CANADIAN HUMAN RIGHTS COMMISSION

BONA FIDE OCCUPATIONAL REQUIREMENTS AND *BONA FIDE* JUSTIFICATIONS UNDER THE *CANADIAN HUMAN RIGHTS ACT*

The Implications of *Meiorin* and *Grismer*

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PREFACE

Since the *Canadian Human Rights Act* (CHRA) was first passed in 1977, the law regarding the defences of *bona fide* occupational requirement (BFOR) and *bona fide* justification (BFJ) has undergone several changes. One of the most important developments occurred in 1999, when the Supreme Court of Canada decided two cases[1] that have had major legal implications. These implications are most significant for employers and service providers facing complaints of alleged discrimination who choose to rely on a BFOR or BFJ defence to justify allegedly discriminatory standards, policies or practices.

These two Supreme Court of Canada decisions reinforced the duty to accommodate individuals who cannot meet an employment or service-delivery standard for any reason related to a ground protected by the CHRA, such as disability, sex, family status or religion. They also clarified the nature of the evidence required in cases where a BFOR or BFJ 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 integrated the Court's approach into its own investigation of complaints involving allegedly discriminatory standards, policies or practices. This document provides an overview of the decisions and outlines the Commission's current investigation process in these cases.

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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 approached and analyzed discrimination cases under human rights legislation in one of two ways, depending on whether the discrimination was first characterized as either "direct" or "indirect" (also known as "adverse effect").

Cases of direct discrimination are those where the discrimination is apparent from the facts. For example, a policy that entitles only men to be employed as security guards would be characterized as direct discrimination because it explicitly excludes women. Indirect discrimination, however, is less apparent at first glance. For example, a policy that requires job applicants to have a driver's licence appears neutral, but this standard may exclude applicants who are ineligible for a licence based on a disability such as epilepsy. Cases such as this one would be characterized as indirect or adverse effect discrimination.

Despite the fact that both policies described above would negatively affect individuals based on a prohibited ground in the CHRA, the legal analysis applied to each type of case was significantly different. The defence of a BFOR/BFJ was traditionally applied only in cases of direct discrimination.

This historical distinction between the legal analysis of direct and indirect discrimination was reduced when amendments to the *Canadian Human Rights Act* were passed in June 1998. These changes made it clear that employers and service providers within federal jurisdiction have a duty to accommodate individuals who are discriminated against by any policy or practice. Section 15(2) of the *Canadian Human Rights Act* now states that:

> *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.*

In 1999, the *Meiorin* and *Grismer* cases eliminated any remaining analytical distinction between the defences for direct and indirect discrimination. The Supreme Court of Canada provided a unified test to be applied consistently to all BFOR/BFJ defences, regardless of whether the discrimination was direct or indirect.

This change simplified the analysis required in discrimination cases and ensured that, in all cases where a BFOR/BFJ is claimed, the employer or service provider must accommodate individuals to the point of undue hardship.

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 was 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, and she had sufficiently demonstrated she could perform the duties of her job safely and effectively. The Government of British Columbia argued that this aerobic standard was a BFOR of the firefighter position.

On appeal, the Supreme Court determined that the aerobic standard was not a valid BFOR. In reaching this conclusion, the Court considered the traditional approach, which analyzed cases differently depending on the initial determination of whether the discrimination was direct or adverse effect. The Court found the differing analysis in the traditional approach was inappropriate. It concluded that the distinction between direct and adverse effect discrimination was artificial, difficult to characterize accurately and inconsistent with the purpose of human rights legislation. The Court also indicated that the old approach led to inconsistent outcomes, legitimized systemic discrimination, and created a dissonance between human rights legislation and the *Charter of Rights and Freedoms.*

The Court therefore rejected the traditional approach and established a unified test for BFOR defences to be applied in all cases of direct or adverse effect discrimination. This unified test asks the following questions:

- Is there a standard, policy or practice that discriminates based on a prohibited ground?
- Did the employer adopt the standard, policy or practice for a purpose rationally connected to the performance of the job?
- Did the employer adopt the particular standard, policy or practice in an honest and good faith belief that it was necessary in order to fulfill that legitimate work-related purpose?
- Is the standard, policy or practice reasonably necessary in order to fulfill that legitimate work-related purpose?

