Supreme Court of Canada -

Bhinder v. CN, [1985] 2 S.C.R. 561

Whether or not work rule creating discriminatory practice with respect to employee contrary to Canadian Human Rights Act -- Canadian Human Rights Act, 1976 -77 (Can.), c. 33, ss. 2, 3, 7, 10, 14(a).

CN introduced a work rule that all employees wear a hard hat at a particular work site. Bhinder, a Sikh employee, refused to comply because his religion did not allow the wearing of headgear other than the turban. Bhinder's employment ceased since the company refused to make exceptions to the rule and Bhinder refused to accept other work not requiring a hard hat. The Canadian Human Rights Tribunal found CN had engaged in a discriminatory practice and ordered reinstatement and compensation for loss of salary. The Federal Court of Appeal, on a s. 28 application, set aside that decision and referred the matter back for disposition on the basis that the work rule was not a discriminatory practice. At issue here was whether or not the hard hat rule was a bona fide occupational requirement, and if so, the effect to be given s. 14(a) of the Canadian Human Rights Act.

Held (Dickson C.J. and Lamer J. dissenting): The appeal should be dismissed.

Per Estey, McIntyre and Chouinard JJ.: The hard hat rule was a bona fide occupational requirement which met the Etobicoke test: one honestly imposed in the interest of the performance of the work with all reasonable dispatch, safety and economy and not for extraneous reasons aimed at defeating the Code. The test does not vary with the special characteristics and circumstances of the complainant. A working condition does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, as a bona fide occupational requirement, it may permit consequential discrimination, if any. Since s. 14(a) of the Canadian Human Rights Act clearly states that no discriminatory practice exists where a bona fide occupational requirement is established, applying such a requirement to each individual with varying results would rob the requirement of its character as an occupational requirement and would ignore the plain language of the section. There was no duty to accommodate since s. 14(a) declared no discriminatory practice where a bona fide occupational requirement existed.

Per Beetz and Wilson JJ.: If the bona fides of an occupational requirement is to be assessed in relation to each employee, s. 14(a) is effectively read out of the Act since, absent the section, an employer is obliged to accommodate the individual up

to the point of undue hardship even if the requirement is a bona fide occupational one. The purpose of s. 14(a) is to make the requirement of the job prevail over the requirement of the employee. It negates any duty to accommodate by stating that the imposition of a genuine job-related requirement is not a discriminatory practice. The legislature, by narrowing the scope of what constitutes a "discriminatory practice", has permitted genuine job-related requirements to stand even if they have the effect of disqualifying some persons for those jobs. Section 14(a) does not conflict with the avowed purpose of the Act which is to prevent "discriminatory practices".

Per Dickson C.J. and Lamer J., dissenting: Section 14(a) of the Canadian Human Rights Act was not intended to obliterate the duty to accommodate and, in doing so, diminish seriously protection of the individual from adverse effect discrimination in the Act. The purpose of the Act is to eradicate discriminatory effects and any interpretation of s. 14(a) which would significantly undermine the effectiveness of the Act in curbing adverse effect discrimination is contrary to the express and implied purposes of the Act. Such reduction of the protection of the individual from adverse effect discrimination under the Act would require clear and explicit words to that effect. The words of s. 14(a) do not suffice.

The words "occupational requirement" refer to a requirement manifestly related to the occupation as a whole. The qualifying words "bona fide" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual. A requirement which is prima facie discriminatory against an individual, even if occupational, is not bona fide for the purposes of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship would result on the part of the employer if an exception or substitution were to be allowed on the part of the individual affected. The test of a bona fide occupational qualification set out in Ontario Human Rights Commission v. Borough of Etobicoke does not exclude an interpretation of bona fide occupational requirement that the discriminatory impact of an occupational requirement on an individual be taken into account. The Etobicoke test left open the question of whether the assessment of reasonable necessity was to be considered in respect of the necessity of the general requirement or the necessity of applying the general requirement to an individual upon whom it would have a discriminatory effect. The Tribunal, therefore, was consistent with the Etobicoke test and with the words of s. 14(a), when it decided that a bona fide occupational

requirement (1) was to be assessed in respect of the particular circumstances surrounding the complaint and (2) included a duty to accommodate on the part of the employer. The Tribunal effectively, and correctly, held that federal legislation is inoperative to the extent that it conflicts with the Canadian Human Rights Act. The Canada Labour Code and its regulations do not create an exception to the Canadian Human Rights Act. Where the two Acts conflict, the matter is governed by the Canadian Human Rights Act. The wearing of safety helmets by Sikhs, which has a prima facie discriminatory effect, is therefore governed by the Canadian Human Rights Act and not the Canada Labour Code. Even if the safety helmet policy were necessary under the Canada Labour Code and Regulations, that policy is not ipso facto a bona fide occupational requirement for the purpose of the Canadian Human Rights Act. The Tribunal could therefore order the employer to grant an employee an exemption because the general policy did not meet the requirements of s. 14(a). This Court should not disturb the Tribunal's findings of fact concerning the safety factors incident to not wearing a safety helmet. Nor should this Court disturb the conclusion reached by the Tribunal that respondent would not be subject to undue hardship if it were to exempt Mr. Bhinder from the safety helmet rule.