaints illustrates that they have remained quite stable in terms of the kinds of complaints and their distribution. Certain categories of complaint, especially those relating to benefits, have remained significant, and employers should pay special attention to these areas, which also includes hiring and termination. The fact that both the number of complaints and the success rates of these complaints have increased should give employers extra incentive to review their policies.

By presenting a comparison of the kinds of information that each venue is willing to consider, this chapter also illustrated employers' full range of responsibilities from different perspectives. Employers must understand how their actions and policies could be scrutinized in each venue, and with this understanding ensure that they conform. In discussing the nature of remedies offered, it can be concluded that awards have seen constant increases, especially in human rights cases. Boards and adjudicators have made it clear that in cases where collective agreements or legislation have been violated by employers, that complainants will be fully reimbursed, and in human rights cases, awarded compensation for damages.

The best defence for employers is to ensure that their policies and actions never put them in a position in which they must defend themselves in front of a tribunal or an adjudicator. Scrutiny in both cases is intense, and punishments for

violations are becoming more significant. Employers can use their understanding of these cases to understand their responsibilities in various circumstances, and they can use their awareness of the kinds of awards that are offered as motivation to meet their responsibilities.

Endnotes

¹ Again, information discussed regarding the pre-1988 period is from the 1990 article, unless otherwise referenced.

² Please note that in this calculation, the case that involved the ratification of a settlement was not included.

³ Success rates for labour arbitration cases were not offered in the 1990 article.

⁴ Lina Maria Riggio v. Sheppard Coiffures Ltd., carrying business under the name of Joseph's Coiffures, and Tony Vitale (1987), Canadian Human Rights Reporter: vol.8, D/4527.

Chapter 5- International Developments

The previous chapters have taken a largely Canadian perspective on the issue of discrimination against pregnant employees. The overall aim of these chapters has been to offer a fairly detailed overview of where this issue stands today in the Canadian context. In order to gain a wider perspective on this topic, the following chapter will present recent developments in an international context so that the issue can be understood on a global scale. This will not only shed light on how the issue has developed in other environments, but it will also allow for insight into how Canada compares globally in the treatment of women and pregnant employees. Due to the sheer magnitude and dispersion of information from international sources, this chapter must necessarily take a more general approach to the issue of discrimination against pregnant employees by including it in discussion of the larger issue of women and employment, but also by using specific examples when possible. In doing so, it will give a glimpse into international developments and create a context for understanding the Canadian situation.

Women's Human Rights in the International Workforce

The situation of women in the international workforce is closely linked to the issue of international human rights. The end of World War II and the establishment of international war crimes tribunals represented the beginning of a period in which human rights became truly international. The signing of the

United Nations Charter in 1945 marked the beginning of a comprehensive international approach to the protection of human rights on an international level.¹ At the same time, this internationalization also corresponds to a more recent development that has seen the increased inclusion of women's rights into the human rights discussion. In many circles there is a growing recognition that women's rights are indeed a component of human rights, and not a separate entity. As Hilary Charlesworth argues: "there has been a fundamental change in the understanding of women's rights, marked by the preference for the term 'women's international human rights' which suggests a bold claim to inclusion in the mainstream rather than specialized side waters."² At the same time, this increased inclusion of women's rights has also drawn attention to the disparities that continue to exist between men and women's enjoyment of human rights on an international scale. It has been argued that:

Women's quality of life, defined by factors such as health, educational and employment status and opportunities, and political rights, is nowhere equal to that of men's...the 'general' international human rights regime has been developed in a way that tends to exclude women. In other words, the apparently non-gender specific principles of human rights law are in fact quite specific in their relevance and application to men's lives...Much feminist energy is now being devoted to finding ways in which human rights law can become less male and more truly human.³

The recognition of these kinds of problems is partly a result of the increased attention that women's rights have begun to receive on an international level. Although an understanding of these problems and issues does not necessarily do anything to remedy the situation, it is clearly a step in the right direction.

Theoretical and academic advances and developments have been accompanied by significant international improvement in equality and human

rights for women. This has been particularly evident throughout women's experiences in employment. In recent times, global economies have gone through a number of changes that have caused numerous transformations and adaptations. Globalization, changing labour markets, economic restructuring and changing technology have created strong new forces and have changed economic conditions on an international scale. These forces have been especially relevant for females in the workplace, who have experienced a range of new opportunities and obstacles.

