

# Supreme Court of Canada

September 9, 1999

**The British Columbia Government and Service  
Employees' Union**

*Appellant*

v.

**The Government of the Province of British Columbia**

*Respondent*

**Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin,  
Iacobucci, Major, Bastarache and Binnie JJ.**

*on appeal from the court of appeal for British Columbia*

## **I. Facts**

(MCLACHLIN J.) Seven years ago Tawney Meiorin was hired as a member of a three-person Initial Attack Forest Firefighting Crew by the Province of British Columbia. Although she did her work well, she was dismissed three years later when the Government adopted a new series of fitness tests for forest firefighters. Ms. Meiorin passed three of the tests but failed a 2.5 kilometre run test. After four attempts she ran the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. Ms. Meiorin had in the past performed her work well, without apparent risk to herself, her colleagues or the public.

The Test required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness.

The Tests were developed following a Coroner's Inquest Report that recommended that only physically fit employees be assigned as front-line forest firefighters for safety reasons. Government researchers from the University of Victoria developed the Tests with a view to protecting the safety of firefighters while meeting human rights norms. They identified the essential components of forest firefighting, measuring the physiological demands of those components and selecting fitness tests to measure those demands.

The test was based on measuring the average performance levels of the test subjects and converting this data into minimum performance standards. 65 percent to 70 percent of male applicants passed 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.

Evidence demonstrated that, owing to physiological differences, most women have a lower aerobic capacity than most men and that, unlike most men, most women cannot increase their aerobic capacity enough with training to meet the aerobic standard. No credible evidence showed that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter safely and efficiently.

The arbitrator found that the claimant had established a *prima facie* case of adverse effect discrimination and that the Government had not discharged its burden of showing that it had accommodated the claimant to the point of undue hardship. The Court of Appeal allowed an appeal from that decision and commented that to permit Ms. Meiorin to succeed would create "reverse discrimination", i.e., to set a lower standard for women than for men would discriminate against those men who failed to meet the men's standard but were nevertheless capable of meeting the women's standard.

## **II. The Issues**

The narrow issue here was whether the Government improperly dismissed the claimant. The broader legal issue, however, was whether the aerobic standard that led to her dismissal unfairly excluded women from forest firefighting jobs.

## **III. Decision**

*Held:* The appeal should be allowed and Ms. Meiorin restored to her former position and compensating her for lost wages and benefits.

## **IV. Analysis**

With respect, I cannot agree that the ability to meet the aerobic standard is necessary to the safe and efficient performance of the work of an Initial Attack Crew member. To the contrary, despite her failure to meet the aerobic standard, Ms. Meiorin did not pose a serious safety risk to herself, her colleagues, or the public. I find that the ability to meet the aerobic standard is not necessary to the ability to perform the tasks of an Initial Attack Crew member. This leaves us with the issue of whether the aerobic standard is unjustifiably discriminatory.

In the case of "direct discrimination", (where the standard is discriminatory on its face), the employer may establish that the standard is a *bona fide* occupational

requirement (BFOR) by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). If these criteria are established, the standard is justified as a BFOR. If they are not, the standard itself is struck down.

A different analysis applies to “adverse effect discrimination”, (where the facially neutral standard discriminates in effect). The BFOR defense does not apply. *Prima facie* discrimination established, the employer need only show: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot accommodate the claimant without incurring undue hardship. If the employer cannot discharge this burden, then it has failed to establish a defense to the discrimination.

Ms. Meiorin had established a *prima facie* case of adverse effect discrimination by showing that the aerobic standard has a disproportionately negative effect on women as a group. If a *prima facie* case of either form of discrimination is established, the burden shifts to the employer to justify it.

It would seem to be that the standard is neutral on its face, leading one to the adverse effect discrimination analysis. I agree that a case of *prima facie* adverse effect discrimination was made out and that the Government failed to discharge its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship.

The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify. This case is a good example of how systemic discrimination adversely affects women as a group. Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law.

Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a 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 individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

The first step in assessing whether the employer has successfully established a BFOR defense is to identify the general purpose of the standard and determine whether it is rationally connected to the performance of the job. The employer must demonstrate a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job.

Once the legitimacy of the employer's general purpose is established, the employer must take the second step of demonstrating that it adopted the standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant.

The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship.

Some of the important questions that may be asked in the course of the analysis include:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) Why were alternative standards investigated and not implemented?
- (c) 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?

- (d) Is there a way to do the job that is less discriminatory while accomplishing the employer's legitimate purpose?
- (e) 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?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard. While the Government's expert witness testified that most women can achieve the aerobic standard with training, this evidence is "anecdotal" and "not supported by scientific data".

Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR.

#### Steps One and Two

The first two elements of the proposed BFOR analysis, that is (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and (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, have been fulfilled. The Government's general purpose in imposing the aerobic standard is not disputed. It is to enable the Government to identify those employees or applicants who are able to perform the job of a forest firefighter safely and efficiently. It is also clear that there is a rational connection between this general characteristic and the performance of the particularly strenuous tasks expected of a forest firefighter. All indications are that the Government acted honestly and in a good faith belief that adopting the particular standard was necessary to the identification of those persons able to perform the job safely and efficiently. It did not intend to discriminate.

#### Step Three

The employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. It must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. In the case on appeal, the issue is whether the Government has demonstrated that this particular aerobic standard is reasonably necessary in order to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently.

The Government adopted the laudable course of retaining experts to devise a non-discriminatory test. However, the Government has not established that it would experience undue hardship if a different standard were used.

The procedures adopted by the researchers are problematic on two levels. First, the aerobic capacity of the test subjects was ascertained, and that capacity was established as the minimum standard required of every forest firefighter. However, that does not necessarily allow one to identify the standard minimally necessary for the safe and efficient performance of the task. Second, these studies failed to distinguish the female test subjects from the male test subjects, who constituted the vast majority of the sample groups. The record does not permit us to say whether men and women require the same minimum level of aerobic capacity to perform the tasks expected of a forest firefighter.

While the researchers' goal was admirable, their aerobic standard was developed through a process that failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex. Employers and researchers should be highly mindful of this serious problem.

The Government defended the original decision not to analyze separately the aerobic performance of the male and female test subjects as an attempt to reflect the actual conditions of firefighting. This misses the point. 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. There is no evidence that the Government embarked upon a study of the discriminatory effects of the aerobic standard when the issue was raised by Ms. Meiorin.

If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defense to the charge of discrimination. Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination

## V. Conclusion

The evidence fell well short of establishing that the claimant posed a serious safety risk to herself, her colleagues, or the general public. The Government also claimed that accommodating the claimant would undermine the morale of the workforce. However, the attitudes of those who seek to maintain a discriminatory practice cannot be determinative of whether the employer has accommodated the claimant to the point of undue hardship. If it were possible to perform the tasks of a forest firefighter safely and efficiently without meeting the aerobic standard, the rights of other forest firefighters would not be affected by allowing the claimant to continue performing her job. The order of the arbitrator reinstating the claimant to her former position and compensating her for lost wages and benefits was restored.

I conclude that Ms. Meiorin has established that the aerobic standard is *prima facie* discriminatory, and the Government has not shown that it is reasonably necessary to the accomplishment of the Government's general purpose, which is to identify those forest firefighters who are able to work safely and efficiently.

I would allow the appeal and restore Ms. Meiorin to her former position and compensating her for lost wages and benefits. Ms. Meiorin's union, the appellant on this appeal, shall have its costs in this Court and in the court below.

*Appeal allowed with costs.*