

## Current Workplace Issues

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The recent Supreme Court of Canada decision regarding the female fire fighter (B.C. v. B.C.G.S.E.U.), changes the law relating to discrimination in several aspects. Practitioners in this field should be aware of these changes, because they are substantial.

The case originally started as a grievance, leading to an arbitration decision. The grievor was dismissed as a fire fighter when she was unable to meet the physical standards imposed by the government, after trying a number of times. Specifically, she was unable to run 2.5 km. in 11 minutes or less. Her best time was 11:08 and her worst 11:49. She had successfully passed the other components of the testing, and had been doing her job satisfactorily for 3 years prior to her dismissal.

The government had consulted experts, who had designed this test as part of a series of physical tests. The arbitrator found that:

1. the aerobic standard adopted was an appropriate standard that was reasonably related to fire fighting duties;
2. the 2.5 km run in 11 minutes or less was a reasonably accurate measure of that standard for aerobic capacity, and
3. the test had been fairly administered to the grievor.

However, when it came to differences between males and females, the evidence was that generally, women had less aerobic capacity than men did. This was borne out by the test results that whereas approximately 65% of men passed the tests, only 35% of women did.

The arbitrator held that the testing regime was not direct discrimination, but indirect or adverse (neutral on its face, but affecting the grievor adversely). Consequently, the employer had the onus of proving that they could not accommodate the grievor without undue hardship. Since she had been employed in this capacity satisfactorily for 3 years, and the government had presented no other evidence of undue hardship in accommodating her, the grievance was allowed.

When the case reached the Supreme Court, the Court accepted the arbitrator's account of the evidence and his reasoning, based on the previous decisions dealing with direct and adverse discrimination, and the duty to accommodate. In ordinary circumstances, the matter might have ended there. However, at the invitation of the parties, the Court went on to enunciate new principles of law that substantially affect and change the law in this whole area.

First of all the Court went on to reject the historical distinction in the defences available in cases of direct and indirect discrimination. It had been true that a bona fide occupational requirement (BFOR) would serve to defend direct cases and that adverse effect cases required accommodation to the point of undue hardship.

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The new approach in this decision will now require accommodation to the point of undue hardship, regardless of whether we are dealing with a case of direct or indirect discrimination. The test to be met for a BFOR defence to any claim of discrimination will be to establish that:

1. the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. 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. the standard is reasonably necessary to the accomplishment of that work-related purpose. **The key change in the law is that in order 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.**

The Court found that the employer met the first two tests, but not the third. They held that the government had not established by evidence, that "the aerobic standard was reasonably necessary to the safe and efficient performance of the work of a forest fighter. The Government had not established that it would experience undue hardship if a different standard were used."

What the government had done was to observe test subjects, and the recorded results of their capacity were then used as the minimum for everyone. The Court criticized this approach, stating that merely describing the characteristics of the test subject does not necessarily identify the standard minimally necessary for the safe and efficient performance of the task. Additionally, the Court criticized that the studies did not distinguish male subjects from female subjects, so that it could not be said whether males and females required the same minimum level of aerobic capacity to perform safely and efficiently the tasks expected of a fire fighter. They held that the goal of the testing 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.

In conclusion, the Court made two significant findings. First, it has effectively abolished the distinction between

direct and adverse discrimination. In order to establish a BFOR defence an employer must now prove accommodation to the point of undue hardship. Secondly, the Court confirms that in order to establish a BFOR, an employer can not merely establish certain qualifications, based on some grouping. It will have to establish that the standard is not so much reasonable but rather the minimum necessary for the safe and efficient performance of the job. Assuming the job in question has both male and female participants (as will almost all jobs today), each group will have to be identified in the testing regime to ascertain whether a different standard is necessary for each gender.

This makes the establishment of a BFOR much more difficult than before for an employer. However, the case emphasizes that the purpose of human rights legislation is to deter discrimination, and that stereotypical thinking about traditional standards is often part of systemic discrimination.

Job requirements are not to be based on the way it has always been done. A defence of BFOR must be established properly, based upon actual testing and hard evidence, and not by impressionistic assessments.

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