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Alberta Court of Queen's Bench Overturns Discrimination Decision on Foreign Trained Engineer

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Case Commented On: *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61 (CanLII)

In an earlier post with Jason Wai, we discussed the decision of the Alberta Human Rights Tribunal (AHRT), in which Mr. Ladislav Mihaly succeeded in arguing that the Association of Professional Engineers and Geoscientists of Alberta (APEGA) discriminated against him on the grounds of place of origin, when it refused to recognize his education as the equivalent of an engineering degree from an accredited Canadian University, and by requiring him to write certain examinations to confirm his credentials. The AHRT also concluded that APEGA could not justify its registration requirements. Thus, Mihaly was successful in his claim of discrimination and was awarded $10,000 for injury to dignity. The AHRT declined to award lost wages to Mihaly.

APEGA appealed the finding of discrimination by the AHRT, and Mihaly cross-appealed, asking for $1,000,000 for lost wages and registration with APEGA, or $2,000,000 if not registered with APEGA (at para 2).

Madam Justice June Ross discussed the appropriate standards of review at paras 46 to 53. She then set out the issues in the case as follows:

> [54] The Appellant raises the following issues:
>
> 1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
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> 2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
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> 3. *Prima facie* discrimination: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?
>
> 4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

First, Justice Ross concluded that the AHRT did not breach the rules of procedural fairness when it did not ask for submissions on its interpretation of the *Engineering and Geoscience Professions General Regulation,* Alta Reg 150/1999 *(EGPR)*, section 8.

Second, Justice Ross concluded that the Appellant did not establish that the AHRT lacked jurisdiction to hear the case as it was about discrimination based upon the "place of origin of academic qualifications." APEGA was seeking to rely on the case of *Grover v Alberta Human Rights Commission,* 1999 ABCA 240 (CanLII) in which the Alberta Court of Queen's Bench held that the *Alberta Human Rights Act*, RSA 2000 c A-25.5 (*AHRA*) did not protect against discrimination based upon the "place of origin of academic qualifications" (the Court of Appeal had later declined to comment on the jurisdictional question). Justice Ross concluded that the jurisdiction issue in this case was more properly determined by the legal test for *prima facie* discrimination as set out in *Moore v British Columbia (Education),* 2012 SCC 61 (CanLII). This would be discussed under issue #3 (*Mihaly* QB, at paras 60-69).

The bulk of Justice Ross's decision addressed whether the AHRT had used and applied the correct test for *prima facie* discrimination, and whether the AHRT was reasonable in concluding the APEGA registration requirements were unreasonable (and thus not justified).

The AHRT relied on the test for *prima facie* discrimination as set out by the Supreme Court of Canada in *Moore*. Justice Ross summarized the test as follows:

> [73] Under the ***Moore*** test, establishing a *prima facie* case of adverse effect discrimination requires complainants to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact…

While APEGA had initially asserted that arbitrariness or stereotyping is a required element of *prima facie* discrimination, Justice Ross concluded that the presence of arbitrariness and stereotyping may support a finding of discrimination but they are not required elements of a finding of *prima facie* discrimination (at paras 74-76).

In applying the *Moore* test, the AHRT concluded that Mihaly was discriminated against on the basis of "place of origin" (treatment as a foreign graduate because of the origin of his educational credentials). Further, Mihaly was adversely impacted by APEGA's requirements that Mihaly complete confirmatory examinations or the Fundamentals of Engineering Exam (FEE). Thus, "place of origin" was a factor in the adverse impact experienced by Mihaly.

There was no dispute in the appeal about the AHRT's finding that Mihaly's place of education was inextricably linked to his place of origin. Further, Mihaly's place of origin was a factor in the adverse impact (at paras 100, 103).

Justice Ross emphasized that while the AHRT found the requirement to write confirmatory examinations or the FEE was an adverse impact related to Mihaly's place of origin, any substantive disadvantage flowing from the requirements to pass the National Professional Practice Exam (NPPE) exams and possess one year of Canadian experience was not linked to the prohibited ground of discrimination (place of origin) (at paras 104-5). Justice Ross then found to be unreasonable the AHRT's conclusion that APEGA assumed engineers with qualifications from foreign countries with which APEGA had no Mutual Recognition Agreements (MRAs) had qualifications which were not at par with Canadian engineering accreditation standards. She

agreed that the AHRT's finding was not supported by the evidence (at paras 84-85). Thus, the evidence did not demonstrate that Mihaly's national origin was a factor in relation to any disadvantage that he may have experienced as a result of APEGA's requirements (at para 105). There was no finding, and no basis for a finding, that the requirement to pass the NPPE constituted adverse impact discrimination (at para 106). Second, the requirement that registered professional engineers must have four years' experience, one year of which must be in Canada, was not found to have had an adverse impact on Mihaly based on his national origin (at para 107). Justice Ross concluded that the AHRT's failure to apply the *Moore* test in relation to the NPPE and Canadian experience requirements, and the lack of evidence to support a finding that these elements were present, rendered the AHRT's finding of *prima facie* discrimination in relation to those elements to be unreasonable (at para 109).