Perhaps one of the most visible results of these changes has been the increase in female participation in the labour force. From 1970 to 1990, the ratio of women to men in the labour force rose from 37:100 to 62:100, and this ratio has continued to grow at a similar rate throughout the 1990s.⁴ In 1995, it was estimated that 44% of the world's women aged 15 and up were active in the global labour force, which represents about 850 million women.⁵ Since 1970, participation levels have risen in all regions of the world except sub-saharan Africa and East Asia, with participation levels reaching 40% in Australia, the Caribbean, Europe, North America, and eastern, central and southeastern Asia.⁶

On a global level, there have also been important advances for women in terms of measures designed to increase equality. These advances can be partly attributed to the fact that there has been an increase in women who hold international positions in organizations devoted to women's and gender issues, which also bodes well for positive future change.⁷ More and more women are attaining managerial positions and gaining footholds in traditionally 'male'

occupations, thanks in some part to increased levels of training, education and skill diversification for women. Governments, employers and unions have also enacted pay equity schemes, affirmative action programs and other measures aimed at alleviating some of the problems that have traditionally limited women in the workplace. These kinds of changes illustrate how changes to global economies have also served to change women's position in the global labour force.

Despite the international growth of women's participation in the labour force and their improved position, serious problems persist, which most often relate to the quality of this new participation. Eugenia Date-Bah has identified some of the key problem areas, which include: preparation (education, training, skill diversification and flexibility), quality of work and working conditions (pay, occupational health and safety, job and social security and sexual harassment), access to productive resources and a range of employment opportunities, and various forms of discrimination.⁶ Despite the advances that have been made, compared to men, women still face lower wages, job segregation and the effects of the 'glass ceiling'. Not only do traditional stereotypes continue to exist, but women still only have full access to a narrow range of occupations and management positions, and they still face unstable and precarious levels of job security. Even with the creation of provisions and programs aimed at improving equality, enforcement of these provisions tends to be limited in many areas of the world, which means they have only limited effectiveness at improving women's employment conditions.

The problems outlined above are accompanied by the more general problem of the undervaluing of women's contributions to society, which goes beyond the differences in wages. Women are not only undervalued for the paid work that they do, but the unpaid work that they do also goes largely unrecognized. Around the world, women carry out the majority of the unpaid work that is essential for the proper functioning of society, but this work goes unrecognized, despite the fact that it takes up much of women's time.⁹ Indeed, the statement that women have only recently become active in the global work force illustrates how only formal work is recognized, and this works to ignore the informal work that women have been carrying out for centuries. Most obviously perhaps, the fact that much of the work that women do is not counted in GDP or GNP goes to show how invisible their work tends to be. This has led to some debate about how different forms of work should be measured and valued. It has been argued "that the economic borderline between production occurring in the workplace and consumption occurring in the household is only a conventional line convenient for distinguishing between relatively easy-to-measure monetary transactions on the one hand, and harder-to-measure non-monetary production for exchange or self-consumption on the other".¹⁰ While women continue to take on a bulk of the family responsibilities, their participation in the formal work force is necessarily limited, which ultimately leads to a situation in which their contributions go unrecognized.

International Recognition, Legislation and Bodies

As was illustrated in the previous chapters discussing this situation in a Canadian context, it has proven especially difficult for women to reconcile their maternal responsibilities with employment, and this is no different in an international context. Despite the benefits that childbearing creates for all of society, women have been disadvantaged as a result of their childbearing capacity, and this is perhaps most clear in its effects on women's career and employment opportunities. In order to ensure that women are not forced to suffer as a result of their childbearing role, governments and international bodies must recognize the importance of this role and how it can have a severe detrimental effect on women's ability to enter or remain in the paid work force. The following section outlines where this recognition stands today and what is being done on an international level to ensure that it continues.

The problem of reconciling women's family and career responsibilities not only affects women's working lives, but it has also been internationally recognized as a key barrier to the improvement of women's condition in general. Perhaps the first step towards ensuring that these barriers are removed is in the recognition of the severity of the problem that exists. To this end, international bodies have an important role to play. As discussed before, the growth of the United Nations has been an important factor in the development of international human rights. They have been at the forefront in the creation of international standards and policies relating to women's human rights. Perhaps the most important UN related group for the creation of international standards, policies

and legislation has been the International Labour Organization (ILO). This organization is part of the United Nations system and was formed in 1919 with the objective of promoting peace and social justice. The ILO currently has 173 member states and is responsible for the maintenance of international labour standards, which include policies relating to human rights, employment policy, conditions of work, industrial relations, occupational health and safety and social security.¹¹ The power of this body's conventions and recommendations comes from the international consensus that they receive through country ratifications, which have been continually increasing.¹² When a country's government ratifies these conventions it is held to a legally binding international treaty. From the very first meeting of the ILO, this organization has concerned itself with the situation of women and employment. Since then, the organization has created a body of recommendations and conventions that are applicable to women. Although earlier conventions were based on the protection of women and have since been criticized as discriminatory, more recent recommendations and conventions have emphasized equality in employment.

