

New Brunswick Human Rights Commission

Guideline for BFOQ's and BFQ's and the Duty to Accommodate

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1.0 THE DUTY TO ACCOMMODATE

The capacity to perform a job in existing working conditions or in a specified manner is *not a bona fide occupational qualification* (BFOQ), if conditions or practices can be modified by the employer without undue hardship. In investigating a complaint, the Commission will determine if reasonable accommodation is possible.

With respect to the provision of services, including goods, accommodations and facilities, a *bona fide qualification* (BFQ), will not be recognised as a defence to a complaint if conditions or practices can be modified by the service provider without undue hardship. In investigating a complaint, the Commission will determine if reasonable accommodation is possible.

¹ Updated on January 31, 2005 to reflect amendments to the *Human Rights Code* that added "social condition" and "political belief or activity" as new grounds of prohibited discrimination.

1.1 COLLECTIVE AGREEMENTS

Notwithstanding the forgoing, where a grievance alleging discrimination has been filed under a collective agreement, a party, alleging that a BFOQ either does or does not exist, may apply to the New Brunswick Human Rights Commission for a determination under the *Human Rights Act* on this issue.

2.0 BFOQ / BFQ GUIDELINE

A respondent may raise the defence that a *bona fide* occupational qualification or *bona fide* qualification exists as a defence to a complaint of discrimination. In investigating the complaint, the Commission will determine the validity of the BFOQ / BFQ.

This Guideline shall apply as follows:

2.1 STATUTORY PROVISIONS - *BONA FIDE* OCCUPATIONAL QUALIFICATION (BFOQ)

Sections 3(5), 3(6), 3(6.1) and 3(7) of the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, state:

s. 3(5) Notwithstanding subsections (1), (2), (3), and (4), a limitation, specification, or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity shall be permitted if such limitation or preference is based upon a *bona fide* occupational qualification as determined by the Commission.

s. 3(6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to

(a) the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan;

(b) the operation of the terms or conditions of any *bona fide* retirement or pension plan that have the effect of a minimum service requirement; or

(c) the operation of terms and conditions of any *bona fide* group or employee insurance plan.

s. 3(6.1) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

s. 3(7) The provisions of subsections (1), (2), (3), and (4) as to physical and mental disability do not apply to

- (a) the termination of employment or a refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstances of the place of work in relation to the physical disability or mental disability, as determined by the Commission; or
- (b) the operation of terms or conditions of any *bona fide* or employee insurance plan.

2.2 STATUTORY PROVISIONS - *BONA FIDE* QUALIFICATION (BFQ)

Sections 4(4), 4(5), 5(2), 5(3), 6(3), 6(4) and 7(2) of the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, state:

(Housing, Commercial Space or Property)

4(4) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of sex, social condition, political belief or activity, physical disability, mental disability, marital status or sexual orientation shall be permitted if such limitation, specification, exclusion, denial or preference is based upon a *bona fide* qualification as determined by the Commission.

4(5) The provisions of subsections (1) and (2) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

(Services, Facilities or Accommodation)

5(2) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of sex, social condition, political belief or activity, physical disability, mental disability, marital status or sexual orientation shall be permitted if such limitation, specification, exclusion, denial or preference is based upon a *bona fide* qualification as determined by the Commission.

5(3) The provisions of subsection (1) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

(Publicity)

6(3) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of sex, social condition, political belief or activity, physical disability, mental disability, marital status or sexual orientation shall be permitted if such limitation, specification, exclusion, denial or preference is based upon a *bona fide* qualification as determined by the Commission.

6(4) The provisions of subsection (1) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

(Professional, Business or Trade Association)

7(2) Nothing in this section affects the application of any statutory provision restricting membership in a professional association or business or trade association to Canadian citizens or British subjects.

3.0 STATEMENT OF PRINCIPLES

The New Brunswick Human Rights Commission affirms its commitment to the following principles:

- a) Freedom from discrimination is the rule; limitations to this freedom are the exception.
- b) Human rights are inherent rights of the person.
- c) Exceptions within human rights legislation must be narrowly construed.
- d) All discrimination is not illegal. Under sections 3(5), 4(4), 5(2) and 6(3) of the New Brunswick *Human Rights Act*, the Commission is empowered to accept, in certain circumstances, a limitation on individual rights if the reasons are *bona fide*.
- e) Employers have the right to expect safe, efficient and reliable performance from their employees; individuals have the right to be individually assessed and treated according to their capacity to provide such performance.
- f) Providers of services or accommodations have the right to provide such services or accommodations in a safe, efficient and economical manner; consumers of

such services or accommodations have the right to obtain such services or accommodations free from any unreasonable or unnecessary requirement.