Of the three bases argued for a finding of *prima facie* discrimination, only the requirement to write confirmatory examinations or the FEE was demonstrated to be related to Mihaly's place of origin, constituting *prima facie* discrimination, and was thus subject to an analysis under *AHRA* section 11 to see if the contravention was reasonable and justifiable in the circumstances.

Justice Ross pointed out that the onus is on the respondent to establish a reasonable and justifiable defence, and that the AHRT had applied the correct legal test as set out in the case law:

> To establish justification, the test requires the defendant to prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship (at para 112, citing *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*]).

There was no quarrel with the AHRT's findings with respect to the first two elements of the test. The appeal focused on the AHRT's finding that APEGA did not reasonably accommodate Mihaly (at para 113).

The AHRT had found that the requirement to write confirmatory examinations was *prima facie* discriminatory and this requirement was not justified on two grounds (at para 118):

- that Mr. Mihaly should not have been required to write confirmatory examinations or the FE Exam, but only examinations to correct perceived academic deficiencies following an individualized assessment of his credentials;
- that Mr. Mihaly should not have been required to write a standardized "one size fits all" examination, rather than being individually assessed.

Justice Ross noted that the first ground arose from a misinterpretation by the AHRT of section 8 of the *EGPR*. This section provides that an applicant should be registered as an examination candidate where:

> the Board of Examiners has required the applicant to complete one or more confirmatory examinations ***or*** examinations for the purpose of correcting a perceived academic deficiency [emphasis added].

The AHRT had concluded that the examinations assigned to Mihaly by APEGA were not for the purpose of correcting a perceived academic deficiency as required or contemplated by section 8. Justice Ross held that this interpretation ignored the disjunctive "or" in the statute (e.g., the examinations could also be confirmatory in nature). She concluded that the AHRT had no specific familiarity with the *EPGR*, did not request submissions from the parties, and thus made an unreasonable interpretation of section 8. Justice Ross noted that because there are several thousand engineering programs, APEGA does not have the capacity or resources to discuss and negotiate agreements with all of them, and must therefore assign examinations to assess the quality of engineering programs that are undertaken by applicants (at paras 120-122).

With respect to the criticism of the requirement of standardized examinations without individual assessments, Justice Ross concluded that there was no evidence internationally educated graduates with entry-level competence would have any difficulty passing the FEE (at para 130). She held that "the possession of entry level competence is reasonably necessary to safe practice as a professional engineer" (at para 135).

The possibility of individualized testing is supposed to be considered when analyzing whether an employer can accommodate an employee without undue hardship (*Meiorin, supra* at para 54). While APEGA individually assesses applicants to determine whether examinations may be waived (e.g., if applicants have completed a graduate degree in a Canadian university or an MRA country, or if they have ten years of progressively responsible engineering requirements), Mihaly did not meet the requirements for a waiver. Mihaly also did not pursue an internal appeal of APEGA's waiver decision (at para 142).

The AHRT had ordered that APEGA establish a committee including foreign trained engineers who have successfully integrated themselves into the engineering profession and to specifically explore and investigate options for individually assessing Mihaly's qualifications. APEGA was also directed to match Mihaly with a mentor who could provide guidance as to how to address his challenges as an engineer and integrate himself into the profession (at paras 144-145). Justice Ross found that these went "beyond the scope of any discriminatory conduct found or even alleged" and would have fundamentally altered APEGA's standards and required it to act outside of its regulatory role (at para 147). She also held that Mihaly had an obligation to search for possible accommodations, and that the AHRT had failed to consider that Mihaly had never attempted the three confirmatory examinations or the FEE (at para 148).
Justice Ross concluded that the AHRT had failed to consider relevant factors in the assessment of undue hardship (at para 149). Therefore, the AHRT's conclusions with respect to APEGA's alleged failure to accommodate Mihaly to the point of undue hardship were unreasonable. APEGA had met its onus to establish that any *prima facie* discrimination was reasonable and justifiable (at para 150).

Justice Ross reversed the decision of the AHRT, and did not remit the matter back to the tribunal.

Commentary

Justice Ross's decision seems to address any legal failings of the AHRT's analysis in this particular case. Human rights decisions have been quite clear that blanket policies are problematic (e.g., mandatory retirement at a specific age without skill assessment) and that individual skills should be assessed wherever possible. Providing waivers in some circumstances for the requirement to meet competency exams like the FEE does strike a balance between the need to ensure competency for individuals from a wide range of backgrounds and the need for individual assessment. But it may also lead to decisions which appear arbitrary, where engineers from different countries are treated differently. This leads to the question of whether all engineers with foreign degrees should have to complete the same competency exams. That is the case for International Medical Graduates (IMGs), for example (for further commentary on this comparison, see our earlier post). At the same time, equality does not mean sameness of treatment, and recognizes that sometimes people may need to be treated differently to achieve equality of results.

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