Earlier 'protective' recommendations were based on protecting women workers from unsafe or unhealthy working conditions. As stated before, these conventions have recently come under attack as being discriminatory and inflexible. It has been argued that the move away from protective standards is a result of the recognition of the parental and patriarchal nature of these earlier conventions.¹³ This recognition has focused increased attention on the conventions and standards that have the elimination of inequality and the

promotion of equality of opportunity as their aims. The move towards these kinds of conventions was made most clear with Conventions 100 and 111, which were adopted in the 1950s. Convention 100 is also known as the Equal Remuneration Convention, and generally speaking it promotes the idea of equal pay for equal work. Convention 111 is also known as the Non-Discrimination Convention and it works towards equality of opportunity and treatment in employment.¹⁴ These conventions are two of the most widely accepted of the UN equality conventions, and can be used to illustrate the ILO's dedication to women's rights, which includes equality in employment.

Perhaps the most important UN convention for women workers is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which has been called the international bill of rights for women. In an international context, this document has been the most prominent for women's rights and equality, as it not only defines what discrimination is, but it sets out measures and agendas for eliminating it. This Convention defines discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁵

It has been ratified by close to 200 countries, and with this kind of backing, the convention has become a part of international customary law. "Around the world the Convention has been used to define norms for constitutional guarantees of women's human rights, to interpret laws, to mandate proactive, pro-women

policies, and to dismantle discrimination".¹⁶ Since this Convention came into power in 1981, it has acted as a base for a range of international and national legislation, and continues to be very important and relevant today. In this way, it acts as a good example of the nature of the international policies and legislation that exist.

International Standards Relating to Pregnant Employees

While dealing with the elimination of discrimination and the expansion of women's human rights, international conventions and standards contain measures to ensure equality of opportunity in employment, which include those designed to assist pregnant employees and new mothers. In response to the recognition that women's maternal and childbearing responsibilities have served to disadvantage women in their employment opportunities, the ILO has enacted a number of policies dealing specifically with maternity rights. These conventions have established the fact that women require leave from employment, and they also establish that "women should not be punished because of their reproductive capacity, and if they do become pregnant, they should still be able to compete in the workplace in a situation of equality with men".¹⁷ These conventions have aimed at making it easier for women to balance family responsibilities and employment.

The first convention of this sort was the 1919 Maternity Protection Convention, which established minimum standards for maternity leave in the mining, manufacturing, construction and transportation industries, along with

several protective standards. The convention provided 12 weeks of maternity leave, the maintenance of benefits, health care provisions and protection against dismissal while on maternity leave.¹⁸ In 1952 this Convention was revised with Convention 103, which extended application to a wider range of occupations, including wage earners working at home or as domestic help in private homes. This Convention also provided that women could take all 12 weeks of their maternity leave after the birth of their child, instead of 6 weeks before birth and 6 weeks after as the initial Convention had stipulated.¹⁹

Another important Convention for women is Convention 156, Workers with Family Responsibilities. This Convention works towards ensuring that people with family responsibilities are treated equally with all others and that these responsibilities and their employment do not conflict.

States are obliged to take all measures compatible with national conditions: to enable workers with family responsibilities to exercise their right to free choice of employment; to take account of their needs in terms and conditions of employment and in social security; to take account of the needs of these workers in community planning; and to develop and promote community services, public or private, such as child-care and family services and facilities²⁰

This Convention came about due to the recognition that the previously mentioned Non-Discrimination Convention did not specifically relate to distinctions made on the basis of family responsibilities. This Convention, along with Convention 158 of 1982, contains policies that prohibit the dismissal of an employee by reason of pregnancy or while on maternity leave. While several of these Conventions deal specifically with certain issues relating to pregnant employees, the previously mentioned Convention on the Elimination of All Forms of Discrimination Against

Women incorporates standards relating to several of these issues. It has been claimed that this convention "is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces".²¹ This Convention makes statements on job protection for pregnant employees and those on maternity leave, the nature of maternity leave and attendant benefits, and the encouragement of social services to assist in reconciling employment and family responsibilities. Taken together, these are the key UN conventions that relate to women generally and pregnant employees specifically.

