IN THE MATTER OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA

AND

IN THE MATTER OF KERRANCE B. GIBBS, PRESIDENT, SURREY TEACHERS' ASSOCIATION

AND

SURREY TEACHERS' ASSOCIATION

COMPLAINANTS

ROBERT J. BOWMAN, DIRECTOR OF COMMUNITY AND EMPLOYEE RELATIONS, SCHOOL DISTRICT NO. 36 (SURREY)

AND

BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT NO. 36 (SURREY)

RESPONDENTS

DIRECTOR, HUMAN RIGHTS CODE, a party pursuant to Section 16(3) of the HUMAN RIGHTS CODE OF BRITISH COLUMBIA

REASONS FOR DECISION

DATE OF HEARING:	June 12, 1978
PLACE OF HEARING:	711 West Broadway, Vancouver, B.C.
BOARD OF INQUIRY:	Sholto Hebenton
EFFECTIVE DATE OF DECISION:	July 11, 1978
APPEARANCES:	David H. Vickers for Kerrance B. Gibbs, President of Surrey Teachers' Association, Surrey Teachers' Association and the Director, Human Rights Code.
	A. Kenneth Thompson for Robert J. Bowman, Director of Community and Employee Relations, School District No. 36 (Surrey) and Board of School Trustees, School District No. 36 (Surrey).

Questions and Conclusion

A narrow issue is involved in this case: whether employees of the Surrey Board of School Trustees should be allowed to draw on their accumulated sick leave benefits when absent from employment for sickness, mental or physical, caused by or aggravated by pregnancy. The case raises fundamental questions of broad scope relating to the protections provided to women by the Human Rights Code of British Columbia (the "Rights Code").

The parties to the case have submitted a written statement setting out the applicable facts and the questions to be determined. The five paragraphs describing the facts are set out below:

1. Section 129A of the Public Schools Act, R.S.B.C. 1960, Ch. 319 reads as follows:

> 129A. A Board shall, in accordance with the regulations, and may, in its discretion, grant leave of absence to a teacher
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> (a) without pay for a stated period of time; or
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> (b) with pay for a stated period of time not exceeding six months; or
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> (c) with the prior approval of the Lieutenant-Governor in Council, with pay for a stated period in excess of six months
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> for the purpose of professional improvement, for maternity, or for any other purpose acceptable to the Board.

2. Section 132 of the Public Schools Act, R.S.B.C. 1960, Ch. 319 reads as follows:

> 132. If a teacher is absent from his duties for reason of illness or unavoidable quarantine and has, if the Board so required, presented a certificate signed by a duly qualified

> medical practitioner to that effect, the Board shall allow him full pay for the number of days of such absence that is equivalent to one and one-half times the number of months taught by him in the service of the Board after the first day of April, 1968, and full pay for the number of days of such absence equivalent to the number of months taught by him in the service of the Board prior to the first day of April, 1968, less the number of days during which the teacher has been absent for either or both of those reasons and for which the Board has previously allowed and paid full pay, but the number of days for which a teacher may be allowed full pay under this section in any one school-year shall not exceed one hundred and twenty.

3. It is agreed that normal maternity leave is not covered by Section 132 aforesaid.

4. It is the policy of the Respondent Board of School Trustees of School District No. 36 (Surrey) to allow employee teachers to take advantage of their accumulated sick leave benefits for all forms of physical or mental illness so certified by a duly qualified practitioner save and except for physical or mental illnesses caused or aggravated by pregnancy.

5. It is the policy of the Respondent Board of School Trustees of School District No. 36 (Surrey) to deny any employee teacher the right to draw on accumulated sick leave benefits when the Respondent is advised that the employee's illness, whether physical or mental, which occasions the absence is caused or aggravated by pregnancy.

The first question is whether the respondent's policy discriminates against employee teachers by reason of sex. I conclude that it does not. The second question is whether the policy discriminates against employee teachers without reasonable cause contrary to section 8 of the Rights Code. I conclude that it does.

