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DEFINING "DISABLITY": IT IS BROAD, BUT IT IS NOT THE FLU

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A. INTRODUCTION

The legal duty to accommodate employees with illnesses or disabilities in accordance with the Ontario *Human Rights Code* (the "Code") remains an ongoing challenge to employers, including charities and not-for-profits. One issue that may be raised in these reasonable accommodation situations is whether the employee is suffering or has suffered from a "disability", within the meaning of the Code. In November 2013, the Human Rights Tribunal of Ontario (the "Tribunal") clarified this issue. In *Burgess v College of Massage Therapists of Ontario* ("*Burgess*"), Candace Burgess ("Burgess") alleged that the decision to cancel her employment contract because she was sick with the flu and therefore unable to attend a mandatory training session was discriminatory.[1] Tribunal Vice-chair Eric Whist found that "the determinative issue in this case is that ... the applicant did not have a disability," meaning that the Code did not provide protection from the termination of her employment.[2] This decision clarifies that transitory ailments (such as the flu) are not "disabilities" under the Code. The decision also affirms that tribunals and the courts will continue to interpret "disability" in a way that will not trivialize its meaning under the Code. While this decision was released in late 2013, it is still a helpful reminder on a recurring issue for employers. This *Charity Law Bulletin* reviews and discusses this decision.

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[1] *Burgess v College of Massage Therapists of Ontario*, 2013 HRTO 1960.

[2] *Ibid* at 27.

B. FACTS

Burgess, the applicant, is a Registered Massage Therapist. From 2004 to 2011 she was hired on annual contracts as an examiner for the Objectively Structured Clinical Evaluation ("OSCE") held by the College of Massage Therapists (the "College"). Under their contracts, examiners were required to attend a two day training session on April 16 and 17, 2012.

On April 15, 2012, Burgess contacted the College to say that she had the flu and thought that she would be unable to come to the training the next day. On April 16, she again contacted the College to say that she could not come, but hoped that she could come on April 17. Later on April 16, the College contacted Burgess to say that because she was unable to attend the required training her contract as an examiner in 2012 was cancelled.

As Burgess considered her rights under the Code had been violated, she commenced an application with the Tribunal.

C. PARTIES' POSITIONS

Burgess submitted that the College had a duty to accommodate her alleged disability, which she claims it failed to do. The College responded that the mandatory training was a reasonable and *bona fide* occupational requirement for OSCE examiners, which needed to be fulfilled as a prerequisite for employment. The College further submitted that Burgess' illness was not a disability as defined under the Code, and, therefore, that it had no obligation to accommodate the illness prior to terminating her employment.

D. RELEVANT LEGISLATION

Section 5(1) of the Code provides persons with protection from discrimination in employment. The protected grounds, set out below, include disability:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offenses, marital status, family status or disability.

Section 17 of the Code set outs a limitation on the right to be protected from discrimination on the basis of disability, stating that:

> A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

Section 10(1) of the Code defines "disability" as follows:

> a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes disabilities mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> b) A condition of mental impairment or a developmental disability,
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> c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
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> d) A mental disorder, or
>
> e) An injury or disability for which benefits were claimed or received under the insurance plan establish under the *Workplace Safety and Insurance Act, 1997*.

E. REASONS OF THE TRIBUNAL

1. Was the training a *bona fide* occupational requirement?

The Tribunal referred to the Meiorin test established by the Supreme Court of Canada (SCC) to consider whether the required training was a "*bona fide* occupational qualification" and whether the College could have accommodated Burgess. The three elements of the Meiorin test are:

> 1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> 2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> 3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably

> necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.3

The Tribunal accepted that the training program was rationally connected to the examiner's job and that the College developed its training program in good faith. Therefore, the College passed the first two steps of the Meiorin test. However, the Tribunal did not find that it was an undue hardship for the College to provide alternative training to people who could not attend the training on the appointed days. In reaching this decision, the Tribunal specifically considered how, on two prior occasions, the College had provided individual training to examiners who were unable to attend the required training.[4]

Therefore, the Tribunal concluded that the College could have accommodated Burgess without undue hardship.

2. Was Burgess' illness a disability?

However, the Tribunal's initial finding was secondary to the conclusion that the flu and other similar transitory illnesses are not protected under the Code because these conditions are not disabilities within the above noted Code definition. Vice-chair Whist commented that "although human rights legislation is to be interpreted broadly, the Tribunal has held that not every medical condition constitutes a disability within the meaning of the Code." He further noted that "it was not the intent of the legislation to include literally everyone suffering from a few days illnesses."[5]

In reaching the decision, Vice-chair Whist commented extensively on the SCC's finding in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*.[6] In this case, the SCC provided guidelines to facilitate interpreting the meaning of "disability". It held that disability should be interpreted broadly and contextually with regards to the circumstances of the person.[7] However, in *Montreal (City)*, Justice L'Heureux-Dubé also stated that "these guidelines are not without limits" and that because "there is not normally a negative bias against these kinds

[3] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652.
[4] *Ibid* at 15.
[5] *Ibid* at 29.
[6] 2000 SCC 27 (CanLII).
[7] *Ibid* at 80.

of characteristics or ailments [i.e. the flu] they will generally not constitute a 'handicap' for the purposes of s. 10."[8]

Vice-chair Whist therefore concluded that "while the appropriate approach in applying the facts to the definition of 'disability' is to be broad, it is not to be so broad as to render the definition of disability meaningless."[9] He firmly stated that if transitory ailments, such as the flu, were protected under the Code it would trivialize the Code's protections.[10]

F. CONCLUSION

The *Burgess* decision demonstrates that tribunals and the courts will accept a broad definition of disability under the Code, but there are limits to Code protections. Employers, including charities and not-for-profits, should therefore be mindful that they must reasonably accommodate employees with disabilities, but they can also be secure in the knowledge that transitory illnesses, like the flu, are not Code protected. For all employers, developing and implementing sick leave policies applicable to both short term transitory illnesses and more serious medical conditions is an important part of human resource and risk management. Employers need to know when and how to respond to an employee's accommodation request, and should seek legal advice in cases where they are unsure how to appropriately deal with such a request.

The text of this decision is available online at: http://canlii.ca/t/g2397.

[8] *Ibid* at 82.
[9] *Supra* note 1 at 34.
[10] *Ibid* at 35.

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