Employment Law Update – November 2016

There were four decisions of note since my last Employment Law update. These cases considered the following:

1. Recognition of "Dependent Contractor" status;
2. Analysis of the doctrine of revelation of character as constituting just cause for dismissal;
3. Use of the *Rules of Court* to strike various allegations in the Notice of Civil Claim;
4. Judicial review of a human rights decision – this decision included a summary of the standard of review, the admissibility of opinion evidence, the test for *prima facie* discrimination and the test for *bona fide* and reasonable justification for the denial of service.

Recognition of "Dependent Contractor" status

In the case of *TCF Ventures Corp. v. The Cambie Malone's Corporation*[1] Mr. Justice Williams considered whether an individual who provided services on a non-exclusive basis through a corporation may be entitled to notice of termination of the employment/contract due to their status as a "dependent contractor". Our Courts have long recognized that modern economic reality results in a variety of economic arrangements, some of which fall within the continuum of independent contractor and employee. When a relationship is found to fall within that continuum it is called a "dependent contractor". Dependent contractor relationships attract the requirement of the provision of notice. This case was a bit unique in that the relationship involved provision of services through a corporation, provision of services on a non-exclusive basis and provision of services on a part time basis. Despite these factors, Mr. Justice Williams found the relationship to be one of dependent contractor and therefore required notice of termination.

This finding was based on a functional analysis of the relationship between the parties. The defendant had not hired a corporation to provide an individual to do the work. The defendant had hired the individual, who happened to provide his services through a corporation. There was also an identified permanency to the relationship in that it had lasted for three and a half years. The lack of exclusivity was not enough to remove it from a relationship that was found to be akin to employer-employee.

Mr. Justice Williams quoted from the decision in *Marbry*[2] which provided a non-exhaustive list of factors for determining where on the continuum a relationship falls:

> [38]…Those factors are:
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> > [1] Duration/Permanency of the Relationship. The longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement. Amongst other evidence, the purchase and maintenance of inventory, which contains a permanency aspect, should be considered;
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> > [2] Degree of Reliance/Closeness of the Relationship. As these two interrelated sub-factors are increased the more likely it is that the relationship falls on the

[1] 2016 BCSC 1521
[2] *Marbry Distributors Ltd. v. Avrecan Int. Inc.,* 1999 BCCA 172

> employer/employee side of the continuum. Included in this factor is whether the sale of the defendant's products amounted to a significant percentage of the plaintiff's revenues; and
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> [3] Degree of Exclusivity. An exclusive relationship favours the master/servant classification.

He noted that not one of these factors is by itself conclusive nor necessary to determine whether the relationship is one that requires notice. He applied those factors and found that the permanency of the relationship and the closeness of the relationship that existed were sufficient to make this a relationship that required notice of termination.

Revelation of Character as Constituting Just Cause

The decision of *Smith v. Pacific Coast Terminals Co. Ltd.*[3] provides an excellent summary of the law of just cause. The case involved the termination of a senior manager, initially on a without cause basis. Subsequent to his termination, the employer discovered a number of things which led them to revoke their offer of severance and maintain that the termination was for cause. The case provided an opportunity for the Court to provide a comprehensive summary of the principles applicable in determining whether a termination is for cause and in particular provided the opportunity to review the law relating to revelation of character as constituting just cause. The employer in this case took the position that the plaintiff by his conduct had revealed a character that was entirely incompatible with his continued employment as a senior manager, a position that requires the utmost trust and integrity. The overall alleged grounds for cause included assertions that the plaintiff was dishonest, insubordinate and cavalier, character traits that the employer said are inconsistent with his role as a senior manager and the trust that the employer must have of a person in that position.

The starting point for the Courts analysis was the basic test for just cause:

> …the test for cause for dismissal: it is "behaviour that, viewed in all the circumstances, is seriously incompatible with the employee's duties, conduct which goes to the root of the contract and fundamentally strikes at the employment relationship"[4]

The onus on the employer to establish cause was described in *Staley v. Squirrel Systems of Canada, Ltd.*[5]as follows:

> It is common ground there is a heavy onus on the employer to show cause for dismissal. In *Leung v. Doppler Industries Inc.* (1995), 10 C.C.E.L. (2d) 147 (B.C.S.C.) aff'd (1997), 86 B.C.A.C. 137, Sanders J. (as she then was) said:
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> > [26] Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

[3] 2016 BCSC 1876

[4] *Panton v. Everywoman's Health Centre Society* (1988), 2000 BCCA 621 at para. 28

> [27] The onus is upon the defendant to prove cause.

