Bona Fide Occupational Requirements and *Bona Fide* Justifications under the *Canadian Human Rights Act*

The Implications of *Meiorin* and *Grismer*

Canadian Human Rights Commission

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PREFACE

Since the *Canadian Human Rights Act* was first passed in 1978, the law with respect to the defences of *bona fide* occupational requirement (BFOR) and *bona fide* justification (BFJ) has undergone several changes. In 1999, the Supreme Court of Canada decided two important cases,[1] which have major implications for employers and service providers when relying on a BFOR or BFJ defence. The decisions reinforce the duty to accommodate individuals who cannot meet an employment or service-delivery standard for reasons such as disability, sex, family status, or religion. They also clarify the nature of the evidence that is required in cases where a *bona fide* occupational requirement or *bona fide* justification is raised in defence of a complaint of discrimination.

As the Court stated in the first of these decisions:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards.[2]

The Court expanded on this point in its second decision:

> Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards.[3]

In light of these two decisions, the Canadian Human Rights Commission has modified its approach to the investigation of complaints which involve allegedly discriminatory standards. This document provides an overview of the decisions, and the consequent changes to the Commission's investigation process.

1 *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, referred to as the *Meiorin* case; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, referred to as the *Grismer* case.

2 *Meiorin*, supra note 1 at paragraph 68.

3 *Grismer*, supra note 1 at paragraph 19.

INTRODUCTION

In the past, Courts and Tribunals held that the first step in considering an allegation of discrimination related to a standard or policy was to identify whether the discrimination was direct or indirect (adverse effect). The BFOR/BFJ defences were traditionally applied only to direct discrimination.

The two categories of discrimination were analysed as follows:

Direct discrimination This term describes standards or policies that are discriminatory on their face, i.e., that clearly make an adverse distinction on the basis of a prohibited ground. For example, a policy that restricts a particular job to men could be characterised as prima facie direct discrimination as it specifically denies women an employment opportunity. Similarly, an employment standard requiring 20:20 uncorrected vision could be characterised as direct discrimination on the basis of disability as it specifically excludes people with vision impairments.

Where a complainant established that an employment standard or policy was *prima facie* direct discrimination, the onus shifted to the employer to show that the challenged standard or policy was based on a *bona fide* occupational requirement.

To do so the employer had to prove:

- that the standard or policy was imposed honestly and in good faith and was not imposed to undermine human rights legislation (the subjective element); and

- that the standard or policy was reasonably necessary for the safe and efficient performance of the work and was not an unreasonable burden on those to whom it applied (the objective element).

If the employer failed to prove these elements, the standard or policy was struck down in its entirety.

Indirect or Adverse Effect Discrimination These terms describe standards or policies that are neutral on their face, i.e., that are applied equally to all people without distinction on a prohibited ground, but which nonetheless have an adverse effect based on a prohibited ground. For example, a job description which requires applicants to have a driver's licence is neutral on its face as it does not specifically exclude anyone. It is not neutral in its effect, however: people who cannot get a driver's licence because of vision impairments or epilepsy, for example, would be precluded from applying for the job. Where the complainant established that an apparently neutral standard or policy had a *prima facie* adverse effect on a group based on a prohibited ground, the burden of proof then shifted to the employer, who, in order to avoid liability, was required to prove two things:

- that there was a rational connection between the job and the standard or policy; and

- that it was not possible to accommodate the specific complainant without incurring undue hardship.

In the unlikely event that the employer failed to prove the rational connection element, the standard or policy would fall. If, however, the employer succeeded in establishing the rational connection element, the standard would remain intact and the focus would shift to individual accommodation.

In the federal jurisdiction, the distinction between direct and adverse effect discrimination was narrowed when Parliament passed amendments to the *Canadian Human Rights Act* in June 1998. With these amendments, Parliament made it clear that employers and service providers have a duty to accommodate individuals who are discriminated against by any policy or practice. Section 15 of the *Canadian Human Rights Act* now states that:

> *15(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

OVERVIEW OF THE SUPREME COURT OF CANADA DECISIONS IN MEIORIN AND GRISMER

A. The *Meiorin* case: *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union*

This case dealt with a grievance by a female forest firefighter, Tawney Meiorin, who had been dismissed from her job because she failed one aspect of a minimum fitness standard established by the Government of British Columbia for all firefighters. After Ms Meiorin had been performing the duties of a firefighter for three years, the respondent adopted a new series of fitness tests, including a running test designed to measure aerobic fitness. After failing the test and losing her job, Ms Meiorin complained that the aerobic standard discriminated against women in contravention of the British Columbia *Human Rights Code*, as women generally have lower aerobic capacity. The Government of British Columbia argued that this standard was a *bona fide* occupational requirement of the firefighter position.

On appeal, the Supreme Court determined that the standard was not a BFOR. In reaching this conclusion the Court considered the traditional approach of first determining whether the discrimination was direct or adverse effect. It found this approach inappropriate for the following reasons.

- The distinction is artificial, and it is sometimes difficult to accurately characterise discrimination as either direct or adverse effect. The distinction is also inappropriate as, in some circumstances, it allows the discriminator to choose an adverse effect form for the discrimination to avoid the harsher consequences of a finding of direct discrimination.

- The approach provides different outcomes depending on the characterisation. In a case of direct discrimination, the policy or standard will be struck down in its entirety if the BFOR is not established, whereas under the indirect test, the policy or standard remains intact as long as the employer can establish the rational connection requirement, and the focus shifts to individual accommodation.