Discussion

a. Pregnancy

I imply no criticism of the parties in this case or of their counsel in observing that the facts about pregnancy which they have brought before the board of inquiry are extremely sparse. In addition to agreeing to the stated facts quoted above, counsel agreed that pregnancy is not a sickness. Counsel also explained that the respondent permits pregnant women to draw on sick leave benefits for sicknesses and injuries which are not pregnancy-related. However the parties elected not to present the sort of medical and statistical evidence about pregnancy which one sometimes sees in cases of this kind. The result is that I, as sole member of the board of inquiry, must rely on my own understanding of pregnancy, uneducated by testimony adduced by the parties. Some of the judicial decisions presented for the purpose of legal argument contained helpful and interesting discussions of pregnancy. One of the issues about pregnancy is voluntariness. Because some women become pregnant only when they want to, many people think of pregnancy as entirely a voluntary condition. Employment rules are drawn accordingly. The arguments against this approach are summarized in an American case concerning a disability plan.[1] In supporting the proposition that pregnancy is not necessarily voluntary, the court noted that religious convictions and methods of contraception play a part. The court stated that there is no 100% sure method of contraception, short of surgery. Addressing itself to the fairness of excluding pregnancy benefits from the disability plan in question, the court noted that benefits under the plan were available for disabilities arising from a great variety of voluntary activities such as skiing, smoking and drinking intoxicating beverages. On the other hand, another American case quoted

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1. Wetzel v Liberty Mutual Insurance Co., 511 F.2d 199, 9 EPD, para. 9942 (3d Cir. 1975).

an opinion letter of the general counsel of the Equal Employment Opportunity Commission approving a group insurance program which excluded from a long-term salary continuation program disabilities resulting from pregnancy by stating that the Commission does not compare an employer's treatment of illness or injury with the treatment of maternity since "maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees".[2]

In that same case, the American Supreme Court referred to findings by the trial court that pregnancy is disabling for a period of six to eight weeks, that approximately 10% of pregnancies are terminated by miscarriage which is disabling, and that approximately 10% of pregnancies are complicated by diseases which may lead to additional disability. That court also received cost evidence which demonstrated that, even without coverage for pregnancy-related sickness, the cost of the medical plan per female employee was at least as high as the cost per male employee. Though evidence about pregnancy would have deepened my understanding of the issues at the heart of this proceeding, I repeat my observation that in reducing to a minimum the evidence in this case, the parties have done no disservice to themselves or to me.

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b. Sex Discrimination

The first legal issue is whether the respondent's policy constitutes sex discrimination as prohibited by section 8 of the Rights Code. The problem with the argument that pregnancy rules are sex discrimination rules is one of plain meaning. The sentence "No person shall discriminate on the basis of sex" does not suggest pregnancy. The quoted sentence means to most people that they must not distinguish between male and female. It does not suggest that the prohibition

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2. General Electric Co. v Gilbert, 429 U.S. 125, 12 EPD para.11,240 (1976).

applies to the distinction between females who are pregnant and females who are not pregnant. Mr. Vickers seeks to bridge this gap in two ways, by a functional argument and by reference to authority. In a letter submitted to the hearing, Mr. Vickers makes the functional point very powerfully. He reasons:

> Women should not be granted equal treatment in the work force only on the condition of and at the price of denying their role as mothers. If only the woman who never becomes pregnant is treated equally, then women as a class have been denied their full humanity, their right to choose to fill their biological role of growing the next generation. It is the same as saying to women - if you want to be equal, then you must be the same as men and not have babies. That is not equal treatment and equal respect for every person regardless of sex. If women who are pregnant are not to be treated as full and equal human beings, women as a class are not equal and are on an inferior footing in the work force.

Historically, discrimination on the basis of pregnancy has been a common feature in the work force. Women who were pregnant were required to cease teaching once their condition "showed". Refusal to hire women on the basis that they might become pregnant has been and continues to be a not uncommon experience for women. Women have been and continue to be fired from their jobs once their employer learns that they are pregnant. Discrimination against women because they may become or because they are pregnant is an ongoing fear and burden for women. The effects of pregnancy discrimination on women is not an abstract, theoretical, hypothetical concept; it is real-life experience. The purpose of the Human Rights Code is to deal with problems of discrimination in a real-life, practical manner and not in an abstract, theoretical, conceptual manner. The latter would be a hollow achievement for working women.

In summary, women as a class and pregnancy are inextricably linked as part of the biological system of the human race. Women should have the freedom to choose to become mothers without being penalized therefor or being treated as persons with less

rights and protections in the work force. The historical and ongoing fact is that there is bias and discrimination in the work force directed towards women on the basis of pregnancy. It is substantial and continuing. On behalf of the complainant, I submit that this type of discrimination, directed against women as a class can only in the result be discrimination on the basis of sex.