Application of Standards

Regardless of the kinds of measures outlined in these Conventions, the true test of their effectiveness lies in how they are applied and enforced. Member states must incorporate international standards into their own statutes, legislation and policies, and this often involves varying levels of interpretation and integration. Countries that ratify international standards subject themselves to a required reporting process in which they must illustrate the steps they have taken to ensure that the legislation is being followed. Implementation of international standards can take a number of different forms. Principles outlined in international standards have been integrated and added to national Constitutions, which ensures a government obligation. The integration of these standards tends to be different in different countries, which has resulted in differing levels of effectiveness.²² Even if the country in question has ratified a

Convention, judges have not always been comfortable using such legislation in their decisions. Experience has proven that standards are most effective in international courts when they are integrated with constitutional guarantees or used as part of government policies. International Conventions are perhaps most effective when they are directly integrated into national laws, although it is often unclear of the effect that international standards have on the creation of these laws.²³ Regardless of how the international standards are implemented, it is clear that effectiveness lies in the political will of national governments. A clear dedication to the principles laid out in international standards by governments and their constituents offers the best hope that the standards will achieve what they were meant to achieve.

The application of these standards becomes even more specific when it comes to maternity rights and policies relating to pregnant employees, such as those relating to leave, benefits and protection. As outlined earlier, ILO standards provide 12 weeks of maternity leave surrounding the time of childbirth. In most countries of the world, this standard has either been met or exceeded and has been accompanied by certain protections during this leave, such as employment, seniority and pension rights.²⁴ Industrialized countries have witnessed the greatest expansion of these kinds of rights, so that maternity leave and accrual of benefit rights go beyond ILO standards. Newly industrializing countries have also seen rising entitlements, which often meet or exceed ILO standards.²⁵ In these countries, however, it is often the case that many women

are not protected by legislation due to the informal nature of their work, which represents an important problem.

The issue of parental leave, although not always directly related to pregnant employees, is closely related to issues of maternity and family responsibilities, and it is therefore important to understand how it is developing. Developed countries are implementing policies that allow new parents to spend more time with their children while not jeopardizing their employment. These countries allow for varying durations of parental leave that are often accompanied by benefit schemes. With the changes taking place to Canadian legislation discussed in an earlier chapter, Canada joins countries such as Austria, Finland, Sweden and France with the most progressive policies in this regard.²⁶ In these ways, international standards in terms of maternity leave and protection while on this leave have been accepted and implemented into legislation in most areas of the world.

Around the world, there has also been progress in implementing international standards relating to social protection and benefits for pregnant employees or those on maternity leave. Health protection and prevention schemes that relate to pregnant employees have improved tremendously around the world. In many countries, mainly developed ones with solid health infrastructures, social security schemes have been created to offer benefits to women who are on maternity leave. In most cases, these benefits are based on a percentage of previous earnings, and many industrial countries meet or exceed the 66% level that the ILO standards call for.²⁷ However, the case in less

industrialized countries has been less advantageous in the case of social security benefits and protection. Despite the fact that maternity protection and benefits have improved in many areas, there is still considerable room for improvement.

Although ILO standards tend to be accepted in most parts of the world, there is an underlying problem relating to the applicability of these standards and their enforcement. One of the most important international problems in terms of the protection of pregnant employees is the fact that many women work in the informal sector or work in occupations that do not fall under the legislation's jurisdiction. For instance, social security schemes are often only applicable to jobs in the formal sector in which employees work enough hours or make enough contributions to qualify for the scheme's protections and benefits. Attempts to remedy this problem have been limited. This problem indicates that in order to ensure the protection of all employees, that standards and legislation relating to maternity leave and benefits be applied to all employees, regardless of the kind of work that they do. Even when legislation and standards are implemented and applicable, they may not always be enforced properly. Developing or unstable countries may not always have the dedication or the resources to ensure the proper enforcement of the legislation, which often places women in a precarious position. These problems of applicability and enforcement are perhaps the two most important barriers to ensuring the equality and protection of pregnant employees in an international context.

Conclusion

Although this chapter could only give a general treatment to the topic of pregnant employees in an international context, it illustrates some of the general trends taking place and can thereby shed light on the position of pregnant employees in Canada compared to other countries. There has been international recognition of the fact that pregnant women have been disadvantaged and discriminated against in areas of employment. In the past and still today, it has been very difficult for women to reconcile their family responsibilities and employment. As a result of this recognition, international bodies such as the ILO have begun to pay more attention to ensuring that equality is reached. International standards relating to non-discrimination, benefits, leave and protection have been implemented and adopted by many countries. In all areas of the world, advances have been made that have assisted women in achieving a balance between family and work.