- The approach is premised on an incorrect assumption that the adversely affected group is a minority by allowing a policy or standard to be left in place if it only affects a small group. This leaves the size of the group affected open to manipulation and is unhelpful where the group is, in fact, the majority.

- There are difficulties with the practical application of the defences. For example, under the direct test the employer is forced to consider reasonable alternatives to the standard whereas under the adverse effect test there is no such requirement.

- The approach legitimizes systemic discrimination since policies or standards that appear neutral, in that they are applied equally to everyone, are not themselves challenged and tribunals and courts cannot assess their legitimacy.

- The approach is inconsistent with both the purpose and terms of human rights legislation, to which a purposive and liberal interpretation is given, and the actual terms of the legislation. There is no distinction between direct and adverse effect discrimination in specific provisions of human rights legislation nor is the duty to accommodate linked legislatively with adverse effect discrimination.

- The approach creates a dissonance between human rights legislation and analysis based on the *Charter of Rights and Freedoms*, since the Charter gives 'little legal importance' to the distinction.

The Court therefore rejected the conventional approach, and proposed a unified test for BFOR defences in cases of direct or adverse effect discrimination. This unified test asks the following questions:

- Is there a policy or standard which discriminates either directly or by adverse effect based on a prohibited ground?

- Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?

- Did the employer adopt the particular policy or standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose?

- Is the policy or standard reasonably necessary to the accomplishment of that legitimate work-related purpose?

This last element requires the employer to show that the policy or standard adopted is the least discriminatory way to achieve the purpose or goal in relation to the particular job(s) to which the policy or standard applies. It includes the requirement of demonstrating that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

B. The *Grismer* case: *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*

Some three months after the *Meiorin* decision, the Court gave its decision in *Grismer*, a case in which the respondent raised a *bona fide* justification defence. Terry Grismer, who passed away before his case was heard by the Court, had a condition known as homonymous hemianopia (HH), which eliminated his left-side peripheral vision in both eyes. The British Columbia Superintendent of Motor Vehicles cancelled his driver's licence on the ground that his vision no longer met the standard of a minimum field of vision of 120 degrees. Certain exceptions to the 120 degree standard were allowed, but people with HH were never permitted to drive.

Mr Grismer re-applied several times, passing all of the requisite tests except the field of vision test, and was not permitted to demonstrate that he was able to compensate for his limited field of vision. He therefore filed a complaint with the British Columbia Council of Human Rights and was successful at Tribunal on the basis that the Superintendent had failed to prove that there was a BFJ for the rigid standard applied to people with HH.

On appeal, the Supreme Court of Canada made it clear that the approach set out in *Meiorin* is equally applicable in service provision cases. It applied the same approach to this complaint, which had been filed many years before the *Meiorin* test was enunciated. It concluded that the 120 degree vision standard was not reasonably necessary, and the standard was struck down.

In adapting the *Meiorin* test to the BFJ defence in *Grismer*, the Court asked the following questions:

- Is the discriminatory standard or policy rationally connected to the function being performed?

- Did the service provider adopt the particular standard with an honest and good faith belief that it was necessary for the fulfilment of its purpose or goal?

- Is the standard reasonably necessary for the service provider to accomplish its purpose or goal?

IMPLICATIONS FOR THE INVESTIGATION OF COMPLAINTS

As a result of these two decisions, the Commission has modified its approach to the investigation of complaints related to employment or service-delivery standards. Now, all allegedly discriminatory standards and policies will have to be justified as rationally connected to the work or service, made in good faith, and reasonably necessary. The investigation will consider whether the standard has the effect of excluding members of a particular group on impressionistic assumptions, or treating one or more groups more harshly than others without apparent justification.

This approach will apply to all complaints whether or not the alleged discrimination took place before or after the *Meiorin* and *Grismer* decisions.

In the investigation of any complaint of discrimination, the onus of proving a BFOR or BFJ lies with the respondent and not with the complainant. The onus is therefore on the respondent to provide evidence of each of the elements of the test set out by the Court. Specifically, evidence will need to be presented to address the following issues:

1) Whether the standard is rationally connected to the performance of the job or service being provided:

- what is the purpose of the challenged standard?
- what are the objective requirements of the job or function of the service to which it applies?
- how is that purpose related to the requirements of the job or function of the service being provided?

2) Whether the standard was adopted in an honest and good faith belief that it was necessary to the accomplishment of its purpose:

   - when, how and why was the standard developed?

3) Whether the standard is reasonably necessary for the employer or service provider to accomplish its purpose:

   - were alternatives considered?
   - if standards were considered, why weren't they implemented?
   - can the respondent demonstrate that it is necessary that all employees meet a single standard or could different standards be adopted?
   - how was the standard designed to minimise the burden on those required to comply?
   - does the policy or standard treat some to whom it applies more harshly than others?
   - was the assistance of others sought in finding possible accommodations?
   - what evidence exists that the respondent would face hardship if it adopted alternative standards or provided accommodation?

CONCLUSION

The *Meiorin* and *Grismer* decisions have significantly changed the way we look at *bona fide* occupational requirements in employment and *bona fide* justifications in the provision of services. It is hoped that this summary of the decisions will help employers and service providers to develop and put in place non-discriminatory standards and practices.

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