4.0 DEFINITIONS

- a) *Bona Fide* - good faith
- b) A *bona fide* occupational qualification (BFOQ) permits a limitation, specification or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, or political belief or activity, in relation to some aspect of employment (section 3(5) of the Human Rights Act).

A BFOQ is decided on by the Commission if the standard was imposed in honest and good faith belief that it was necessary to the fulfillment of a legitimate purpose rationally connected to the performance of the job, by demonstrating that it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

By example, a BFOQ may be necessary to preserve the essence of the business operation, or to ensure that the duties of a job can be performed safely.

A BFOQ carries with it an undeniably serious impact, as it allows an employer not to hire on the basis of the enumerated prohibited grounds of discrimination under the *Human Rights Act*.

- c) A *bona fide* qualification (BFQ) permits a limitation, specification, exclusion, denial or preference on the basis of sex, social condition, political belief or activity, physical disability, mental disability, marital status, or sexual orientation in relation to property rights, accommodation, services, facilities available to the public, publications or displays. BFQ's are provided for in sections 4(4), 5(2), and 6(3) of the Act.

Note: The term *bona fide "occupational qualification"* or BFOQ includes *bona fide "occupational requirement"* or BFOR. The term *bona fide "qualification"* or BFQ includes *bona fide "requirement"* or BFR.

5.0 OPERATIONAL GUIDELINES

A Human Rights Officer will be guided by the following general considerations.

- a) A respondent may raise the defence that a BFOQ / BFQ exists as a defence to a complaint of discrimination. In investigating the complaint, the Commission will determine the validity of the BFOQ / BFQ.

- b) A BFOQ or BFQ will not be pre-approved, but will be considered in the investigation of a complaint, on a case by case basis.
- c) When considering whether a BFOQ / BFQ exists, the Human Rights Officer will request specific information from the respondent in support of the assertion.
- d) The onus is on the respondent to prove that a *bona fide* reason exists for the allegedly discriminatory practice.
- e) A complaint for which a BFOQ or BFQ is used as a defence will be reviewed by the Director, Legal Counsel and the investigating Human Rights Officer.
- f) If approved, the BFOQ or BFQ serves as a defence to that particular complaint, but is not necessarily a defence for future similar complaints.

6.0 FACTORS TO BE CONSIDERED IN DETERMINING IF A BFOQ / BFQ EXISTS

6.1 BFOQ

A recent Supreme Court of Canada decision effectively modified the traditional approach taken to the *bona fide* occupational qualification defence in employment rules. The Court in *British Columbia Public Service Employee Relations Commission (BCPSERC) v. The British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 S.C.R. 3 adopted the new three part test that eliminates the distinction between direct and adverse effect discrimination. The test requires employers to consider accommodation before an employment rule is adopted and allows exemptions only when reasonably necessary. The new test, now called the "Meiorin Test", after the female fire fighter in the *BCGSEU* case, *supra*, provides a simpler approach in determining whether an employment rule is justified:

- First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose.
- Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose.
- Third, the employer must establish 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 on the employer.

McLachlin, J. in *BCGSEU (Meiorin)*, *supra*, 5-6.

The last requirement for establishing a BFOQ defence refers to the duty to accommodate where a human right has been violated in employment. In circumstances where an employee has been terminated due to discrimination, a valid defence available to the employer is one where it can be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the complainant without imposing undue hardship upon the employer. The respondent will have to demonstrate that it is not possible to adopt a less discriminatory practice. The burden of proof, on a balance of probabilities, is on the respondent.

An employer has a duty to accommodate even when an existing collective agreement would be changed by the accommodation.

A union has a duty to accommodate an affected employee a) where the union has participated in establishing an impugned policy or practice, and b) where the employer has agreed to modify a discriminatory practice and needs the union's cooperation.

The complainant has a duty to advise the employer of his or her situation and the need for accommodation.

The complainant has a duty to accept a reasonable solution, and to facilitate the implementation of the solution.

For a BFOQ (in relation to employment) to exist, the Human Rights Officer must objectively determine the following questions:

- Is the employer applying a standard or policy?
- Does the standard or policy discriminate (directly or indirectly) on a ground prohibited in section 3?
- Is the standard or policy rationally connected to the performance of the job? One must identify the positional duties to which the standard or the policy must apply.
- Did the employer adopt the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its employment-related purpose? One must look into the circumstances surrounding the adoption of the policy or standard.
- Is the standard reasonably necessary for the employer to accomplish its employment-related purpose? One must include evidence of its actual effect on the

employees and of alternatives considered by the employers (such as individual assessment). Is this the least discriminatory means of accomplishing the purpose? Is it designed to minimize the burden on those required to comply? What hardship would result from alternative standards or accommodations?

- Has the employer integrated its duty to accommodate into its workplace standard?

