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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. WILSON, HILL and LAX JJ.

B E T W E E N:	)	
	)	
CORPORATION OF THE COUNTY OF SIMCOE	)	*Ronald M. Snyder,* for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
ONTARIO PUBLIC SERVICE UNION and its LOCAL 911	)	*Richard Blair,* for the Respondents
	)	
Respondents	)	
	)	
-and-	)	
	)	
THE CROWN IN RIGHT OF ONTARIO	)	*Sara Blake and David Strang,* for the Intervenor
Intervenor	)	
	)	
	)	**HEARD AT TORONTO:** November 10, 2009

LAX J.:

[1] In this application for judicial review, the County of Simcoe seeks to set aside the decision of arbitrator M.R. Gorsky appointed pursuant to s. 49 of the *Ontario Labour Relations Act, 1995*, S.O. 1995, c. 1. The arbitration decision arose from a grievance filed by David Rogers against his employer, the County of Simcoe ("Simcoe"), for his removal from his position as an

ambulance paramedic as a result of a condition that affected his visual acuity. The arbitrator ordered the applicant to return Rogers to a paramedic position in an "attend only" capacity, despite his inability to meet the vision requirements for a Class F licence, which is required for paramedics by s. 6(1)(f) of O. Reg. 257/00, the general regulation under the *Ambulance Act*, 1990, c. A.19 ("the *Ambulance Act* Regulation") and s. 2(1) of O. Reg. 340/94, the licence regulation under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("the *Highway Traffic Act* Regulation"). The Attorney General for Ontario intervened to support the applicant's request for an order setting aside the decision of the arbitrator. It also intervened and provided evidence in the hearing before the arbitrator.

[2] The *Ambulance Act* Regulation requires that all ambulances in Ontario be staffed by two paramedics who can both drive the ambulance and attend patients. The arbitrator concluded that the provisions of the Ontario *Human Rights Code*, R.S.O. 1990 c. H.19 (the "*Code*") applied to the *Ambulance Act* Regulation and that the failure of the Regulation to provide for the possibility of reasonable accommodation amounted to substantive discrimination. He concluded that there was a duty to accommodate Rogers as an attend only ambulance paramedic despite his lack of qualification to drive the ambulance, and that doing so would not cause undue hardship.

[3] At the beginning of the hearing, Simcoe withdrew its challenge to the arbitrator's finding that the *Code* applied to the *Ambulance Act* Regulation and conceded that the arbitrator made no error in law in his interpretation of the Regulation and the *Code*. The remaining issue is whether the arbitrator's finding that the employment of Rogers in an attend only paramedic position could be accommodated without undue hardship is reasonable. For the reasons that follow, we conclude that the arbitrator's decision is unreasonable and should be set aside.

BACKGROUND FACTS

[4] David Rogers was a fully trained and experienced paramedic who was employed by the County of Simcoe for 14 years. In 2002, he was diagnosed with Choridal Melanoma, a condition that affected his visual acuity. He underwent treatment for the condition, but was unable to meet the minimum standard prescribed by the *Highway Traffic Act* Regulation to hold a Class F licence. Under the Regulation, this category of licence is required to drive an ambulance. Rogers had 20/200 vision in the left eye and 20/20 vision in his right eye, but the *Highway Traffic Act* Regulation, s. 17(1)(j), provides that an applicant or holder of a Class F license cannot have visual acuity in the weaker eye that is less than 20/100.

[5] Subsection 6(1)(f) of the *Ambulance Act* Regulation requires that a paramedic employed in a land ambulance service "shall hold and maintain a driver's license that authorizes the person to drive an ambulance". Subsection 2(1) of the *Highway Traffic Act* Regulation stipulates that a Class F licence is required to drive an ambulance. Rogers was therefore no longer qualified to drive an ambulance.

[6] In November 2004, Simcoe communicated Rogers' situation to the Ministry of Health and Long Term Care and inquired if the Ministry would waive the Class F licence requirement in Rogers' case, allowing him to drive an ambulance notwithstanding his inability to meet the regulatory requirements. On September 5, 2005, Rogers also communicated with the Ministry, seeking permission to work as an attend only paramedic. At that time, s. 6(3) of the *Ambulance*

Act Regulation exempted volunteer paramedics from complying with the Class F licence requirement if they were working in an attend only capacity. Subsection 6(3) was revoked in July 2008. At the time of the hearing, there were 110 volunteer paramedics in Ontario. All but one held a Class F license.

[7] The respondent union supported Rogers' request for accommodation and further requested that the Ministry review the regulations with respect to the *Code*. By letter dated October 26, 2005, the Ministry indicated that it could not waive the requirement that paramedics must hold a Class F licence.