At the same time, however, serious problems continue to persist in many areas of the world, especially developing and unstable countries. This illustrates that the process of creating true equality is not something that can be achieved simply by implementing standards. This kind of equality will only be fully realized when people around the world come to fully realize that women should not be at a disadvantage because of their childbearing capacity. This realization must be accompanied by resources and dedication to ensure that real change can take place. In this way, although standards can be accepted, their effectiveness might

only be ensured once developing economies become more mature and stable. With this mind, it becomes obvious that Canada has taken advantage of its economic maturity and stability to implement and enforce standards that have benefited pregnant employees. Although there is still considerable room for improvement, Canada is clearly one of the most progressive countries in terms of the legislation and enforcement that is necessary to ensure the equality of pregnant employees.

Endnotes

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- ¹ Berta Esperanza Hernandez-Truyol, "Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution", Women and International Human Rights Law, (New York: Transnational Publishers, Inc., 1999), p.14.
- ² Hilary Charlesworth, "General Introduction", Women and International Human Rights Law, (New York: Transnational Publishers, Inc., 1999), p.xix.
- ³ ibid., p.xix.
- ⁴ Eugenia Date-Bah, "Introduction", Promoting Gender Equality at Work: Turning Vision Into Reality, (New York: Zed Books Ltd., 1997), p.3.
- ⁵ ibid., p.3.
- ⁶ Valerie Oosterveld, "Women and Employment", Women and International Human Rights Law, (New York: Transnational Publishers, Inc., 1999), p.367.
- ⁷ Kelly Askin, "Introduction", Women and International Human Rights Law, (New York: Transnational Publishers, Inc., 1999), p.xxv.
- ⁸ Date-Bah, "Introduction", p.5.
- ⁹ Oosterveld, "Employment", p.368.
- ¹⁰ ibid., p.399.
- ¹¹ ibid., p.369.
- ¹² "Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women" www.unifem.undp.org (October 10, 2000)
- ¹³ Oosterveld, "Employment", p.374.
- ¹⁴ ibid., p.378.
- ¹⁵ "Convention on the Elimination of All Forms of Discrimination Against Women" Division for the Advancement of Women website. (October 10, 2000)
- ¹⁶ "Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women" www.unifem.undp.org (October 10, 2000)"

¹⁷ Oosterveld, "Employment", p.388.

¹⁸ ibid., p.379.

¹⁹ ibid., p.379.

²⁰ ibid., p.380.

²¹ "Convention on the Elimination of All Forms of Discrimination Against Women" Division for the Advancement of Women website. (October 10, 2000)

²² "Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women" www.unifem.undp.org (October 10, 2000)"

²³ ibid.

²⁴ Anne-Marie Brocas, "Equality of Treatment Between Men and Women in Social Security and in Family Responsibilities", Promoting Gender Equality at Work: Turning Vision Into Reality, (New York: Zed Books Ltd., 1997), p.164.

²⁵ ibid., p.164.

²⁶ ibid., p.166.

²⁷ ibid., p.166.

Conclusion

In conclusion, this thesis has aimed at facilitating an understanding of where the issue of discrimination against pregnant employees stands today. To do this, it has focused on recent developments, but it has also traced the evolution and development of the issue by grounding its discussion on previous scholarship. This has been done with the primary goal of providing employers with an understanding of their responsibilities as they have been defined and developed through public policy, both internationally and nationally, and through human rights and labour arbitration cases. The findings and recommendations discussed in this conclusion are summarized in Appendix B.

In its approach to achieving the above, this thesis began with an analysis of today's Canadian public policy environment, specifically as it relates to pregnant employees. Legislation discussed included the Canadian Charter of Rights and Freedoms, human rights codes, the Canada Labour Code, employment standards acts and occupational health and safety acts. Each piece of legislation deals with issues that are relevant to women in general, but they also have specific application to pregnant employees, and together they provide a range of provisions relating to leave, benefits and protection, which were discussed in this chapter. Although it was illustrated that many of the basic provisions are rather similar across all Canadian jurisdictions, employers would be wise to ensure that they are aware of the specifics of the legislation applicable in their jurisdiction. Similarly, although this legislation has not changed drastically

in the last decade, employers must stay up-to-date on the changes that have occurred. Employers must be aware of the current legislation and must ensure that their policies, programs and actions fully conform.

