

Arbitrator: lifting requirements for school cleaners discriminatory against women

Is it sex discrimination to require that school cleaners be able to lift 50 pounds from the floor to shoulder height? In *Canadian Union of Public Employees, Local 4400 v. Toronto District School Board* (September 4, 2003), an Ontario arbitrator has said it is.

The case involved three part-time cleaners who were terminated after they failed a test that involved lifting 50 pounds to shoulder height. After grieving their terminations and being provided with strength training that enabled them to meet the requirement, they won their jobs back. At the hearing into their grievance, they gave uncontradicted evidence that they had never had to lift anything weighing 50 pounds from the floor to shoulder height when performing their duties.

The evidence also demonstrated that the heaviest objects cleaners are required to lift, such as boxes of photocopy paper and five-gallon pails of floor cleaner, could be made lighter either by dividing the objects into smaller items, or by ordering supplies in containers holding smaller amounts. No evidence was provided by the employer concerning the costs of doing so.

UNION: REQUIREMENT EXCLUDES FEMALES

The union tendered expert evidence showing that, between ages 18 and 25, 75 per cent of men can lift 50 pounds to shoulder height, while only 35 per cent of women can. This difference increases with age: almost no women at age 45 can meet the requirement, while between 60 and 65 per cent of men can. The evidence of differential abilities was supplemented by actual duplications of the test imposed on the grievors by 315 women and 258 men between ages 18 and 30 at York University: all of the men were able to lift 50 pounds to shoulder height, while only 27 per cent of the women could.

The union submitted that the evidence clearly showed that the test had a disproportionate impact on women. The employer's own records showed that women had a failure rate nine times greater than that of men. The union argued either that the requirement should be struck down as not being rationally connected to the job of part-time cleaner or that the employer should be required to accommodate women.

The employer responded by arguing that the requirement to lift 50 pounds was not discriminatory because women can meet the standard - as the three grievors did after being offered the appropriate training. It also argued that, if the requirement was held to be discriminatory, it was necessary for reasons of safety and efficiency. The only appropriate accommodation, the employer submitted, was to offer employees the opportunity to be re-tested after weight training.

NO UNDUE HARDSHIP TO REVISE RULE

Relying on the case law originating with the *British Columbia Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union* case (the B.C.

Firefighters case, also referred to as the *Meiorin* case) (see ["Not reasonably necessary": aerobic fitness test held discriminatory in B.C. woman firefighter victory](#)" and ["The duty to accommodate after Meiorin and Grismer"](#)), the arbitrator upheld the union's grievance. He noted, first, that the union had established a *prima facie* case that the standard constituted constructive discrimination because of its differential impact on women. Even if only the actual applicants for the position (as opposed to women in general) constituted the group considered for the purpose of determining whether the standard was discriminatory, it was clear that the failure rate was much higher for women than for men.

Under the three-step *Meiorin* approach for determining whether an employer has justified a *prima facie* discriminatory workplace rule or standard, the rule or standard will be upheld if the employer establishes that it

- was adopted for a purpose rationally connected to the performance of the job;
- was adopted in an honest and good faith belief that it was necessary to attain this legitimate work-related purpose; and
- is reasonably necessary to accomplish the purpose. To prove reasonable necessity, it must be shown that it is impossible to accommodate the claimant and others sharing his or her characteristics without imposing undue hardship on the employer.

At the first step, the arbitrator rejected the union's argument that the 50-pound rule was not rationally connected to the employment. He accepted that it had been adopted for reasons of safety and efficiency. There was no dispute between the parties as to the second step - both agreed that the employer had not acted in bad faith in adopting the standard.

Turning to step three, the arbitrator held that the requirement to lift 50 pounds to shoulder height was not reasonably necessary, and that the grievors could have been accommodated short of undue hardship:

"[T]he evidence falls far short of establishing that revising the impugned standard so as to accommodate female part-time cleaners ... who are incapable of lifting fifty pounds from floor to shoulder height would impose undue hardship upon the Board. The evidence indicates that the maximum weight ... could be reduced to twenty-five pounds or less by permitting [cleaners] to split boxes of photocopy paper ..., and by adopting one or more of the following alternatives:

1. ordering supplies in smaller containers;
2. rearranging supplies in school storerooms, or ordering smaller quantities of supplies, so as to reduce the height to which pails and boxes are stacked;
3. arranging for heavier supplies to be lifted or lowered by the head caretaker or by another member of the caretaking staff other than a female part-time cleaner."

The arbitrator noted further that, although some of these alternatives would involve additional expense, there was no evidence to indicate that it would amount to undue hardship.

Accordingly, the union's grievance was allowed, and the employer's requirement was declared to be in violation of Ontario's *Human Rights Code*.

In Our View

Since *Meiorin*, tribunals have increasingly held that, to pass the test of reasonable necessity, employers must build accommodation into work rules and standards, rather than supplementing discriminatory standards by accommodating those who cannot meet them. In this case, this meant adopting the approaches suggested by the arbitrator. For its part, the employer had offered to accommodate female cleaners by providing strength training along with the chance to

re-qualify. This is the sort of "supplemental" accommodation that is less likely to be accepted today than before *Meiorin*.

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