

"Not reasonably necessary": aerobic fitness test held discriminatory in B.C. woman firefighter victory

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Some five years after losing her job as a firefighter with the British Columbia Forest Service, Tawney Meiorin has been told by the Supreme Court of Canada that she can have it back. A three-year veteran with the Initial Attack Forest Firefighting Crew, Meiorin's job had been to put out forest fires while they were small and easily contained. Her employment record was satisfactory.

Following the recommendations of a 1991 Coroner's Inquest Report that only physically fit employees be assigned to front-line firefighting duties, the provincial government launched a review of its existing fitness standards. Government-commissioned researchers devised four tests, one of which required employees to run 2.5 kilometres in 11 minutes. Meiorin passed three of the tests, but failed the running test after four attempts, running the distance in 11 minutes and 49.4 seconds. She was laid off, and the union brought the matter to arbitration.

NO EVIDENCE OF RISK

The arbitrator sustained Meiorin's grievance and ordered that she be reinstated with compensation for lost wages and benefits. Accepting evidence that most women have a lower aerobic capacity than most men, the arbitrator found that the test was discriminatory, in that it had a disproportionately negative effect on women as a group. An expert testifying for the government stated that most women could achieve the aerobic standard with training, but the arbitrator rejected this evidence as anecdotal and unsupported by scientific data. The arbitrator found further that there was no credible evidence that the aerobic standard adopted by the government was necessary for firefighters of either gender to perform their jobs satisfactorily, or that Meiorin's failure to meet the standard meant that she constituted a safety risk.

This result was reversed by the province's Court of Appeal, which found that the aerobic standard was necessary to the safe and efficient performance of the work. The Court also commented that allowing Meiorin to succeed would create "reverse discrimination", in that it would discriminate against those men who could meet the lower standard set for women but were incapable of meeting the men's standard. Meiorin's union appealed to the Supreme Court.

NEW THREE-PART TEST FOR JUSTIFYING DISCRIMINATORY STANDARD

In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (September 9, 1999), a unanimous Court ruled that the government had failed to establish that the aerobic

standard was reasonably necessary for determining who could safely perform the duties of a forest firefighter. The Court first accepted the arbitrator's ruling that Meiorin had demonstrated that the test had an adverse discriminatory effect on women, due to their generally lower aerobic capacity. The issue now was whether the government could defend the aerobic standard as being a *bona fide* occupational requirement (BFOR) in spite of its discriminatory effect.

Before turning to the case itself, the Court articulated a new, three-step approach to determining whether a discriminatory standard can be justified as a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities that

1. it adopted the standard for a purpose rationally connected to the performance of the job;
2. it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. the standard is reasonably necessary to the accomplishment of that purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer. (See also ["Nicotine addiction is a disability, B.C. arbitrator rules"](#) on our Publications page.)

The employer passed the first two parts of the test. The Court noted that the purpose of the aerobic standard, to enable the government to identify those able to work safely and efficiently as firefighters, was rationally connected to a forest firefighter's work. As well, it was clear the government had acted in good faith and without discriminatory intent in attempting to identify those who could perform the job safely and efficiently. Neither of these elements had been seriously disputed.

FLAWED METHODS

However, the contentious issue was whether the standard was reasonably necessary in order to identify those able to work safely and efficiently. Here, despite what it termed the government's "laudable" efforts to have experts devise a non-discriminatory test, the Court held there were serious problems with the methods adopted by those experts.

First, the Court pointed to their overly "descriptive" approach; one in which performance standards were devised based on measuring the average performance levels of the test subjects. The Court noted that merely describing the characteristics of a test subject's performance does not necessarily allow one to identify the standard minimally necessary for the safe and efficient performance of the task.

Second, the studies failed to distinguish female test subjects from males, who formed the large majority of the sample groups. This showed that the aerobic standard had been developed in a manner that failed to address the possibility that it may discriminate unnecessarily on the ground of

sex. An expert testifying on behalf of the government defended the decision not to make separate gender-based measurements as an effort to reflect the actual conditions of firefighting. This, the Court stated, was of little use in trying to develop a standard that both accomplished the government's purpose and avoided unintentional discrimination: "The polymorphous group's average aerobic performance is irrelevant to the question of whether the aerobic standard constitutes a minimum threshold that cannot be altered without causing undue hardship to the employer. Rather, 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 and, if not, to reflect that disparity in the employment qualifications."

Nor had the government investigated the possibility that the standard was discriminatory after Meiorin raised the issue. Rather, the expert reports relied on by the government merely asserted, without any supporting evidence, that women could attain the standard with appropriate training.

DUTY TO ACCOMMODATE NOT MET

The government, the Court observed, had presented no evidence as to the cost of accommodating Meiorin, but had argued only that undue hardship would result were it to deviate from a standard that was necessary for the safety of the firefighters and the public. The Court noted that this claim of unacceptable risk arising if Meiorin were accommodated had been rejected by the arbitrator as being unsupported by cogent evidence. There was nothing, the Court agreed, to show that using a different standard would compromise the government's purpose to the point of undue hardship.

It had also been asserted that accommodation would undermine the morale of other forest firefighters. The Court responded that, not only was this proposition unsupported by any evidence, but even if it were supported, mere opposition by those seeking to maintain a discriminatory practice could not be used to show that accommodating Meiorin would amount to undue hardship on the employer. Only where employee objections are based on well-grounded concerns that their rights will be affected can this be taken into consideration. Here, there was no indication that any such rights would be affected by allowing Meiorin to continue in her position.

Before concluding, the Court took several aspects of the Court of Appeal's decision to task, including its view that allowing Meiorin to succeed would lead to "reverse discrimination". This reflected a flawed notion of equality: "True equality requires that differences be accommodated 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."

In Our View

In the course of this decision, the Court had the following to say about employers' obligations under

human rights legislation: "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. By enacting human rights statutes ..., the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible."

Employers should, therefore, carefully consider whether any potentially discriminatory standard, rule or practice is reasonably necessary for the accomplishment of a work-related purpose, and ensure that it provides for accommodation short of undue hardship. (See also ["Ontario Human Rights Commission issues guidelines on accommodating disability"](#) on our Publications page and ["Federal human rights body issues alcohol and drug testing policy"](#) on our What's New page. For subsequent decisions applying this case, see ["Arbitrator rules against "perfect" accommodation for phobic technician"](#) on our Publications page and ["The duty to accommodate after Meiorin and Grismer"](#) on our What's New page.)

For further information, please contact [Lynn Harnden](#) at (613) 940-2731.