[8] On September 22, 2005, Simcoe, the union and Rogers signed an agreement that accommodated Rogers in a position outside the bargaining unit, but that did not preclude him from seeking alternative accommodation.

[9] On September 4, 2005, Rogers had filed a grievance alleging that the employer failed to provide him with appropriate workplace accommodation. Article 5.03 of the relevant collective agreement states that "the employer and the union recognize their obligations in accordance with the provisions of the *Human Rights Code* including the duty to accommodate and any other statutory right". Rogers and the union's position was that he should have been permitted to work as an attend only paramedic. Simcoe denied the grievance on the basis that it could not, given the regulations, employ him in a paramedic role. Further, it took the position that it had complied with its accommodation obligations under the *Code* by placing him in a non-paramedic position.

[10] The respondents applied to the Minister of Labour pursuant to s. 49 of the *Labour Relations Act* and an arbitrator was appointed. It was not disputed before the arbitrator that Rogers could not drive an ambulance. The arbitrator found that the applicant had breached the *Code* by failing to reasonably accommodate Rogers. He ordered the applicant to place Rogers in an attend only paramedic position and to compensate him for any losses occasioned by the failure to accommodate.

ANALYSIS

Standard of review

[11] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada described the reasonableness standard at para. 47:

> [47] Reasonableness is a deferential standard … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[12] The parties agree that the standard of reasonableness applies to the arbitrator's decision that Rogers could be employed in an attend only capacity without causing undue hardship to the employer.

The Meiorin Test

[13] The test for adjudicating discrimination claims in the employment context was established in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*"). In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), it was held to apply to all claims for discrimination under the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210. The *Meiorin* test also applies under the Ontario *Code*; a discriminatory workplace standard may be justified provided it satisfies the three-part *Meiorin* test: *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. 3d 18 (C.A.) at para. 77.

[14] Once the plaintiff establishes that a workplace standard is *prima facie* discriminatory, which in this case is conceded, *Meiorin* provides at para. 54 that the onus shifts to the defendant to prove on a 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 fulfilment 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.

[15] The arbitrator found that the standard established in s. 6(1)(f) of the *Ambulance Act* Regulation was adopted for a purpose rationally connected to the performance of the job of a paramedic, as the safety of patients and the public could be affected by the way in which ambulances are staffed (Arbitration Decision, para. 74). He also found that the standard was adopted for good faith reasons, namely to maintain health and safety standards in the operation of the land ambulance service (Arbitration Decision, para. 76). However, he found that the non-accommodating requirement that all paramedics be able to drive an ambulance was not reasonably necessary to achieve this goal and that the accommodation sought by Rogers to work as an attend only paramedic would not give rise to undue hardship.

The Basis for the Arbitrator's Decision

[16] The sole basis for the arbitrator's decision that the workplace standard requiring ambulance paramedics to hold a Class F license was not reasonably necessary for the health and safety of patients and the public was the absence of evidence that there were negative health and safety effects in the approximately 18 years during which volunteer paramedics had been permitted to serve in an attend only capacity. In reaching this conclusion, the arbitrator purported to rely on the evidence of Anthony Campeau, a witness produced by the Crown. Campeau was a former manager of the Land Ambulance Program, Emergency Health Services Branch, of the

Ontario Ministry of Health. The arbitrator found Campeau's professional qualifications and experience "impressive".

[17] Campeau testified that the exemption for volunteer paramedics which relieved them of the requirement to hold a Class F license had been introduced to meet the service requirements of some northern areas of the province and reserves, the alternative being areas where no ambulance service could be provided. He said that almost no volunteers now served without possessing a Class F license and anticipated a time when the exemption would no longer apply. This in fact occurred in 2008 with the revocation of the statutory exemption for volunteer paramedics by O. Reg. 268/08, s. 2(2).

[18] Campeau and Rob Duquette, a witness produced by Simcoe who is the provincial Manager, Quality Programs and Proficiency Development, Paramedic Services, both testified about the "frequently chaotic" conditions that arise at accident sites. Their evidence described how any impediment to meeting the best standard of ambulance care can have dire health and safety consequences. They gave examples of different scenarios to illustrate how the health and safety of patients and the public could be negatively impacted if ambulances were permitted to operate with an attend only paramedic. Their evidence was that limited response times must be met to afford sick and injured patients the best chance of receiving life saving and life sustaining medical care, and that the need to transfer care responsibilities in order to avoid having an attend only paramedic drive would lead to unacceptable delays and cause inadvertent distress to the patient, relatives and bystanders. They testified about the urgent need for a speedy response in all emergencies to provide transport to hospitals. Although the arbitrator did not specifically refer to the scenarios they described, it is clear from the reasons that he accepted their evidence. He said:

> [104] Mr. Campeau's and Mr. Duquettes's descriptions of a number of scenarios involving the provision of ambulance services in a variety of circumstances could not have been more real and therefore does not qualify as "purely speculative". Nor were the health and safety concerns expressed by them in any way speculative, in that their hypotheses lacked logical consistency.