The Supreme Court of Canada has dictated that a contextual approach must be taken to determine whether in the circumstances the conduct is reconcilable with maintaining the employment relationship.[6]

> [29] When examining whether an employee's misconduct – including dishonest misconduct – justifies his or her dismissal, courts have often considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.

With respect to an assessment of cumulative cause, or cause on the basis of revelation of character, the required analysis was described in *Molloy v. EPCOR Utilities Inc.*[7] as follows:

> [210] Employers are entitled to hold high expectations regarding the trustworthiness of their senior or managerial employees. When a senior employee's conduct reveals character traits that undermine the employer's trust in the employee, summary dismissal may be warranted: *Letendre* at para. 39.
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> [211] This has been described as "revelation of a character flaw": *Jewitt v. Prism Resources Ltd.* (1980), 110 DLR (3d) at 715, [1980] B.C.J. No. 1670 aff'd 127 D.L.R. (3d) 190 (BCCA); *Chodan* at para. 28; *Rae v. Wascana Energy Inc.* [2003] A.J. 1738 at para. 24, 2003 CarswellAlta 2009. In *Jewitt*, Smith J. expressed the view that dishonest conduct will almost always justify dismissal, and the more serious and responsible the position held, the more that honesty must not only be inherent, but patent. While the case pre-dates *McKinley*, this same sentiment has been echoed in numerous cases since.

McKinley requires that in addition a contextual analysis must be undertaken to determine if summary dismissal is warranted. That analysis has been said to entail two phases: a consideration of the overall circumstances in determining whether the cumulative effect of the alleged improper acts rises to the level of dishonesty, followed by an assessment of whether dismissal is proportionate in regards to the seriousness of those acts.[8]

> [194] In order to give effect to the principle of proportionality, the employer should first reasonably determine that the employee engaged in misconduct and then put the nature of the misconduct into context to determine whether the conduct irreparably harmed the employment relationship before relying on the misconduct as grounds for cause.

This analysis requires consideration not just of the nature of the misconduct but also of the nature of the position of the employee. The assessment must be done on an objective basis. Mr. Justice Sigurdson considered the various allegations of misconduct alleged against Smith. He characterized the four alleged misconducts as an error in judgment, in conflict of interest with the employer, a mistake and in breach of company policy. Considering all of them as a whole, as well as the nature of the plaintiff's position, he

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[6] *McKinley v. BC Tel,* 2001 WCC 38
[7] 2015 ABQB 356
[8] *Nshina v. Azuna Foods (Canada) Co. Ltd.,* 2010 BCSC 502

found that the employer did not have just cause for the dismissal. The factor that appears from the judgment that likely would have tipped the scale to establishing just cause is if he would have found any of the misconduct to be dishonest rather than a mistake or error in judgment. The extensive analysis that Mr. Justice Sigurdson does of the relevant case law indicates that when there is dishonest conduct on the part of a senior and trusted employee, cause will be found either on the basis of a single alleged act of misconduct or on a cumulative basis.

Use of the application to strike provisions of the *Rules of Court* to dispose of portions of an employee's claim

Schulz v. Beacon Roofing Supply Canada Company [9] demonstrated how Rule 9-5(1) of the *Supreme Court Rules* can be used to dispose of portions of an employee's claim. It serves as a lesson to counsel to carefully analyse pleadings and to make use of the *Rule* where appropriate. Under the rule, applications to strike will be successful only if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. *Schulz* involved the without cause termination of an employee. In the Notice of Civil Claim, in addition to claiming damages for the failure to provide reasonable notice, the dismissed employee claimed damages for the failure to pay overtime, for harassment and for punitive damages. The employer brought an application to strike those portions of the Notice of Civil Claim on the basis that they did not disclose a reasonable cause of action.

a. Claim for overtime

The employer's argument in this portion of the application was that any claims for breach of the provisions of the *Employment Standards Act* must be brought within that statutory regime and that the Court accordingly did not have any jurisdiction over the claim. The Court agreed with the employer, referring to the British Columbia Court of Appeal in *Macaraeg*[10] which provided in part as follows:

> [102] Where a statute provides an adequate administrative scheme for conferring and enforcing rights, in the absence of providing for a right of enforcement through civil action expressly or as necessarily incidental to the legislation, there is a presumption that enforcement is through the statutory regime and no civil action is available.
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> [103] In this case, the *ESA* provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.

