

Discrimination on the basis of citizenship - Ontario Human Rights Tribunal releases landmark decision

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In *Haseeb v. Imperial Oil Ltd.* (July, 2018), the Human Rights Tribunal of Ontario (“Tribunal”) was tasked with considering a claim of discrimination in employment on the basis of citizenship. While citizenship is a prohibited ground of discrimination under the *Ontario Human Rights Code* (“Code”), it is certainly one of the less frequently litigated grounds of discrimination. The decision therefore is very useful to employers as it discusses citizenship discrimination in the hiring process with particular regard to employment qualifications and pre-conditions.

The facts giving rise to the case may seem innocuous at first blush. Imperial Oil Ltd. had a program through which it would recruit engineering graduates as “Project Engineers”. In order to be eligible for consideration, applicants were required to be able to work in Canada on a permanent basis (the “permanence requirement”). This in turn required applicants to have either permanent residency or citizenship. As a pre-condition to employment, the employer required applicants to provide proof of that status, either by way of a Canadian birth certificate, citizenship certificate, or certificate of permanent residence.

The employer’s rationale for the permanence requirement was in part based on the considerable time, energy and expense it incurred in training and educating new recruits. The employer’s goal was to retain newly-hired engineers with the hope that they would stay with the company and take on senior positions in the future. The employer facilitated this goal by screening new recruits based on their ability to work permanently in Canada.

At the relevant time, the applicant, Mr. Haseeb, was an international student completing his engineering studies at McGill University. Mr. Haseeb had a particular interest in working in the energy sector making Imperial Oil an attractive prospective employer. Although Mr. Haseeb was not a Canadian citizen and did not have permanent residency in Canada, he was part of a special immigration project and expected to obtain a postgraduate work permit (“PGWP”) for a fixed term of three years upon graduating.

Mr. Haseeb applied for the position of Project Engineer at Imperial Oil. Throughout the hiring process, Mr. Haseeb lied about his inability to work in Canada on a permanent basis. Nevertheless, he was a top candidate and was ultimately offered the position. When he could not provide proof of his eligibility to work in Canada on a permanent basis, the offer was rescinded.

This was notwithstanding the fact that Mr. Haseeb would have obtained a three year PGWP to coincide with the start date at Imperial Oil. Mr. Haseeb brought a human rights application claiming that he was discriminated against on the basis of citizenship.

The Tribunal had little difficulty concluding that the permanence requirement did discriminate on the basis of citizenship. In the Tribunal's view, the Code was clear that any requirement or consideration that made distinctions based on Canadian citizenship, permanent residence status or "domicile in Canada with the intention to obtain citizenship" was discriminatory. The only exceptions to this general rule were if the requirement was required or authorized by law, or fell within the other Code defences.

As the permanence requirement was not required by law, and the other Code defences were not applicable, it was found to be a *direct* breach of the Code - the permanence requirement distinguished among job candidates who were eligible to work in Canada based on their citizenship and permanent residence status. The effect of this distinction was to impose a disadvantage on the applicant, and other non-citizen international students.

The Tribunal further held that the bona fide occupational requirement ("BFOR") defence was not available to the employer. The Tribunal noted that a BFOR defence is available in instances where a prohibited ground of discrimination is not directly engaged but where a workplace requirement results in an exclusion or preference of a group identified by a prohibited ground. This is referred to as "indirect" or "constructive" discrimination. Because the employer's permanence requirement directly engaged the prohibited ground of citizenship, the BFOR defence was not available.

Even if a BFOR defence could be advanced, the facts showed that the employer had, in its discretion, waived the permanence requirement in the past. This meant that the permanence requirement was not a necessary requirement and was not linked to the performance or essential tasks relating to the job. The Tribunal also noted that the employer did not show that the permanence requirement could not be waived without causing undue hardship.

The Tribunal concluded its decision by declaring the employer's permanence requirement to be prohibited discriminatory conduct under the Code. The parties were given 45 days to advise the Tribunal as to whether they wished to engage in mediation, failing which a hearing to determine damages would be scheduled.

In our view

It is important for employers to understand that the issue in this case did not relate to the applicant's eligibility to work in Canada, but instead to his eligibility to *permanently* work in Canada. This distinction is important as eligibility to permanently work in Canada is based on citizenship or permanent residency. As most Readers of Focus will be aware, all employers must ensure that employees are able to legally work in Canada. This case demonstrates however that including additional pre-employment criteria which can only be met through citizenship or

permanent residency may run afoul of the Code.

For further information please contact [Kecia Podetz](#) at 613-940-2752 or [Sébastien Huard](#) at 613-940-2744