[19] The arbitrator noted that the respondent's counsel did not take "any significant position refuting Mr. Campeau's or Mr. Duquette's descriptions" and accepted that their evidence was unrefuted. However, the arbitrator found, based on the absence of evidence of incidents with volunteer paramedics, that "Mr. Campeau's evidence clearly demonstrated that health and safety concerns were hypothetical" (Arbitration Decision, para. 95).

[20] It is clear from *Grismer* that the employer (or in this case, the regulator), is entitled to choose and define the purpose or goal of the workplace standard so long as that choice is made in good faith:

> [21] Having chosen and defined the purpose or goal – be it safety, efficiency, or any other valid object – the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide that workplace safety. However, the employer is not entitled to set standards that

> are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily excludes some classes of workers. On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination.

[21] The arbitrator accepted that the goal established by Ministry of Health's Land Ambulance Service was to provide the highest level of health and safety standards to all who are served by ambulance paramedics. He accepted that the closer the standard is to providing an ideal service, the greater the likelihood that patients will receive the medical care they require, promptly and competently. It was undisputed that there could be delays experienced in transporting patients should an ambulance be permitted to operate with an attend only paramedic, as well as problems in communicating a patient's condition where a transfer was necessitated because an attendant could not drive.

[22] Having found that the non-accommodating standard that all paramedics be able to drive an ambulance was enacted in good faith to maintain health and safety standards in the operation of the land ambulance service, and was rationally connected to the performance of the job of ambulance paramedic, the arbitrator was required to determine whether or not the standard was reasonably necessary to achieve the employer and regulator's goal of providing the highest level of health and safety to those served by ambulance paramedics. Instead, the arbitrator found that the "critical issue" was whether the standard was reasonably necessary to achieve the goal of "reasonable safety" (Arbitration Decision, para. 84). The goal of the Ministry in requiring that ambulance paramedics be able to both drive and attend patients was not reasonable safety, but the highest level of safety. As Campeau explained in his evidence, the justification for a higher level of risk and a lesser level of safety in permitting volunteers to serve as attend only paramedics was to provide ambulance services in those areas where the alternative was to have no service at all (Arbitration Decision, para. 96). By applying a historic standard that provided minimum paramedic services through volunteers in some areas, the arbitrator usurped the Crown's authority to establish a goal of the highest level of health and safety for patients served by full-time employee paramedics in most areas of the province, including the County of Simcoe.

[23] The only evidence before the arbitrator was that the exemption for volunteer paramedics had been in place for 18 years, that "some" had served in an attend only capacity and that at the time of the hearing all, save one, held a Class F license. There was no evidence of the number of attend only paramedics who had served in the past or the actual practice involving volunteer paramedics. Nor was there any reason to believe that such evidence might be available. It is difficult to imagine how the negative health and safety risks associated with volunteers, including transport delays and adverse patient outcome, could have been measured and documented. In short, this is not a case where there was no evidence that there were any problems. More accurately, it is a case where there was simply no evidence to support the application of a lesser standard of safety in the County of Simcoe as a reasonable accommodation.

[24] The arbitrator accepted the uncontradicted evidence of Campeau and Duquette of the concerns for the health and safety of patients and the public if ambulances were permitted to operate with an attend only paramedic. It was unreasonable for the arbitrator to dismiss the evidence of Campeau, ignore the evidence of Duquette and conclude on the basis of no evidence that the workplace standard was not reasonably necessary for the health and safety of patients and the public.