Mr. Justice Jenkins held that *Macaraeg* was determinative in this case and that he was bound to follow his decision. The pleadings relating to claims covered by the *Employment Standards Act* were struck.

b. Claim for harassment

The employer's argument regarding this portion of the claim was the same as that relating to the claims under the *Employment Standards Act*, specifically that these claims must be brought under the provisions of the *Human Rights Code* and that the Court therefore had no jurisdiction over them and they should be

[9] 2016 BCSC 1475
[10] *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182

struck from the Notice of Civil Claim. Mr. Justice Jenkins referred to the following portion of the decision in *Bajwa*[11]*:*

> In British Columbia the *Human Rights Code* R.S.B.C. c. 210 provides a statutory scheme that forecloses the possibility of a common law remedy for discrimination.

In that case, Mr. Justice Armstrong had struck the claim of the plaintiff in its entirety after quoting the following passage from *Keays*[12]*:*

> [63]…Honda argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhadauria,* [1981] 2 S.C.R. 181. In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario Human Rights Code is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend – namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself.

Mr. Justice Jenkins found this law to be determinative of the issue and struck those portions of the Notice of Civil Claim advancing claims covered by the *Human Rights Code.*

c. <u>Claim for punitive and aggravated damages</u>

The employer argued that the matters pleaded as supporting the claim for aggravated and punitive damages did not occur during the course of dismissal, which is a requirement at law. As the pleadings do not otherwise contain material facts to support a viable claim or cause of action, these portions of the Notice of Claim must be struck.

Mr. Justice Jenkins reviewed the law relating to the awarding of punitive and aggravated damages in wrongful dismissal claims, in particular *McKinley*[13] which set out the key principles for establishing the circumstance in which aggravated damages may be awarded. He quote the following passage from that decision:

> [78]…In [*Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085], McIntyre J. (writing for the majority) highlighted that unlike punitive damages, aggravated damages serve the purpose of <u>compensation</u> for intangible injuries. He stated that such damages could be awarded where: (1) an employer's conduct was "independently actionable", (2) it amounted to a wrong that was separate from the breach of contract for failure to give reasonable notice of termination, and (3) it arises from the dismissal itself, rather than the employer's conduct before or after the dismissal (pp. 1103 – 4)

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[11] *Bajwa v. Veterinary Medical Association (British Columbia),* 2012 BCSC 878 at para. 138
[12] *Kaeys v. Honda Canada Inc.,* 2008 SCC 39
[13] *McKinley v. BC Tel,* 2001 SCC 38

He went on to quote from the Supreme Court of Canada decision of *Keays*, where the court at para. 57 said as follows:

> Damages resulting from the manner of dismissal must then be available only fi they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of the dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive"…

He summarized the law relating to the claims for aggravated and punitive damages as follows:

> [35] In *McKinley* the Court outlines that punitive damages are penal and exemplary in nature and may be awarded only where the conduct giving rise to the complaint is found to merit punishment (at para. 85). However, both aggravated and punitive damages have to do with the conduct at the time of the dismissal and the same independent action requirement exists for punitive damages (*Keays* at para. 60 and 68; *McKinley* at para. 86)
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> [36] In this case, the Human Rights Code provides a comprehensive scheme for the treatment of such discrimination; the defendant is thus correct that discrimination is not independently actionable within the meaning of *Vorvis* (*Keays* at para. 64; see also *Carter v. Travelex Canada Limited*, 2009 BCCA 180).

As nothing in the plaintiff's pleadings relates to conduct that arose during the course of the dismissal itself, the application to strike those portions of the Notice of Civil Claim claiming aggravated and punitive damages was granted.

Judicial Review of a Human Rights decision

The case of *Providence Health Care v. Dunkley*[14] involved an application for judicial review of a Human Rights decision which found that an employer had discriminated against an employee and that the discrimination was not justified on the basis of undue hardship. This case involved the residency of a deaf doctor. The residency was terminated when the employer determined that the cost of obtaining sign language interpreters was prohibitive. The resident then brought a Human Rights complaint, alleging discrimination. The Tribunal found the complaint to be justified[15]. The respondents to the complaint brought petitions for review of the decision under the *Judicial Review Procedure Act*[16].

a. Standard of review

The decision began with a summary of the standard of review which bears repeating as a reminder to counsel of the requirements for review. The standard of review applicable to the Tribunal is determined by s. 59 of the *Administrative Tribunals Act*[17]. The requirements of that section of the Act have been considered by the British Columbia Court of Appeal[18] which has held that the Tribunal's findings on

