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CASE SUMMARY: WHAT DOES EQUALITY MEAN? EVEN THE SUPREME COURT OF CANADA IS CONFLICTED ON THIS QUESTION

The Supreme Court of Canada considered an allegation of adverse impact discrimination where an apparently neutral pension plan had a disproportionate impact on female RCMP members with children. The majority held the plan violated the right to equality enshrined in section 15 of the Charter of Rights and Freedoms. The three different sets of reasons show a significant difference of opinion within the Court.

Administrative law – Human rights – Charter of Rights and Freedoms – Equality rights – Discrimination – Employment – Benefits – Pension plans

Fraser v. Canada (Attorney General), [2020] S.C.J. No. 28, 2020 SCC 28, Supreme Court of Canada, October 16, 2020, R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis,
S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

The claimants are three retired members of the RCMP who took maternity leave in the 1990s. After their leaves, they experienced difficulties meeting work obligations and childcare responsibilities. The RCMP did not permit regular members to work part-time but had a job-sharing program so they could split one full-time position. The three claimants enrolled in the job-sharing program; they and most of the other RCMP members who job-shared were women with children.

Pursuant to the legislation, RCMP members could treat certain gaps in full-time service, such as leave without pay, as fully pensionable. The claimants were not able to purchase full-time pension credit for their job-sharing service. They were treated like part-time employees who only received pension credits pro-rated for the hours worked.

The claimants initiated an application arguing that the pension consequences of job-sharing have a discriminatory impact on women contrary to section 15(1) of the *Charter*.

The Federal Court found that job-sharing is part-time work and the claimants could not obtain full-time pension credit for it, and this did not violate section 15(1) of the *Charter*. The application judge compared job-sharing to leave without pay.

The Federal Court of Appeal dismissed the claimants' appeal. The claimants appealed to the Supreme Court of Canada. The claimants argued that the negative pension consequences of job-sharing infringed section 15(1) of the *Charter* because they have an adverse impact on women.

The Supreme Court of Canada allowed the appeal in a 6-3 decision. The three sets of reasons for judgment show a divergence of opinion within the Court.

Majority Reasons:

The majority said that two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the outcomes that the impugned law or policy has produced in practice. Both kinds of evidence are not always required.

The majority said it is not necessary to prove discriminatory intent; legislation with an ameliorative purpose can still be challenged pursuant to section 15(1); it is not necessary to prove that the protected characteristic "caused" the disproportionate impact; and it is not necessary to prove that the law affects all members of a protected group in the same way.

The second step of the section 15 test is whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The majority said there is no rigid list of factors for the court to consider. The goal is to examine the impact of the harm caused to the affected group, which must be viewed in light of any systemic or historical disadvantages faced by the claimant group.

The majority said that full-time RCMP members who work regular hours, who are suspended, or who go on unpaid leave can obtain full pension credit for those periods of service under the pension plan. However, full-time members who temporarily reduce their hours under a job-sharing agreement are classified as part-time workers and cannot acquire full-time pension credit for their service.

Family/caregiver status is not yet a protected ground in the *Charter* and the majority held that whether family/caregiver status should be protected under the *Charter* did not need to be decided in this case.

The majority said the use of a temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women. The relevant evidence showed that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children. These statistics were supported by compelling evidence about the disadvantages women face as a group in balancing professional and domestic work.

The majority said the Federal Court incorrectly relied on the claimants' "choice" to job-share because differential treatment can still be discriminatory even if it is based on choices made by the individuals.

For the second part of the test, the majority said this adverse impact perpetuates a long-standing source of disadvantage to women: pension plans have historically been designed for full-time employees with a male pattern of employment.

The majority found the government could not prove this limit on the right to equality was justified pursuant to section 1 of the *Charter*. The government identified no pressing and substantial purpose that explains why job-sharers should not be granted full-time pension credit for their service.

Dissenting Reasons of Justices Brown and Rowe:

Justices Brown and Rowe issued dissenting reasons, which first emphasized that it was important to examine the pension plan in its entirety. The only employment statuses provided for under the pension plan are full-time, part-time, and leave without pay. Job-sharers are treated as working part-time during the period in which they job-share. As they work part-time hours, they receive part-time pension benefits for the period they job-share.