6.2 BFQ

The Supreme Court of Canada has also evoked its new Meiorin test in a case that followed the *BCGSEU, supra*, decision, with respect to a BFQ; i.e., with regard to areas of activity, other than employment, covered under human rights legislation. The case, *Terry Grismer (Estate) v. The BC Superintendent of Motor Vehicles et al.*, [1999] 3 S.C.R. 868, dealt with the failure to individually assess the Complainant because of an inflexible visual field standard. The Court ruled that the Superintendent's "blanket refusal" to individually assess persons with homonymous hemianopia (H.H.) constituted discrimination.

In deciding that the refusal to individually assess the Complainant amounted to discrimination, the Court relied on the Meiorin test from the *BCGSEU* decision, *supra*. With the distinction between direct and adverse effect discrimination abolished, the governing principle in determining whether an exemption to human rights law exists depends on whether individual assessment is provided for within the applicable standard:

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.

Grismer, supra, para. 19.

For a BFQ (in relation to goods, services, accommodations and publications), the Human Rights Officer must objectively determine the following questions:

- Is the service provider applying a standard or policy?
- Does the standard or policy discriminate on a ground prohibited in sections 4, 5, 6 or 7?
- Is the standard or policy rationally connected to the provision of the service? One must identify the specific services to which the standard or the policy must apply.

- Did the service provider adopt the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its service-related purpose? One must look into the circumstances surrounding the adoption of the policy or standard.
- Is the standard reasonably necessary for the service provider to accomplish its service-related purpose? One must include evidence of its actual effect on the service users and of alternatives considered by the service provider (such as individual assessment). Is this the least discriminatory means of accomplishing the purpose? Is it designed to minimize the burden on those required to comply? What hardship would result from alternative standards or accommodations?

Discrimination may result from the outright refusal of accommodation or a service, or it may result from the imposition of unreasonable or unnecessary requirements; suppliers of services (including goods, accommodations and facilities) have a duty to avoid these discriminatory practices.

For example, requirements which are not legitimate include the preferences of others, or a contract between the supplier and a third party.

A respondent supplier may be required to modify premises or equipment, or the manner in which a service is delivered. An individual requiring such modification must self-identify, and the supplier has a right to request reasonable authentication of the individual's special need.

6.3 UNDUE HARDSHIP

In determining undue hardship, the Human Rights Officer must take into account:

- a) the capacity of the employer or service provider to absorb the cost of revenue lost from the measures taken to the extent that these are not offset by increased productivity, tax exemptions, grants, subsidies or other gains;
- b) the extent to which the inconvenience would prevent the employer or service provider from carrying out the essence of its business;
- c) the scope of the demands made by the measure on other workers or customers of the business;
- d) the costs to the respondent as assessed in the context of the size of the organization and its financial situation;
- e) the ability of the employer or service provider to absorb the cost of modifying premises or equipment, and the ability to amortise such costs before implement-

ing planned changes to ensure accessibility;

- f) the employer's or supplier's ability to absorb the cost of retrofitting in light of firm plans to move to accessible premises;
- g) that a proposed accommodation cannot significantly interfere with the rights of others, or discriminate against them. The interchangeability of the employer's workforce, and the safety of the complainant and others involved can have an impact on the ability to accommodate; and
- h) that costs such as overtime, special leave, or costs in responding to a threatened grievance are not necessarily considered as undue hardship, nor is minor disruption of a collective agreement. However, a substantial departure from the normal operation of a collective agreement may amount to undue interference with a respondent's business.

6.4.0 BALANCING OF INTERESTS

6.4.1 BALANCING OF RIGHTS

There must be a balancing between the rights of the individual to be treated on his or her own merits and the needs of the employer or service provider to operate his or her own business safely, efficiently and economically.

In order for a discriminatory practice to be justified, it must incorporate the duty to accommodate individual differences into its standard or policy; and it must be imposed in honest and good faith belief that it was necessary to the fulfillment of a legitimate purpose rationally connected to the performance of the job or to the provisions of the service, by demonstrating that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship upon the employer or the service provider.

6.4.2 BALANCING OF RISKS

It is necessary to balance the risks involved - safety, health, financial or other, and make a judgement as to whether they outweigh the duty not to discriminate.

In order to determine if a BFOQ or BFQ is appropriate, it is necessary to assess the risk - safety, health, financial or other negative impact - including the potential arena of risk, the likelihood of adverse consequences, and the potential severity of such consequences. In so doing, the Human Rights Officer should respond to the following questions:

- a) Can the job be performed or the service be provided efficiently and effectively without the qualification?
- b) What is the risk of injury to the individual, with or without the qualification?
- c) What is the risk of injury to others, with or without the qualification?