Awareness of the legislation that exists is only the first step for employers wishing to ensure that they do not discriminate. How the legislation has been judicially interpreted must also be understood, because it is the decisions from legal cases that more clearly define how the legislation is to apply to employers' responsibilities. To illustrate the implications for employers, the next three chapters of the thesis dealt specifically with how public policy has been interpreted and applied in human rights and labour arbitration cases. The first chapter of this section focused on human rights cases, and this analysis illustrated several issues that employers must be aware of. Most importantly, developments during this period ensured that discrimination against pregnant employees is legally considered to be discrimination on a prohibited ground. Along with conclusions relating to pregnant employees' entitlement to benefits and leave, this chapter also clearly illustrated that employers must be prepared to clearly justify their actions and policies. The onus is placed on them to prove that their requirements are bona fide, that they worked to accommodate their employees' needs, and that they have met the requirements of the legislation in question. This chapter made clear the kind of scrutiny that employers' actions can be placed under, which makes it necessary for employers to be aware of legislation and requirements when making decisions relating to pregnant employees.

As was illustrated in this thesis, an understanding of the decisions made in labour arbitration cases is important for employers because policies and actions are held to a different standard than in human rights cases. Analysis of these cases therefore offered a different perspective on what employers must be aware of, and this served to illustrate several important issues. As in human rights case analysis, recent cases served to reinforce conclusions that were relevant prior to this past decade. Most importantly perhaps, employers would be wise to ensure that any illness relating to pregnancy is accompanied by sick leave benefits. Although cases are judged on the wording of the collective agreement in question and the merits of the case, decisions during this period indicate employers' responsibilities in this regard. Cases from this period also illustrated the importance for employers to ensure that they treat women on maternity leave in exactly the same fashion as those employees on other health-related unpaid leaves. Adjudicators have shown that they will protect pregnant employees' entitlement to sick leave and their right to choose the timing and duration of their leave, unless the collective agreement contains provisions that limit these entitlements.

The previous two chapters offered a range of useful information to assist employers in understanding the issue along with understanding their responsibilities as defined by the courts. In order to fully understand the relationship between human rights cases and labour arbitration cases, the fourth chapter focused on comparing the characteristics of each. It specifically focused on a comparison of the nature of the complaints, the types of evidence and

information that were considered, success rates and the nature of the remedies awarded. By illustrating how these factors tend to be different in both cases, this chapter illustrated that employers must be aware of how their policies and actions will be interpreted in both venues. They must be aware of the range of information and evidence that can be considered during these cases, so that they can ensure that all of their policies and actions conform from all perspectives.

While the previous chapters focused on the issue from a Canadian context, the fifth and final chapter approached the issue from an international context. This chapter not only allowed for a more global understanding of the issue, but it provided insight into where Canada stands internationally in its treatment of pregnant employees. The key observation made in this chapter is that the issue of women's international human rights has received increased attention. As a result, international bodies have created a number of standards and legislation that relate to women in general and pregnant employees specifically. Although it was argued that this increased attention is a significant development, it was concluded that application and enforcement of these standards remains key. Government will is essential in ensuring the future of positive change. Canadian managers can use the experiences and policies of other countries, both negative and positive, to understand the issue and how improvements can be made.

In all of these ways, this thesis highlighted several implications for human resource managers in Canada. Trends and conclusions that were important prior to this past decade have remained important and were reinforced by the analysis

offered in this thesis. Many of the issues that have arisen in case analysis remain the same, and boards and tribunals continue to come to similar decisions. Although some issues have evolved and new ones have developed, given the recurrence of certain themes throughout cases over the past 20 years, employers would be wise to heed them.

Cases from this period illustrated that awareness of these issues is becoming increasingly important. Both within Canada and internationally, there have been increased levels of attention placed on the treatment of women in employment. Women are becoming much more aware of their rights, and many more groups and individuals are dedicating themselves to working toward the elimination of discrimination. It is no surprise that employers must be aware that their policies and actions are now under more intense scrutiny. Analysis has also indicated the higher success rates and the growing amount of damages and payments that employers are being ordered to make. It can be concluded that once a complaint makes it to the point of legal proceedings, that employers are having an increasingly difficult time proving that they have not discriminated. As a result, employers would be wise to take a proactive approach to the issue of discrimination against pregnant employees, and remedy potential problems before they cause complaints.

