

Sometimes Less is More: Requesting Information Regarding a Job Applicant's Citizenship Status

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A recent decision of the Human Rights Tribunal of Ontario (the HRTO) should serve as a caution to employers to limit inquiries into a job applicant's ability to legally work in Canada only to the extent necessary to establish they are able to do so. In *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957 (CanLii), the HRTO found that Imperial Oil directly discriminated against Haseeb contrary to the *Human Rights Code* (the Code) by revoking a job offer because he only possessed a work permit and did not have Canadian citizenship or permanent residency status.

Background

Haseeb was an international student studying engineering at McGill University. During his final semester he applied for an entry level position with Imperial Oil. However, prior to doing so, Haseeb learned through other students that Imperial Oil had a policy of only hiring international students for co-op positions, not for permanent, full-time positions (the Policy). Notwithstanding the Policy, Haseeb completed the job application and affirmed that he was eligible to work in Canada on a permanent basis, despite his postgraduate work permit only permitting him to work in Canada on a full-time basis for up to three years.

As the hiring process unfolded, Haseeb maintained that he was eligible to work in Canada on a permanent basis. He eventually became the top-ranked applicant for the position and Imperial Offer extended an offer of employment. The offer was conditional on him being able to provide proof that he was able to work in Canada on a permanent basis. Accordingly, Imperial Oil requested that Haseeb provide a Canadian birth certificate, Canadian citizenship certificate, or Canadian permanent resident card. Because he was unable to provide any of the requested documentation by the deadline for acceptance, Imperial Oil revoked the job offer.

Haseeb's Position

As a result of Imperial Oil revoking the offer, Haseeb filed an application with the HRTO. He alleged that Imperial Oil's Policy directly discriminated against him based on citizenship and in a manner prohibited by the Code. In particular, Haseeb argued that but for the Policy, he would have accepted the position by the deadline.

Imperial Oil's Position

Imperial Oil advanced a number of arguments in defence of the application, which included:

- Haseeb had no right to work for any employer and lacked standing to bring the application;
- the Policy was an employment strategy directed toward succession planning and to grooming the best recruits;
- any discrimination was connected to “immigration status” which is not a protected ground under the Code; and
- Haseeb’s dishonesty and misrepresentations during the hiring process resulted in the job offer being revoked.

Further to these defences, Imperial Oil argued that the Policy constituted a *bona fide occupational requirement* (BFOR) because Imperial Oil invested significant resources in time-consuming training processes for its engineers who are hired following their graduation and that continue long after they are hired, promoted and transferred to more senior roles in different locations across the country. Imperial Oil suggested that it would lose all of the time, money and effort spent to retain engineers without the Policy.

HRTO Decision

The HRTO dismissed each of Imperial Oil’s arguments and determined Haseeb had been discriminated against based on citizenship and in a manner contrary to the Code. Specifically, it stated at paragraph 110 that “to obtain protection from discrimination under the Code on the basis of ‘citizenship,’ the applicant need only establish that the alleged discriminatory treatment is linked to his personal characteristic of being a non-citizen of Canada (or non-Canadian citizen).”

Because the Policy acted as a complete “citizenship bar,” the HRTO found that it resulted in direct discrimination against Haseeb¹. In this regard, the HRTO rejected the BFOR defence since Imperial Oil was limited to the statutory defences for direct discrimination specifically provided for under the Code. In any event, the HRTO found that if the BFOR defence had been available to Imperial Oil, it failed to establish that the Policy was necessary and that accommodating Haseeb would have caused the company to experience undue hardship.

Finally, the HRTO found that Haseeb’s dishonesty and misrepresentations regarding his ability to work in Canada on a permanent basis were not material to whether the Code had been breached. Instead, it found that his dishonesty had to be considered in the context of his desire not to be ruled ineligible for a position that he was otherwise qualified for, and that but for the dishonesty he would have been hired.

Consequently, the HRTO ruled that the parties were to advise if mediation was desirable to negotiate a remedy. Otherwise, it would schedule two days of hearing for argument regarding an appropriate damage award.

Takeaway for Employers

As this decision now makes clear, requests for information concerning an applicant's particular citizenship or residency status may run the risk of offending the Code, even when the applicant is dishonest in the application process. While employers are still within their rights to confirm that an applicant can legally work in the country, and are encouraged to do so, they should keep the old adage that "sometimes less is more" in mind, and only request the information that is necessary to establish that the applicant can legally work in the country. Otherwise, "more" could result in defending a lengthy and costly application before the HRTO.

For further information, please contact Nathaniel Marshall or any other member of the Employment & Labour Group.

¹ It is also noteworthy that the HRTO found that by advertising the requirement to work in Canada on a permanent basis in written application and job postings, Imperial Oil made public pronouncements of its intention to violate the Code.