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[14] 2016 BCS 1383
[15] 2015 BCHRT 100
[16] R.S.B.C. 1996, c. 241
[17] S.B.C. 2004, c. 45
[18] *British Columbia v. Bolster,* 2007 BCCA 65 at para. 124 and *Lavender Co-Operative Housing v. Ford,* 2011 BCCA 114 at para. 58

questions of mixed fact and law are to be reviewed on the standard of correctness. The Court of Appeal has also cautioned about the care that must be exercised in determining whether a question is one of mixed fact and law, stating as follows:[19]

> [27] It is important to note that in both *Bolster* and *Lavender*, the Court was considering the application of a legal standard to uncontroverted facts. The mixed questions of fact and law referred to by the Court were well suited to a standard of correctness, and there were no extricable issues of fact that needed to be considered.
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> [28] A court on judicial review will not, of course, have heard the witnesses who testified before the tribunal. Many tribunals do not record their proceedings, so the court may have no record at all of the testimony. It will, therefore, be practically impossible for the court to fairly or efficiently make findings of fact. For that reason, it is important that courts not be too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness. If there is an extricable issue of fact involved in the "mixed" question, the court must defer to the tribunal in respect of that issue in accordance with s. 59(2) of the *Administrative Tribunals Act.*

b. Admissability of opinion evidence

The Court considered a complaint by the Petitioner's relating to the admissibility and weight accorded to an expert report submitted into evidence by the Respondent. The Court confirmed that the legal test for admissibility of opinion evidence in Tribunal matters is that established in *Mohan*[20]. Specifically, the Tribunal determined that the evidence was relevant to the issues before the Tribunal, it was necessary to assist the Tribunal in areas outside of its experience and knowledge, Dr. Russell had the required expert qualifications by reason of her specialized training and experience and the evidence was not otherwise inadmissible. The Court determined that in applying that test the Tribunal was correct in admitting the opinion evidence into evidence.

The Petitioners also argued that the Tribunal should have excluded the expert evidence on the basis of an appearance of bias. Before the Tribunal was evidence of emails between Dr. Russell and the complainant and/or her counsel expressing her desire to assist the complaint with her complaint to the Tribunal, including a letter of support. The Court noted that Dr. Russell had in her report acknowledged her duty to be impartial and to assist the Tribunal and referred to the Supreme Court of Canada decision in *White Burgess*[21] where the acknowledgment of the duty to be impartial was found to be a factor that can be considered in determining an issue of bias. The Court rejected this grounds of appeal finding that it was not unreasonable for the Tribunal to rely on the evidence of Dr. Russell in the areas that the evidence was relied upon.

The Petitioners final objection relating to Dr. Russell's evidence was due to the fact that it was based on hearsay evidence obtained in interviews, literature reviews and extrapolations from documents. The Court reviewed the law on this issue and concluded that Dr. Russell's evidence fell into the first category of expert evidence mentioned by Sopinka J. in *Lavallee*[22], that being evidence that an expert obtains and

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[19] *J.J. v. School District No. 43 (Coquitlam),* 2013 BCCA 67 at paras. 27 - 28
[20] *R. v. Mohan*, [1994] 2 S.C.R. 9
[21] *White Burgess Langille Inman v. Abbot and Haliburton Co.,* 2015 SCC 23
[22] *R. v. Lavallee,* [1990] 1 S.C.R. 852

acts upon within the scope of his or her expertise. The Court concluded as follows with respect to the evidence of Dr. Russell:

> [62]…As a professional called upon to give expert evidence, she was entitled to base her opinion on her professional experience, her knowledge of the relevant academic literature, and her interviews with other professionals with expertise in the relevant subject area. Her opinion evidence was not rendered inadmissible or of no weight on this account.

c. The test for *prima facie* discrimination

The Petitioners also alleged that the Tribunal erred in its analysis of the existence of *prima facie* discrimination, which provided the Court with an opportunity to review the applicable test. The Court found that the Tribunal had correctly described the test for discrimination as follows:

> [348] The test for discrimination under the *Code* is as follows: First, the complainant bears the onus of proving a *prima facie* case of discrimination. If the Complainant fails to do so the complaint is dismissed. If the complainant establishes a *prima facie* case, then the onus shifts to the respondent to prove a justification. If the respondent fails to do so the complaint is justified. If the respondent establishes a justification there is no discrimination and the complaint is dismissed.

The Court found that the Tribunal applied the appropriate test in determining how a complainant establishes *prima facie* discrimination, applying the test set out in *Moore*[23] which is as follows:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code;* that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

In applying *Moore* the Tribunal held that the complainant must establish as follows:

(1) That she has a characteristic protected from discrimination under the *Code;*
(2) That she experienced an adverse impact with respect to the service and her employment; and
(3) That the protected characteristic was a factor in the adverse impact.