This last element requires the employer to show that the standard, policy or practice adopted is the least discriminatory way to achieve the purpose or goal related to the job at issue. It includes the requirement to demonstrate 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 BFJ defence. Terry Grismer, who passed away before the Court heard his case, 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. While certain other exceptions to the 120-degree standard were allowed, people with HH were never granted a licence.

Mr. Grismer re-applied several times, passing all of the requisite tests except the field of vision test, and he 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. He 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 unified test set out in *Meiorin* was equally applicable to service provision cases. Using the unified approach, the Court concluded that the 120-degree vision standard was not reasonably necessary and struck down the standard because it failed the final element of the test.

In adapting the *Meiorin* employment-related test to the BFJ defence in *Grismer*, the Court established the following questions to ask in service-related cases:

- Is the underlying purpose of the standard, policy or practice rationally connected to the service provider's function?
- Did the service provider adopt the particular standard in an honest and good faith belief that it was necessary in order to fulfill the service provider's purpose or goal?
- Is the standard, policy or practice reasonably necessary in order to fulfill the service provider's purpose or goal?

IMPLICATIONS FOR THE INVESTIGATION OF COMPLAINTS

As a result of these two decisions, the Commission integrated the unified test into its process for investigating complaints where a BFOR/BFJ defence is raised. The following approach applies to all such complaints within the jurisdiction of the Commission, regardless of whether the initial discrimination is characterized as direct or adverse effect.

First, an investigation will consider whether the standard, policy or practice has the direct or indirect effect of excluding or negatively affecting individuals based on a prohibited ground included in the CHRA: this is the initial determination of whether a *prima facie* case exists. In the investigation, the onus of demonstrating sufficient evidence of the *prima facie* case lies with the complainant.

Once a *prima facie* case is established, the onus of proving a BFOR/BFJ defence then shifts to the respondent. The investigation will apply the unified test to consider whether there is evidence demonstrating that the standard, policy or practice is rationally connected to the work or service, was made in good faith and is reasonably necessary. To successfully defend its standard, policy or practice, the respondent must provide sufficient evidence of each of the elements of the unified test.

Specifically, the investigation will assess the following issues in a case.

1. Can the complainant show that the policy, standard or practice creates a distinction or exclusion related to one of the prohibited grounds in the CHRA? Investigation questions to explore this evidentiary requirement may include the following:

   - What is the standard, policy or practice in question?
   - What distinction or exclusion does it make or imply?
   - How is this distinction or exclusion directly or indirectly related to a prohibited ground in the CHRA?

   If the *prima facie* case is sufficiently demonstrated by the evidence, the investigation will proceed to step 2.

2. Can the respondent show that the underlying purpose of the standard is rationally connected to the performance of the job or service at issue? Investigation questions to explore this evidentiary requirement may include the following:

   - What is the purpose of the challenged standard, policy or practice?
   - What are the objective requirements of the job, or function of the service, at issue (the specific jobs or duties to which the standard applies)?
   - How is the purpose related to the objective requirements of the job or function of the service?

3. Can the respondent show that the standard was adopted in an honest and good faith belief that it was necessary in order to accomplish the respondent's purpose? Investigation questions to explore this evidentiary requirement may include the following:

   - When, how and why was the standard developed?

4. Can the respondent show that the standard is reasonably necessary for the employer or service provider to accomplish its purpose? Investigation questions to explore this evidentiary requirement may include the following:

   - Does the standard exclude members of a particular group based on impressionistic assumptions?
   - Does the standard treat some to whom it applies more harshly than others?
   - Were alternative standards considered, or were alternatives to the standard itself–such as individualized testing–considered?
   - If so, why weren't the alternatives implemented and why was this particular standard chosen instead of others?
   - Is the standard the least discriminatory means of accomplishing the purpose?
   - Is it necessary that all employees meet a single standard, or could varying standards be adopted?
   - How was the standard designed to minimize the burden on those required to comply?
   - What efforts were made to accommodate negatively affected individuals?
   - Was the assistance of others sought in finding possible accommodations?
   - Would the respondent face undue hardship if it adopted alternative standards or provided individual accommodation?

CONCLUSION

The *Meiorin* and *Grismer* decisions have significantly influenced the way the Commission analyzes BFORs in employment and BFJs in the provision of services. This summary of the decisions is intended to help employers and service providers to develop and implement non-discriminatory standards and practices.