

Member's Quarterly

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Feature

Discrimination in the Hiring Process – Employers Beware!

Use caution when asking candidates even the simpler questions

When engaged in the hiring process, employers generally have to exercise a great deal of caution. And when it comes to human rights in particular, employers often run into competing interests and obligations.

For example, on the one hand the Ontario Human Rights Commission encourages the collection of human rights-based data so as to create strong human rights and human resources strategies. However, on the other hand, in *Haseeb v Imperial Oil*, 2018 HRTO 957, the Human Rights Tribunal of Ontario (“HRTO”) recently reminded us of the risks employers face when they do ask Code-related questions.

The Facts

Mr. Haseeb was an international engineering student studying at McGill University on a student visa. Following graduation, Mr. Haseeb’s intention was to pursue an engineering career in Canada and to use the postgraduate work program as a path to permanent residency.

In 2014, Mr. Haseeb applied for an entry-level position at Imperial Oil. As he had previously heard that Imperial only hired Canadian citizens or permanent residents, he lied on his application and in two subsequent interviews by answering “yes” to the question: “Are you eligible to work in Canada on a permanent basis?”

At the end of the hiring process, Mr. Haseeb was offered the position. However, the job offer was conditional on Mr. Haseeb providing proof that he either was a Canadian citizen or had permanent residency status. He could not do so and consequently, Imperial rescinded its offer of employment.

Mr. Haseeb filed a complaint with the HRTO alleging discrimination on the basis of place of origin, citizenship and ethnic origin.

The Findings

The HRTO, in its decision, zeroed in on the permanence requirement that was attached to the question Imperial asked its candidates during the hiring process. Specifically, the Tribunal found that it amounted to direct discrimination on the basis of citizenship given that it distinguished between candidates who were permanent residents and citizens, and those who were not.

While the Tribunal did acknowledge that employers are indeed legally required to obtain proof of eligibility to work in Canada at the commencement of any employment relationship, the addition of whether or not the eligibility was on a permanent basis breached the Code.

Imperial argued that this permanence requirement was a *bona fide* occupational requirement (“BFOR”) and a practice that was integral to their organizational succession plan.

The Tribunal rejected Imperial’s BFOR argument. Imperial could not point to a specific task performed by an engineer that was linked to the permanence requirement. Indeed, generally successful BFOR arguments have been safety-related. Moreover, Imperial could not demonstrate that it was essential to succes-



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sion planning as they had plead. Finally, the evidence before the Tribunal indicated that Imperial had made a number of exceptions with respect to the permanence requirement in the past, specifically where a candidate was highly specialized in their field. The Tribunal therefore found that the practice was optional, rather than a necessary criteria of the job.

Imperial was ordered to pay \$120,360.70 to Mr. Haseeb because of its discriminatory hiring practice. The damages represented lost wages, damages for injury to dignity, feelings and self-respect, and interest. No public interest remedies were ordered as Imperial had already taken corrective action with respect to its recruitment process.

Takeaways for Employers

The decision in *Haseeb* is a useful reminder of the exposure that can be associated with human rights in the hiring practice.

Imperial's question pertaining to eligibility to work in Canada is indeed proper and, in fact, it remains a requirement that individuals must be legally able to work in Canada before commencing work. However, Imperial's question was problematic because of the addition of two words: permanent basis, which was found to be reflective of a hiring practice that distinguished between citizens, permanent residents and those who are able to work in Canada due to a valid work permit.

While employers are not strictly prohibited from asking Code-related questions during the hiring process, *Haseeb* is a reminder that it should be done only with extreme caution. Moreover, if the decision is made to ask for such information, careful consideration should be given to ensuring that it is done in a manner that is consistent with the Code.

Navigating human rights issues in the hiring process can be tricky across jurisdictions. Legal advice is always recommended in order to limit exposure to human rights claims.

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