I do not do full justice to Mr. Vickers' argument by compressing it to the statement that pregnancy is the very essence of womanhood and that therefore it is artificial to treat "pregnant" as other than an expression of being female. Mr. Vickers supports his position by reference to a number of cases in the American federal courts. In the cases discussed at the hearing and in material filed subsequently, Mr. Vickers demonstrates that in the United States no fewer than eighteen Federal district courts and all seven Federal appeal courts which have considered the issue have held that discrimination against pregnant women violates the prohibition against sex discrimination in the Civil Rights Act, 1964, as amended.[3] Most of those cases were

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3. Communications Workers v American T & T Co., 513 F.2d. 1024, 9 EPD para. 10,035 (2d Cir. 1975);

Farkas v South Western City School District, 506 F.2d 1400, 9 EPD, para. 10,007 (6th Cir. 1974);

Hutchison v Lake Oswego School Dist. No. 7 519 F.2d 961 10 EPD, para. 10,325 (9th Cir. 1975);

Wetzel v Liberty Mutual Insurance Co., 511 F.2d 199, 9 EPD para. 9942 (3d Cir. 1975).

and House of Representatives, 95th Congress, 2d Session, Report No. 95-948, "Prohibition of Sex Discrimination Based on Pregnancy", March 13, 1978.

overruled by the Supreme Court of the United States in General Electric Co. v Gilbert.[4] In General Electric, the U.S. Supreme Court followed its decision in Geduldig v Aiello[5] in which it had held that a disability program which excluded pregnancy disabilities did not constitute sex discrimination in violation of the Fourteenth Amendment.[6]

The American law took a curious turn in Nashville Gas Company v Satty[7]. That case involved an employment rule which required pregnant employees to take an indeterminate maternity leave and which deprived such employees of their accumulated job seniority on their return to work. The Court held that that rule violated the sex discrimination prohibitions of the Civil Rights Act, 1964. It distinguished the General Electric case on the ground that Satty involved the creation

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4. See citation in note 2. Though the Supreme Court and the Court of Appeal in General Electric both use the expression "pregnancy-related disabilities", there are passages in the judgments suggesting that the employees may have been seeking to have the disability resulting from normal pregnancy treated as a disability under the sickness plan. The Appeal Court decision is reported at Gilbert v General Electric Co. 10 EPD para. 10,269 (4th Cir. 1975).

5. 417 U.S. 484 (1974).

6. The constitutional language being interpreted was the equal protection clause of the Fourteenth Amendment which, in relevant part provides "No State shall... deny to any person within its jurisdiction the equal protection of the laws."

7. 54 L.Ed. 2d. 356 (1977).

of a burden while General Electric involved the denial of a benefit. To clarify the situation the House Committee on Education and Labor has submitted an amendment to the Civil Rights Act which will prohibit discrimination based on pregnancy, child birth or related medical conditions.[8]

The only court decision in Canada of which I am aware dealing with this issue is the decision of the Federal Court of Appeal in Attorney General of Canada v Stella Bliss.[9] In holding that the provisions of the Unemployment Insurance Act relating to benefits for pregnant former employees do not violate the sex discrimination protections of section 1(b) of the Canadian Bill of Rights, Pratte, J. states emphatically that special rules about pregnancy do not constitute discrimination on the basis of sex.[10]

The American cases and the Federal Court decision discussed above do not, of course, purport to be authoritative interpretations of the Rights Code. One important distinction is that the Rights Code contains the doctrine of reasonable cause whereas the decisions subject to discussion were establishing the rights of pregnant women by reference to standards of sex discrimination and equal protection. But insofar as the General Electric and Bliss cases decide that the denial of the benefits there involved does not constitute sex discrimination, I agree with those decisions.

Pregnancy affects different women in different ways. Some women can work at some jobs up to mere hours before the time of delivery. Some women find it very difficult to function in employment situations after the first few months of pregnancy. Though some women are indifferent to the

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8. See citation in note 3.