This thesis has served to illustrate that employers be aware of the issues and legislation that relate to pregnant employees. A key aim of this thesis was to present these issues and legislation as they currently stand. Employers must ensure that their policies and actions conform to all relevant pieces of legislation,

and they must be aware of how their responsibilities have been defined and detailed in the courts. Employers must constantly review and update their policies so that they can ensure that they do not discriminate. As in the past, flexibility remains the key ingredient. Given the range of legislation and responsibilities that this legislation confers upon employees, strict adherence to one policy or one interpretation has proved create problems.

Taking steps to ensure against discrimination will not only help avoid the payment of damages, but the valuing of all employees and the importance of their reproductive capabilities serves higher purposes. If employers dedicate themselves to ensuring that they do not discriminate against pregnant employees, they will not only avoid costly court cases, but they will ensure that their workplace offers equal opportunities for all employees. This will not only serve to attract, retain and keep employees happy, but it will also help in the process of ensuring that women are not disadvantaged for their role in a process that helps all of society.

In these ways, this thesis has illustrated the importance of genuine dedication to the aim of removing barriers in employment for women. In discussing the topic of pregnant employees in an international context, the key conclusion was that government dedication and political will is the key factor for ensuring positive change. The need for this kind of dedication extends to employers and ultimately requires an understanding of the underlying issues and the disadvantages that women have faced. As a first step towards this

understanding, this thesis has aimed at presenting the issues, and working toward helping employers understand their responsibilities.

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Appendix A: Case Awards

Summary of Awards Offered in Human Rights Cases (only those cases in which awards were offered are included)			
Case	Lost Wages and Benefits	Damages	Corrective
Lina Maria Riggio v. Sheppard Coiffures Ltd. (1987)	\$726	\$375	-
Edadeen Bird v. Norman Ross and Aphetow House (1987)	\$2580.55	\$2000	-
Century Oils Inc. and Production Supply v. Christine Marie Davies and BC Council of Human Rights (1988)	\$3600	-	-
Laurene Wiens v. Inco Metals Company (1988)	-	-	Hire complainant in next available job and stop exclusion policy
Marlene McAlpine v. Canadian Forces (1988)	\$4692	-	-
Leslie Brown v. Pat Robinson (1989)		\$1000	-
Hazel Ann Magee v. Warner Lambert Canada Inc. (1990)	\$3200	\$2000	-
Tami Hurd v. Soo Kwan Cho (1990)	\$1600	\$1500	-
Mira Heincke v. Kenneth Brownell and Emrick Plastics (1990)	\$10569	\$3000 (\$7836.10 interest)	-
Heather Schumacher v. McDermaid Agencies Ltd. (1991)	\$4500	-	Pay 60% of bonuses and commissions to employees on maternity leave in the future
Sherry Middleton v. 491465 Ontario Ltd. (1991)	\$10955.60	\$2500	-
Phung Thi Nguyen v. Pacific Building Maintenance Ltd. (1991)	\$4163.50	\$1000	-
Saskatchewan Human Rights Commission and Arlene Stagg v. Intercontinental Packers Ltd. And Diane Moore (1992)	\$4445.80 (\$1013.30 interest)	-	-
Donna Marie Brown and Canadian Human Rights Commission v. Department of National Revenue (1993)	Up to parties involved	\$1500	-
Nadine Stielow v. Medigas Ltd. (1992)	\$13054.35	\$1000 (\$3212.66 interest)	-
Tracy Jenner and Ontario Human Rights Commission v. Pointe West Development Corp. and Dennis Lavery (1993)	\$5487.23	\$5000 (\$2902 interest)	-

