Meiorin Test and the Bona Fide Occupational Requirement

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Tawney Meiorin was a forest firefighter for the Province of British Columbia. At the time she was dismissed, she had successfully worked for the Province of British Columbia for three years in a crew that attacked and suppressed forest fires. In May of 1994, the Province introduced a new fitness testing regime. Ms. Meiorin passed the first three tests but was unable to successfully complete the last test. After four failed attempts to run a 2.5-kilometre route in full firefighting gear within an 11-minute time frame, Ms. Meiorin was terminated.

Ms. Meiorin's labour union launched a grievance to dispute her termination arguing she had been wrongfully dismissed. The new fitness tests were developed to address a 1991 Coroner's Inquest which recommended that only physically able-bodied individuals be charged with fighting forest fires as a safety measure. An aerobic standard designed to evaluate the rate at which the body can take in oxygen was implemented following the 2.5-kilometre run in full gear. The Province, Ms. Meiorin's employer, argued that this new testing regime constituted a *bona fide* occupation requirement ("BFOR"). BFORs are necessary requirements of a job which on their face may be discriminatory, but because they are necessary to perform the job, they are precluded from Human Rights legislation. For example, to wash windows on skyrise buildings, a BFOR may be that the individual has use of their limbs. In Ms. Meiorin's case, her employer felt that this new testing was necessary to ensure the safety of its firefighting team.

Arbitration

The matter was heard by an arbitrator for the British Columbia Human Rights Tribunal. In the arbitrator's findings, it was determined that the new fitness testing was discriminatory to women because women cannot achieve the same level of aerobic testing as men even with appropriate aerobic training. The arbitrator determined the way in which this oxygen intake percentage was measured tended to favour males.

(See *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union Union* 1997 CanLII 3694 (BC CA) at par. 9). The arbitrator also noted the employer presented "no cogent evidence . . . to support its position that it cannot accommodate Ms. Meiorin because of safety risks," and found Ms. Meiorin did not present a safety risk to herself, her colleagues, or to the public.

Ultimately, Ms. Meiorin was successful and was awarded both compensation and reinstatement in her position as a firefighter.

Appeal to the British Columbia Court of Appeal

The decision of the arbitrator was appealed to the British Columbia Court of Appeal. The Appellant, The Government of the Province of British Columbia as represented by the Public Service Employee Relations Committee, was successful in having the arbitrator's decision overturned. In their decision, the Court disagreed with the adjudicator's findings and found that reverse discrimination against men would occur as a result of allowing a lower oxygen intake by women and cited that the testing imposed for the firefighters was a BFOR. The Appellant Court cited the case of ***Large v. Stratford (City)***, 1995 CanLII 73 (SCC), [1995] 3 S.C.R. 733. In that decision, the Supreme Court held that it was a BFOR for a police officer working for the City of Stratford to be forced to retire at the age of 60. The Court of Appeal determined, at paragraph 19, that an individual assessment was impractical and a general rule applying to all employees was necessary. Simply put, to accommodate individuals based on their own testing was impractical. Paragraph 19 states:

> The significance of this case is the principle that in a case such as Large, an employer seeking to establish a bona fide occupational requirement must demonstrate that individual assessment is impractical and therefore a general rule is necessary. The appellant submits that the necessary corollary to this principle must be that if individual testing is carried out, there is no discrimination. We agree.

The appeal was allowed, and the arbitrator's award was set aside effectively nullifying the arbitrator's award.

Appeal to the Supreme Court of Canada

The Supreme Court of Canada (SCC) reviewed the British Columbia Court of Appeal's decision. The SCC proposed a new, three-step analysis commonly referred to as the "Meiorin Test" to evaluate BFORs in the workplace. The discriminatory rule or requirement must be:

- Adopted for a purpose rationally connected to the performance of a job;
- Adopted in an honest belief that it was necessary to satisfy a legitimate purpose;
- Reasonably necessary to accomplish that purpose. To establish this, the employer must show that it was impossible to accommodate the individual or group without creating undue hardship to itself. In the case of Meiorin, the first two areas of the test were met (see par. 71).

The Province could rationally connect the new fitness requirement with the performance of a job and did so to satisfy a legitimate purpose. Where the test failed was that the Province could not argue that accommodating the individual or group created a hardship. In paragraph 79, the Supreme Court states:

> Referring to the Government's arguments on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence . . . to support its position that it cannot accommodate Ms. Meiorin because of safety risks". The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

The Court determined that the fitness tests newly employed by the Province of British Columbia unwittingly discriminated against women. Specifically, it was determined by the arbitrator in ***British Columbia (Public Service Employee Relations Commission) v BCGSEU***, [1999] 3 S.C.R. 3, in paragraph 11:

> Evidence accepted by the arbitrator demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The arbitrator also heard evidence that 65 percent to 70 percent of male applicants pass the Tests on their initial attempts, while only 35 percent of female applicants have similar success. Of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.

Lastly, the Supreme Court address the BC Court of Appeal's suggestion that the arbitrator's ruling constituted reverse discrimination against men. At paragraph 81, the Supreme Court states:

> The Court of Appeal suggested that accommodating women by permitting them to meet a lower aerobic standard than men would constitute "reverse discrimination". I respectfully disagree. As this Court has repeatedly held, the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated: Andrews, supra, at pp. 167-69, per McIntyre J.; Law, supra, at para. 51, per Iacobucci J. A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men. "Reverse" discrimination would only result if, for example, an aerobic standard representing a minimum threshold for all forest firefighters was held to be inapplicable to men simply because they were men.

Conclusion

In conclusion, the British Columbia Court of Appeal's decision was overturned. Ms Meiorin was reinstated and received compensation. The requirements of undue hardship changed significantly after the Meiorin decision. The test for discrimination was more clearly defined as was the test for *bona fide* occupation requirements. The Province of BC failed to demonstrate that the aerobic test was reasonably necessary to the "*safe and efficient performance of the work of a firefighter.*" This case also demonstrates the correlation between employment law and human rights legislation.