9. A-121-77 (June 2, 1977).

10. pp.73-74.

well-being of the foetus, many women have strong feelings of responsibility for their unborn child and adopt standards of physical conduct designed to avoid any type of collision or fall which might result in injury to it. So a pregnant woman's willingness and ability to pursue her normal recreational and employment activities depend very much on the individual woman and on the individual employment situation. Mr. Vickers argued that the purpose of the Rights Code is that employment-related decisions should become sex-blind. Whether decisions should become sex-blind depends in my view on the issue involved in the individual situation. If pregnancy is equated with sex, then some curious and unfortunate results can arise. For example, there is a general rule of employment law that an employer may discipline (and in some circumstances dismiss) an employee for refusal to obey instructions given within the course of employment. I think that it would be wrong to discipline an 8-month pregnant firefighter for refusal to enter a burning building, and it would be wrong to discipline an 8-month pregnant ski instructor for refusing to lead the Canadian National Ski Team on a downhill course. If one concludes that pregnancy is sex, then one can never have a special rule for pregnant employees.

The community's approach to and rules about pregnancy are undergoing change. For a number of years many industries imposed maternity leaves on women. In some industries these rules constituted the classic type of discrimination which the Rights Code is designed to prevent, namely decision-making about employees by class and without regard to the individual capability of members of the class. Now most employers are attempting to deal with pregnant employees on a more individual and sophisticated basis. Different types of maternity leave are being made available. Employers with health and disability plans are creating different features for pregnant women. Most of the employers are motivated, at least in part, by

self-interest. The Rights Code is a statute whose purpose is to bring about equality. It is not a device to create additional remuneration and benefits for employees. We can expect to see a variety of programs some of which will create and some of which will deny maternity leave, some of which will provide for pregnancy-related sickness and some of which will not. Seniority rights will be affected in different ways. Some of these rules will be good, some will be bad. Few will be perfect from the outset. But they can begin to approach perfection as they are subjected to the hard thinking of the bargaining process and the continuing presence of the Rights Code and the activity of the Director and her staff. The situation is complicated. Complicated situations call for complicated solutions. Trying to protect the legitimate rights of pregnant women by adoption of sex discrimination standards is like trying to perform brain surgery with a garden trowel.

c. Reasonable Cause

As I have indicated above, I conclude that the complainant in this case should prevail because the policy of the respondent violates the reasonable cause provisions of section 8 of the Rights Code. There are three thresholds which must be crossed before a claimant can succeed under the reasonable cause provisions: the first is whether a complainant under section 8(1) of the Rights Code can succeed if he does not fall within the specific categories such as race, religion, sex, etc. which are referred to in section 8(2); the second is whether, assuming that reasonable cause can include persons in categories other than those in 8(2), pregnancy is one of the additional areas of protection; and the third is whether, if pregnant women are entitled to the Rights Code protections at all, it is appropriate to give the complainants in this case the order they request. These three questions will now be examined in order.

1. Mr. Thompson, counsel for the respondent, put in issue the question whether the reasonable cause protection of section 8(1) can apply if the complainant is not in one of those categories listed in section 8(2). Though some support may be found in his proposition in the reasons for judgment of Robertson, J.A. in Re Vancouver Sun and Gay Alliance Toward Equality,[11] I conclude that complainants who do not fall within the section 8(2) categories can claim the reasonable cause protections of section 8(1). In my view this conclusion is compelled by the reasons for judgment of Hutcheon, J. in Russell Daniel Burns v United Association of Journeyman of the Plumbing and Pipefitting Industry, Local 170 and Piping Industry Apprenticeship Board.[12] Further support for the proposition can be found in the dicta of Kirke Smith, J. in the Jefferson[13] case. These judicial decisions support the decisions of nine boards of inquiry established under the Rights Code which had concluded that the reasonable cause protections in sections 3, 8 and 9 extended beyond the protected categories in sections 3(2), 8(2) and 9(2) respectively.

2. Is pregnancy a status protected by the concept of reasonable cause in section 8(1)? Pregnancy is one of those conditions where there has been a pattern of conduct by which employers made broad categorizations without regard to individual circumstances. Many employers

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11. 77 D.L.R. (3d) 487 (1977).

12. Complaint No. A770816, Vancouver Registry, unreported.

13. David Richard Jefferson v George Baldwin and British Columbia Ferries Service, Complaint No. C765173, Vancouver Registry, unreported.

developed rules requiring pregnant women to stop work and to lose various other benefits in addition to present salary as a result of pregnancy and notwithstanding the effect of that pregnancy on that particular woman. That situation presented a classic case of what human rights legislation is all about. At the core of human rights legislation is the belief that people should be treated on their own merits and not by a categorization process that bears no relationship to the employment decision at hand. That pregnancy is seen as a human rights issue is demonstrated by the American cases and legislative material referred to above and by cases in Canada such as Bliss referred to above and the Culley[14] case involving flight attendants. In the Kroff[15] case, an earlier decision of a board of inquiry constituted under the Rights Code, the board held that a pregnant employee was entitled to Rights Code protection. I was a member of the board of inquiry in the Kroff case and believe that it was rightly decided. I conclude that pregnant women should be entitled to the reasonable cause protections established in section 8(1) of the Rights Code.

