What's New in HR Law

Requiring permanent eligibility to work in Canada is discriminatory: Human Rights Tribunal of Ontario

August 8, 2018

BOTTOM LINE

In yet another ground-breaking decision of potentially broad application to Ontario workplaces, the Human Rights Tribunal of Ontario determined that imposing a requirement that job applicants prove they are permanently eligible to work in Canada is discriminatory.

Facts: Employer rescinded conditional offer of employment when employee failed to provide proof of permanent eligibility to work in Canada

The employer in this case (Imperial Oil Limited) had a policy dating back to 2004 to offer entry-level jobs only to candidates who were eligible to work in Canada on a permanent basis – that is to landed immigrants or Canadian citizens. Following this policy, in the course of the interview process, job applicants would be asked to confirm and provide proof of their permanent eligibility to work in Canada.

The applicant applied for the entry level position of Project Engineer. An international student at the time he applied, the applicant was not eligible to work full-time with an off-campus employer. However, upon graduation the applicant would have become eligible to receive a Post-Graduate Work Permit (PGWP). This would have allowed him to work full-time for any off-

campus employer for three (3) years. The only requirement for obtaining the permit was that he complete his university degree.

During the interview process, the applicant indicated that he was eligible to work in Canada on a permanent basis; in fact, this was not true. The employer extended the applicant a conditional offer of employment and asked for confirmation of his status. At that time, the applicant revealed that he would have to work on a "federal work permit" issued upon graduation and valid for 3 years (i.e. the PGWP), and that "before the permit even expires, I will have obtained permanent residence in Canada."

The employer took the position that hiring individuals who were not permanently eligible to work in Canada amounted to undue hardship because it could potentially disrupt internal succession planning.

The Determination: "Permanence requirement" is discrimination based on the ground of citizenship unless authorized by law or criteria are met for defences under the *Code*

The Tribunal held that the "permanence requirement" imposed by the employer throughout the hiring process constituted a violation of the *Code*. The violation did not fall into any statutory exceptions or exemptions, nor did it amount to a *bona fide* occupational requirement.

The Tribunal held that the controversy about whether or not the applicant was eligible to work at the time the employer made the conditional job offer was irrelevant to the issue of whether the employer's job advertisement and interview questions focusing on permanent eligibility to work in Canada were in breach of the *Code*.

Similarly, the fact that the applicant had not been straightforward about his eligibility to work in Canada was not relevant to the determination of whether the employer had violated the *Code*. Regardless of whether the applicant was dishonest at the time of hiring, the Tribunal noted that a protected ground need only be one of the factors involved for there to be a violation of the *Code*.

The Tribunal found that no statutory defences were available to the employer, including the *bona fide* occupational requirement defence, as the employer engaged in "direct" discrimination.

The Tribunal also held that, even if a *bona fide* occupational requirement defence were available in direct discrimination cases, the employer had not been able to demonstrate that permanent eligibility to work in Canada was a *bona fide* occupational requirement. Notably, the employer had in the past made exceptions for some employees who were similarly not yet permanently eligible to work in Canada at the time of hiring.

In addition, while there was evidence of some job movement/ promotions for Project Engineers during the first two to three years of hire, this did not happen at a "sufficient rate" to constitute undue hardship for the employer.

Check the Box

This appears to be the first decision of the Tribunal to provide a fulsome interpretation and application of the ground of "citizenship status" in the context of job applications and hiring. At this time it is not known whether this decision will be judicially reviewed, and whether other Tribunal adjudicators will choose to follow it.

Unless statutory exemptions or exceptions are available, employers should be careful not exclude individuals who are eligible to work in Canada, though not permanently eligible to do so. Otherwise, an employer may be found to be discriminating under the *Human Rights Code* in both employment and employment advertising

Date: July 20, 2018

Forum: Human Rights Tribunal of Ontario

Citation: *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957

Need more information?

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