

Arbitrator rules bilingualism requirement for job posting reasonable

In a case argued by J.D. Sharp of our firm, an Ontario arbitrator has upheld a requirement that candidates for a job vacancy be bilingual despite the fact that the employer had recently staffed other positions advertised as bilingual with unilingual candidates.

Ottawa Hospital v. Ontario Nurses' Association (November 3, 2005) involved the grievance of an unsuccessful candidate for a permanent job share position in the Cardiac Reference Centre at the Heart Institute. The grievor met all of the clinical requirements for the position but did not meet the requirement for bilingualism, which was rated at a B plus level. Her score was B minus. The position was awarded to a junior candidate who met both the clinical and linguistic requirements.

The union grieved the decision, arguing that there was no significant difference between abilities at the B plus and B minus levels and that the requirement was arbitrary because other positions had recently been filled with nurses who were even less bilingual than the grievor.

GRIEVANCE DISMISSED

The arbitrator dismissed the grievance, holding that the requirement was reasonable and proper. Turning first to the union's argument that there was no real difference between assessments of B plus and B minus, the arbitrator found that there was a significant difference between the two levels in the ability to carry on a conversation. Accordingly, he held that the two candidates were not relatively equal in linguistic ability.

The arbitrator also held that the requirement was reasonable because it bore an appropriate relationship to the work in question: it could be expected that patients and their families would be under considerable anxiety in a cardiac facility and that it would be best to be able to communicate with them in their first language.

The arbitrator also pointed to the fact that the hospital was in the process of obtaining a designation as a bilingual facility under the province's *French Language Services Act* and that it had some progress to make before it attained the requisite proportion of bilingual staff. While noting that the hospital had no official target or deadline to meet, the arbitrator stated that this did not relieve it of its obligation to work towards the designation:

"There is no doubt that at present, the staff of Registered Nurses at the Cardiac Reference Centre is simply not able to provide francophone patients with nursing care in French on a permanent, twenty-four hour basis. While it is true that no precise target had been established, the Hospital knew that it was far from meeting any target which might reasonably be expected to be established, and that it must do everything possible to remedy this situation. The Hospital, I find, acted correctly in including a bilingual requirement, at the B+ level, in the job posting in question."

By awarding the position to the junior candidate, the hospital had gained an extra 7.5 hours of bilingual capacity per pay period. The fact that other positions had recently been filled with unilingual candidates did not make the linguistic requirement for this position

unreasonable. In those cases, the employer had advertised for bilingual candidates but no qualified bilingual candidates had applied. In the result, the grievance was dismissed.

In Our View

The fact that no satisfactory result has been achieved in the pursuit of a goal such as the provision of bilingual services will not mean that a job requirement that seeks to advance that goal will be unreasonable. If the goal is valid and related to the legitimate business needs of an employer, the employer can adopt job requirements aimed at attaining it.

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