FTR Now

Accommodation and the Special Needs Child: The Supreme Court of Canada Decision in *Moore*

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The Supreme Court of Canada has released an important decision which reaffirms some of the key principles in the accommodation process. The issues in *Moore v. British Columbia (Education)* arose from the financial choice made by a British Columbia School District in the provision of services. The Court's criticism of the failure of that District to consider reasonable alternatives to the closure of a critical program because of financial constraints is a timely reminder to employers and service providers about the process of accommodation. In this *FTR Now* we discuss this decision and its implications for those employers and service providers.

THE DECISION

AT THE TRIBUNAL

Jeffrey Moore, the child at the centre of this case, was diagnosed early in his formal education with a learning disability, specifically dyslexia. The District's own psychologist concluded that he needed more intensive remediation than he had been receiving up to that point and suggested that he attend the District's Diagnostic Centre to receive this remediation. However, the Centre was closed shortly thereafter due to financial constraints. Jeffrey's parents were advised by the psychologist and the principal of Jeffrey's school that he would not be able to receive the intensive remediation he needed in any of the District's schools, but that the intensive remediation program was available in a private school. Jeffrey was ultimately transferred to the private school. His father launched a human rights complaint, arguing discrimination in the provision of a service on the basis of disability and claiming the costs of the private school tuition.

In 2005, the B.C. Human Rights Tribunal upheld the human rights complaint, concluding that the failure to identify Jeffrey's needs early and to provide intensive instruction after the closing of the Diagnostic Centre resulted in discrimination against Jeffrey in the provision of education services. While the Tribunal acknowledged the financial constraints on the District, it found that there was no evidence that the District had explored reasonable alternatives for students with special needs before it closed the Diagnostic Centre. Accordingly, it ordered systemic remedies against the District and the province as well as reimbursement to Jeffrey for the costs of private school education to Grade 12, half his transportation costs and $10,000 in damages.

ON APPEAL

The Tribunal's award was overturned by the B.C. Supreme Court, a decision in turn upheld by a majority of the B.C. Court of Appeal. Both courts held that the Tribunal had applied the wrong analysis in determining whether Jeffrey had been discriminated against by comparing Jeffrey with the general school population rather than with other special needs students.

On further appeal, the Supreme Court of Canada reversed the two courts below. The Court stated that the "service" in question was education, not special education. The Court noted that the preamble of the B.C. *School Act* provided as follows: "the purpose of the British Columbia school system is to *enable **all** learners to develop their individual potential* and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy" [emphasis added]. The Court stated that Jeffrey had been denied 'meaningful' access to general education available in the province: while he was provided with some educational assistance, the evidence was clear that it was wholly inadequate to meet his learning needs. The Diagnostic Centre had been closed solely for financial reasons and

the Court found that the financial cuts made by the District had a disproportionate impact on special needs students. Despite the legitimate financial pressures that the District was facing, however, certain discretionary programs (such as an outdoor school which operated at about the same cost as the Diagnostic Centre) were maintained. In light of those facts, the Court was critical of the District's failure to consider whether there were other alternatives reasonably available to accommodate special needs students upon the closure of the Diagnostic Centre, or whether it had considered cost-reduction alternatives for the Centre. The Court further found that the evidence was clear that at no time did the District even consider what the consequences of this closure would be on those students who accessed the service provided by the Diagnostic Centre. In light of all of this, the Court concluded that the original Tribunal finding of discrimination should be upheld as well as the award made to Jeffrey.

The Court overturned the finding of liability against the province, as it was the District that had made the decision to close the Centre. The remedies for systemic discrimination were also overturned because the scope of the inquiry had extended beyond the original complaint before the Tribunal.

IMPLICATIONS GOING FORWARD

Critical to the reasoning of the Court was its finding that with the closing of the Diagnostic Centre, the District did not undertake **any** analysis of whether alternative accommodation was available for the special needs students accessing its services, nor did it consider whether any cost-reducing measures could have allowed the Centre to remain open. These students were essentially left without an option in the public education system.

While the District argued that severe financial constraints dictated this result, the Court found that the failure to explore any other reasonable alternatives undercut this argument and rejected the District's defence that financial reasons ("undue hardship") justified the District's actions.

This decision serves to underline that where an established accommodation is removed, careful consideration must be given to other means by which an effective accommodation can be continued. Further, where an accommodation is being removed—or is not being provided in the first place—because of "financial constraints," a defence of undue hardship based on cost will not succeed unless it can be shown that a careful consideration of all alternatives has been undertaken and that there are no other options available for funding the accommodation or an alternative accommodation.

If you have any questions about this decision, please contact your regular Hicks Morley lawyer.

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