

FIREFIGHTER'S CASE BEARS CLOSE SCRUTINY

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In September 1999, the Supreme Court of Canada issued a decision that changes and clarifies the way employers will approach occupational qualifications and the duty to accommodate employees without discrimination.

In the past, courts focused on whether the discrimination alleged in a particular case was “direct” discrimination, meaning discrimination on its face, or “adverse effect” discrimination, meaning discriminatory in effect. The distinction was arbitrary and created strange results from time to time. The Supreme Court decision, in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. – The Firefighter’s Case* – has now changed all that.

A B.C. firefighter lost her job when, after three years of satisfactory job performance, the Government adopted a new series of fitness standards. She failed one of those standards, a 2.5 kilometre run, by taking 49.4 seconds longer than required under the standard. The Union grieved the termination on the basis that the application of the standard was discriminatory. They argued that women have a lower aerobic capacity than men and cannot increase this capacity with training to meet the standard.

The case made its way to the Supreme Court of Canada. Madam Justice McLachlin, speaking for the Court, found that the conventional approach of categorizing discrimination as either “direct” or “adverse effect” was artificial and should be replaced by a unified approach. The elements of the unified approach now involve a three-step test for determining whether a potentially discriminatory standard is a *bona fide* occupational requirement. On this point, the court said:

“...An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (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 the individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”

Madam Justice McLachlin goes on to point out that in determining what amounts to an undue hardship, the factors previously taken into account by the courts will still apply. These include the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees.

In performing the analysis in any particular case, “the skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible.” Employers, courts and tribunals are expected to be innovative and practical when

considering how this should be done in any particular circumstance. Guidance is given, however as to some of the important questions that might be asked in the course of the analysis. These include:

1. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
2. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
3. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
4. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
5. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
6. Have other parties who are obliged to assist in the possible search for possible accommodation fulfilled their roles?

In the case of the B.C. firefighter, the Court found the employer had met the first two elements of the test, but was not able to establish that the standard was reasonably necessary to the accomplishment of the work-related purpose. The process used to develop the aerobic standard failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex. Aerobic performances of males and females were not analyzed separately and the analysis used a larger group of males to determine average aerobic performance. The goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently. If they did not require the same minimum capacity, then the standard should have been revised to reflect that disparity in the employment qualifications. As a result, the standard was found to be discriminatory and the firefighter was reinstated to her former position with lost wages and benefits.

As employers develop job qualification standards in the future, it will be important for them to keep in mind the Court's new approach to the analysis. By applying the three tests and the principles with respect to undue hardship, and by analyzing the situation using the kinds of questions posed by Madam Justice McLachlin, however, employers should now have a better idea of how courts and tribunals will deal with this question.

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