The Tribunal noted that once the complainant had established these three things, the burden then shifted to the Respondents to justify their conduct. The Court found that the Tribunal had correctly applied the test for *prima facie* discrimination. The petitioner's argument at the judicial review was that the Tribunal had conflated the question of *prima facie* discrimination with the question of whether there was a failure to accommodate. The Court rejected the petitioner's argument finding that the Tribunal had recognized the necessity of the link between the group membership and the adverse treatment.

[23] *Moore v. British Columbia (Education)* 2012 SCC 61 at para. 33

The petitioner further alleged that the Tribunal erred in finding the nexus for *prima facie* discrimination, arguing that there is no "free standing" duty to accommodate. The Court found that the Tribunal recognized and agreed that there was no free standing duty to accommodate but found that the complainant was denied the benefit of her residency and her employment due to her disability. The Court pointed to the following portions of the Tribunals judgment:

> [387] Further, both Respondents also argue that "there is no freestanding" duty to accommodate. I agree that the duty to accommodate would not arise in circumstances where there was no nexus between the protected ground and the adverse impact. A complainant must establish a nexus between the protected characteristic and the adverse impact. The fact that Dr. Dunkley has a disability and was treated adversely does not, on its own, automatically establish a nexus between the two. If, for example, Dr. Dunkley had been removed from the program or terminated from employment for academic deficiencies which had no connection to her deafness, her complain would fail at the third step of proving a *prima facie* case.
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> [389] Abella, J. sad in McGill, "The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittinly." While it is not necessary to specifically identify arbitrariness or stereotyping, the negative impact on Dr. Dunkley is arbitrary in that it results soley from a program designed only for a hearing population. While I accept that neither UBC nor PHC attributed stereotypical attributes to Dr. Dunkley because of her deafness, the norm of oral communication is oriented to persons who can hear and imposes a burden on persons who are Deaf that is not imposed on others.
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> [393] Dr. Dunkley was offered a residency in dermatology at UBC because of her merits and capacities. As Dr. Warshawski wrote, "Dr. Dunkley was accepted into the program based on her outstanding CV." She was denied the benefit of the residency training and employment, based not on her merits and capacities, but entirely on her disability. In short, because she is Deaf.

The Court confirmed the test as expressed in *Bombardier*[24] and described by the BC Court of Appeal in *Kelly*[25] where the Court observed as follows:

> The complainant discharges its onus when it proves the three steps, the third of which is simply to establish a connection between the disability and the decision, without regard for any consideration of the decision maker, such as hardship, or the motive or state of mind of the decision maker.

The Court confirmed the decision of the Tribunal, finding that it was clear that if the complainant had not been deaf, she would not have lost her employment and her residency. Her deafness was clearly a factor

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[24] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39

[25] *University o British Columbia v. Kelly,* 2016 BCCA 271 at para. 25

in the adverse impact that she suffered. With this finding the Court confirmed the Tribunals finding of a *prima facie* case of discrimination.

d. *Bona Fide* Reasonable Justification

The Court then went on to consider the argument that the respondents had a *bona fide* and reasonable justification for the denial of service. The Court referred to the three step test established by the Supreme Court of Canada [26] for determining whether a *prima facie* discriminatory standard is a *bona fide* reasonable justification or a *bona fide* occupational requirement. A service provider or employer may justify the standard by establishing on a balance of probabilities:

1. That it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
2. That it adopted the standard in good faith, in the belief that it is necessary to the fulfillment of the purpose or goal; and
3. That the standard is reasonably necessary to accomplish its purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

The petitioner had argued at the Tribunal that it would suffer undue hardship to accommodate Dr. Dunkley due to the significant costs associated with providing her with the required interpreter services. They did not argue, nor are they required to establish, that it was "impossible" to accommodate her. The Court said that the Tribunal had correctly held that the onus was on the respondents to prove that they could not accommodate Dr. Dunkley without undue hardship on a balance of probabilities. The Tribunal held that the respondent had failed to satisfy this onus. Applying the standard of correctness, the Court agreed, finding that the failure of the respondent to take reasonable steps to discover accurately the true cost of providing the required accommodation shows that they had not proven on a balance of probabilities that the accommodation would amount to undue hardship.

[26] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. [*Grismer*] and *British Columbia (Public Service Employer Relations Commission) v. BCGSEU,* [1999], 3 S.C.R. 3 [*Meiorin*]