[25] Moreover, the arbitrator failed to appreciate that he was required to embark on a contextual inquiry in determining whether or not Rogers could be accommodated short of undue hardship. Different circumstances present different risks and therefore require differing levels of safety: *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 66. For example, the wearing of kirpans to accommodate the religious beliefs of Sikhs has been permitted in schools, but not on airplanes or in the courts: *R. v. Hothi*, [1985] 3 W.W.R. 256 (Man. Q.B.), aff'd [1986] 3 W.W.R. 671 (Man. C.A.); *Nijjar v. Canada 3000 Airlines Ltd.*, [1999] C.H.R.D. No. 3; *Pandori v. Peel Bd. Of Education* (1990), 12 C.H.R.R. D/364, aff'd (*sub nom. Peel Board of Education v. Ontario Human Rights Commission*) (1991), 3 O.R. (3d) 531 (Div. Ct.). In determining whether or not the wearing of a kirpan posed a threat, the courts have very carefully considered the environment in which the rule must be applied. In a school, there is an ongoing relationship among students and staff and a meaningful opportunity to assess the circumstances of the individual seeking the accommodation. Unlike an airplane or courtroom, a school is a "highly circumscribed environment": *Pandori* at para. 197. An accident scene is not.

[26] Further, in *Multani*, on which the arbitrator relied, there was meaningful historical evidence that over the 100 years since Sikhs had been attending schools in Canada, not a single violent incident that related to the presence of kirpans in schools had been reported. The lack of evidence of risks was also present in *Peel Board of Education* and is referred to in *Multani* at para 60. In these cases, the absence of evidence of risk was a reliable indicator that the requested accommodation would not pose a safety risk, because of the experience with large numbers of students over a lengthy period of time. There was the ability to actually know about any risks that the accommodation might present as it could be readily inferred that had any violent incidents with a kirpan occurred in a school, this would have been reported, recorded and known. In the instant case, the arbitrator had no meaningful historical evidence of the 18-year experience with volunteer paramedics. It was therefore unreasonable for him to conclude that volunteer paramedics without a class F license had been "safely integrated into the system".

[27] The arbitrator referred at some length at paras. 32-53 of his reasons to the decision of a Board of Inquiry in *Jeppesen v. Ancaster (Town)*, [2001] O.H.R.B.I.D. No. 1, which concerned a human rights complaint by a fire-fighter who had been refused full-time employment. The duties, although largely related to fire-fighting and fire prevention, also included some related ambulance duties and, as such, required a Class F license. Due to a visual disability, the complainant could not obtain this license. The arbitrator referred to the following passage from *Jeppesen* at para. 33 of his reasons:

The Legal Capacity to Operate an Ambulance

> [37] Regulations to the *Highway Traffic Act* require that a person hold a class F licence or its equivalent to drive an ambulance. Regulations to the *Ambulance Act* require that each ambulance that responds to a call be staffed with a crew of at least two attendants. Both attendants need to hold a valid licence to drive that ambulance. *The rationale for this requirement is obvious, given the likelihood that the attendants may have to reverse the roles of driver and passenger to permit emergency work on a patient to continue during transport. As well, one of the ambulance attendants may be called upon to drive another ambulance, for example, where a second ambulance has been dispatched from a nearby region to provide additional or a higher level of medical service to patients.* [Emphasis added.]

[28] In his reasons, the arbitrator outlined the evidence of Campeau in which he explained why both attendants need to hold a valid license to drive an ambulance. Campeau described the response to multiple vehicle accidents and the role of coordinators in making on the spot decisions, including where to transport patients for treatment, allocating crew members from one ambulance to another site and the transfer of patients between ambulances. As in *Jeppesen*, he explained that permitting Rogers to be employed as a paramedic in an attend only capacity would impose undue hardship because it would give rise to an unacceptable level of risk to the health and safety of people being transported by ambulance and to others (Arbitration Decision, para. 96).

[29] Although the arbitrator said that he was “mindful” of the context in which the case arose and the “highly significant implications for the health and safety of patients and others”, he based his decision on the absence of evidence of actual harm. He did so in the face of evidence that the accommodation would operate in an environment that he accepted was “frequently chaotic” and in the face of uncontradicted evidence that he accepted that there were “real” health and safety concerns. The applicant was required to unequivocally establish the existence of concerns relating to safety, but was not required to show actual harm: *Multani* at para. 67. The applicant satisfied this test.

[30] An essential element of the job of a paramedic is to transport patients as quickly as possible. It was accepted by the arbitrator and admitted before us that there will be delays if a paramedic is unable to drive. Extending human rights protections to situations that will result in placing the lives of others at risk flies in the face of logic: *Alberta (Human Rights Commission) v. Kellogg Brown & Root (Canada) Co.* (2007), 425 A.R. 35 (C.A.) at para. 36. The arbitrator’s decision is not defensible on either the facts or the law.

[31] Accordingly, the decision of the arbitrator dated July 2, 2007 is set aside. As agreed, costs of $5,500 are awarded to the applicant. The intervenor does not seek costs.

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LAX J.

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J. WILSON J.

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HILL J.

Released: December 4, 2009

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REASONS FOR JUDGMENT

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