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14. Re Culley and Canadian Pacific Airlines Ltd., (1977) 1 W.W.R. 393 (B.C.S.C. 1976). The complainants in both cases were unsuccessful. Bliss has been described above. In Culley, the court held that the Rights Code did not apply to Canadian Pacific Airlines Ltd. since Canadian Pacific Airlines Ltd. is subject to federal jurisdiction.

15. Re a Complaint by H.W. against Jack R. Kroff and Riviera Reservations of Canada Ltd., July 22, 1976.

3. That takes me to the question whether the feature of pregnancy presented in this case is one which deserves statutory protection. As I have indicated above, pregnancy creates problems in a number of different employment contexts. One can well imagine situations where disparate treatment of pregnant women might not violate Rights Code protections. For example, given the conflicting expressions on the extent to which pregnancy is a voluntary condition, a board might well decide that an income protection plan designed to ensure against disability resulting from sickness should not apply to benefits during maternity leave for a normal pregnancy uncomplicated by sickness. There are, of course, decisions to the contrary in which courts and tribunals have held that pregnancy is a disability. In the case before me, however, I am not faced with that argument. Here it is conceded that pregnancy is not a sickness. The only issue is whether it is reasonable to exclude from the sickness protection provisions sickness which is pregnancy-related. In some circumstances it may be reasonable to exclude certain illnesses from a health protection plan. However, in this case I was not presented with any analysis demonstrating what pregnancy-related illnesses should be excluded, other than an argument based on the language of the Public Schools Act. The two sections are 132 and 129A. There is nothing in section 132 that states that pregnancy-related illness should be treated in any way different from other illnesses. Section 132 deals with illness but does not treat any illness in any way different from any other illness. Section 129A does not deal with illness. It deals with other types of leave of absence, one of which is maternity. Accordingly, it does not require the treatment of pregnancy-related illness adopted by the respondents. Read separately, the two sections do not compel or even imply the interpretation reached by the respondents.

Nor, when I read them together, do I conclude that these two sections bring about this conclusion. It is apparent that the respondent has taken the view that pregnancy-related illness, deriving as it does from maternity, is a section 129A feature not to be covered by the medical plan but to be covered as a medical benefit. Though it can be argued that pregnancy-related illnesses should be covered, if covered at all, by maternity benefit provisions, I do not believe that that analysis is appropriate in interpreting the Public Schools Act. I note with interest that in a number of labour arbitration cases the boards have not related pregnancy-related illnesses back to maternity benefits but have considered it more appropriate to treat them under the sickness features of the income protection plans.[16]

In summary, I conclude that the policy of the respondent Board of School Trustees to deny employee teachers to draw on accumulated sick leave benefits when absence is caused or aggravated by pregnancy discriminates against employee teachers without reasonable cause in contravention of section 8 of the Rights Code.

Board of Inquiry

By: _____
Sholto Hebenton

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16. Re Hotel Dieu of St. Joseph Hospital (London) and Ontario Nurses Association, (1976), 13 L.A.C. (2d.) 177 (O'Shea).

Re Toronto Board of Education and Ontario Secondary School Teachers Federation (1977), 15 L.A.C. (2d) 1 (Weatherill).

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RESPONDENTS

DIRECTOR, HUMAN RIGHTS CODE, a party
pursuant to Section 16(3) of the HUMAN
RIGHTS CODE OF BRITISH COLUMBIA

O R D E R

IT IS HEREBY ORDERED that the Board of School Trustees of School District No. 36 (Surrey),(the "School Board"), cease to contravene section 8(1) of the Human Rights Code and refrain from committing the same or a similar contravention to that which has been established, namely denying employee teachers the right to draw on accumulated sick leave benefits when the School Board is advised that the employee's illness, whether physical or mental, which occasions the absence is caused or aggravated by pregnancy.

Counsel may speak to the matter of costs if they so desire.

Board of Inquiry

By: _____
Sholto Hebenton

DATED: July 11, 1978

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RESPONDENTS

REASONS FOR DECISION

AND

ORDER

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