Nancy Sievert v. Roycom Realty Ltd. and/or Philip Rossiter (1994)	Up to parties involved	\$2500	-
Julie Lord v. Haldimand-Norfolk Police Services Board and Lee Stewart (1995)	\$35306.91	\$10000	-
Lyne Leclair v. Arnel Roberge (1993)	\$12677	\$2000 (\$7158 interest)	-
Elizabeth Jodoin and Ontario Human Rights Commission v. Ciro's Jewellers Inc. and Morris Nash (1996)	\$8013.63	\$5000 (\$3320.80 interest)	-
Violet Rancourt v. Alfredo's Holdings Ltd. and Fred Scofi (1996)	\$1644.80	\$750	-
Lynn Gosselin v. Kenora Ballet School (1994)	\$2052.21	\$3300	-
Commission des droits de la personne du Quebec et Marie-Ange Dabel v. Lingerie Roxana Ltee. (1995)	\$3500	\$5000	
Commission des droits de la personne du Quebec et Therese Sasseville v. Commission Scolaire de Jean-Rivard (1995)	\$25589.11	\$5000	Reinstate all lost rights and priveleges
Teresa Lynn Rachwalski v. ECS Electrical Cable Supply Ltd. (1996)	\$43280	\$2500	-
Juanita Crook and Ontario Human Right Commission v. Ontario Cancer Treatment and Research Foundation and Ottawa Regional Cancer Centre (1996)	\$25700	\$11000 (\$8563.33 interest)	-
Connie Maclean v. Ken Hutchison (1998)	-	-	Reinstate 16 days of vacation time
Michaela Armstrong v. Crest Realty Ltd. (1996)	\$6912	\$2500	Hire grievor in next available position
Commission des droits de la personne du Quebec et Giuseppina Gagliano v. Systemes Internationaux de fret Dillon Reid Inc. (1996)	\$2934.67	-	Grievor to receive retroactive seniority
Connie Wight and Ontario Human Rights Commission v. Office of the Legislative Assembly and Attorney General of Ontario (1998)	-	\$1000	-
Maria Mazuelos v. Mary Jo Clark (2000)	\$1505	\$1500	-

Appendix B: Summary of Conclusions

1990 Article- Key Conclusions	
Issue	Conclusion
Benefits and Leave	pregnant employees who are ill or disabled by reason of their pregnancy should not automatically be excluded from the right to claim sick leave
"	regardless of the reason for the inability to work, any illness related to pregnancy should entitle the employee to sick leave benefits
"	if a female employee is absent from work for reasons related to her pregnancy, then she is normally not entitled to sick leave benefits
"	if some form of disability or abnormal condition accompanies pregnancy, the employee should be entitled to these benefits
"	HR managers would be advised to consider developing a flexible sick leave benefit policy for pregnant employees if they are interested in attracting and retaining qualified female employees
"	pregnant employees should be allowed to continue to work up to the time they go on maternity leave
BFOQ	not being pregnant is not a bona fide occupational requirement for most jobs
Termination	employer attitudes or customer preferences are not acceptable justifications for terminating a pregnant employee
General	the burden is on the employer to prove that discrimination did not take place
"	changes necessitate a thorough review of all existing personnel policies relating to pregnancy and employment
"	employers must be aware of existing legislation as it relates to the issue
"	HR management policies must be designed within the legal framework and should be flexible enough to accommodate the needs of all employees
"	employers must ensure that policies do not have the effect of discriminating either directly or indirectly against pregnant employees as failure to do so can be costly both in terms of the payment of compensatory and punitive damages and the potential inability of the firm to attract and maintain qualified female personnel

Thesis- Key Conclusions	
Issue	Conclusion
General	employers can no longer successfully argue that pregnancy discrimination is not a prohibited ground of discrimination
Legislation	employers must be aware of the legislation that applies in their jurisdiction
"	it is not enough for employers to just be aware of legislation, they must also know how it has been applied and what this means for their responsibilities
BFOQ	burden of proof is still on employers to prove that discrimination did not take place
"	not being pregnant is still not a BFOQ for most occupations
"	employers' responsibilities to employees do not end with the establishment of neutral rules- they must ensure that the negative effects are also eliminated
Benefits and Leave	only pregnant women can decide on the length and timing of maternity leave
"	employers cannot dictate the timing of leave and must respect employees entitlement to sick leave regardless of the timing

"	pregnant women's entitlement to sick leave is vigorously defended by boards and arbitrators
"	benefits that are clearly defined as service driven shall not be available to those on maternity leave
"	any illness relating to pregnancy should be accompanied by sick leave benefits
Termination	pregnancy cannot play any role in employee termination
"	in terms of terminations, employers would be advised to consider the well being of the employee ahead of trivial specifics
Collective Agreements	the specific wording of collective agreements is key in labour arbitration cases
"	employers must be fully aware of the details of their collective agreement and must ensure that negotiation of details is inclusive
General	employers must ensure that employees on pregnancy leave are treated in exactly the same manner as those employees on other health related leaves
"	an employer must be able to clearly illustrate that they have carried out their responsibilities
"	most applicable conclusion continues to be that employers should review their policies based on an understanding of the issue and their requirements
"	employers must understand the kind of scrutiny that they will be under
"	the number of cases has risen significantly, as have success rates and the amount of damages awarded
"	employers should pay special attention to areas which have seen most complaints: benefits, hiring, and termination
"	statistics indicate that the best policy for employers is to avoid cases, which requires a proactive approach
"	flexibility and genuine dedication remain key

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