The plan is a “contributory defined benefit pension plan,” which means that contribution rates are based on a percentage of a member’s earnings. All members accrue pensionable service at the same rate regardless of whether they work part-time or full-time (e.g. one-year of part-time work and one year of full-time work both count as one year of pensionable service).

Members who are on leave without pay (LWOP) do not contribute to the pension plan during their leave because they are not working. They can “buy back” pensionable service following a period of LWOP. By contrast, members who job-share do make pension contributions during the job-share period, based on their part-time hours. The dissent said the claimants are seeking to obtain a full-time pension benefit in respect of a period where they have worked part-time hours. No other members are entitled to such a benefit. Even members who take LWOP are limited to the hours they worked prior to taking LWOP (e.g. the part-time member who takes LWOP is only able to buy back part-time pension benefits for their time spent on LWOP). The claimants are, in this sense, asking to be put in a better position than everyone else under the plan.

The dissent said step one of the section 15(1) test requires a distinction and the two ways a distinction can be framed based on sex are by comparison to full-time members and by comparison to members who take LWOP. The comparison to members who take LWOP is a distinction that is not based on sex because there is no evidence that members taking LWOP are less likely to be women. However, the distinction by comparison to full-time members is a distinction based on sex because members of the job-sharing program are disproportionately women, whereas uninterrupted full-time employment is a male pattern of employment. Therefore, the pension plan creates a distinction that, in its impact, is based on sex.

The dissent said step one of the section 15 test requires a claimant to establish causation between the impugned law and the disadvantage. Correlation is not enough. There may be other independent factors causing the disadvantage. Where a law is created to reduce a pre-existing systemic disadvantage (without eradicating it), an element of disadvantage will obviously be present. In such cases, a claimant cannot meet step one by pointing to a statistical difference and a broader group disadvantage.

The dissent said step two of the section 15 analysis must consider whether the unequal impact corresponds with a group’s actual circumstances or needs or whether it is in any other sense substantively discriminatory. To establish substantive discrimination, an element of arbitrariness or unfairness has always been required in the section 15 analysis. The dissent said this does not mean the law must have a discriminatory purpose; it does not.

The dissent said it is not arbitrary or unfair (and therefore not discriminatory) for an employer to prorate compensation, including benefits, according to hours worked when this responds to employees’ actual capacities and circumstances. Employers must be able to compensate employees based on hours worked and offering pension benefits that are prorated to hours worked is not substantive discrimination.

The dissent said the pension plan does not represent a source of ongoing systemic disadvantage as it does not contribute to women’s systemic disadvantage; nor does it reinforce, perpetuate, or exacerbate the pre-existing disadvantage of women in the workplace which arises in part from unequal distribution of parental responsibilities. The provisions of the pension plan represent an example of a government acting incrementally to address inequities that exist in society, using provisions that do not have a discriminatory impact. The legislation is ameliorative in both intent and effect.

Dissenting Reasons of Justice Côté:

Justice Côté said the claim fails at step one of the section 15(1) analysis because the impugned provisions of the pension plan do not create a distinction on the basis of sex. The effect of the provisions is to create a distinction not on the basis of being a woman, but on the basis of caregiving responsibilities alone or as a result of a combination of sex with caregiver status. Caregiving status can be separated from sex. Same-sex couples with children, as well as those individuals with elderly caregiving responsibilities will all be disproportionately affected.

Justice Côté said disproportionate impact alone is not sufficient to meet step one of the section 15(1) analysis. Step one includes a requirement of causation, nexus or tether between the impugned provisions and their effect.

In the present case, the claim is on behalf of women with children, and not simply women. It is critical that the claimants had caregiving responsibilities that made them decide to job-share. The statistics show that women are disproportionately affected – given that the majority of job-sharers are women with children – but this is insufficient to say that step one has been met. Justice Côté said there is no reason why job-sharing is a singularly sex-based issue; rather, it is a caregiving status issue because job-sharing is a solution for all members with caregiving responsibilities, not just a solution for those of a certain sex who have children.

Justice Côté said the claimants cannot satisfy the first step of the test because the alleged distinctions are based on caregiving status; not sex. It is up to the legislature to address any policy gaps in the plan's provisions in these circumstances.

In the result, based on the decision of the majority, the appeal was allowed.

This case was digested by Scott J. Marcinkow, and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Scott Marcinkow at smarcinkow@harpergrey.com.