Immigration status by any other name? Court overturns controversial HRTO decision on discrimination when hiring non-citizens

By Amanda Boyce and Haadi Malik

In 2019, we wrote about the Human Rights Tribunal of Ontario (the "**Tribunal**") decision in *Haseeb v Imperial Oil Limited*, 2018 HRTO 957. In that case, the Tribunal awarded damages representing four years of lost wages (approximately $120,000) to a job applicant who lied about his immigration status to a prospective employer. The Tribunal found that the Company discriminated against the Applicant on the prohibited ground of citizenship as enumerated in the Ontario Human Rights Code (the "**Code**"). Thankfully for employers, the Divisional Court recently overturned that Tribunal decision, ruling that "permanent residence" is not subsumed beneath "citizenship" as a prohibited ground of discrimination under the Code.

Tribunal Decision

Only Canadian citizens or permanent residents are permanently eligible to work in Canada. The Company had a policy requiring applicants for entry-level, project engineer positions to be able to work in Canada on a "permanent basis" (the "**Policy**"). The Applicant was a recent Canadian university graduate who was not a citizen or permanent resident. Rather, he was eligible to work lawfully for three years in Canada on a Post-Graduate Work Permit. When applying for the position, the Applicant lied and claimed that he was eligible to work in Canada on a permanent basis. The Applicant was unable to prove his immigration status when offered the job, and the Company subsequently revoked the job offer.

The Tribunal found that the employer's Policy constituted discrimination based on the protected ground of citizenship and was contrary to the Code. The Company argued that it was more than willing to hire permanent residents, who are by definition citizens of countries other than Canada. However, the Tribunal reasoned that only citizens of other countries could ever lack the ability to work in Canada on a permanent basis, and that the Policy therefore disadvantaged them as non-Canadians. It found that including one group of non-citizens (i.e. permanent residents) did not protect the Company from liability for excluding another group of non-citizens (i.e. those holding work permits).

The Tribunal rejected the Company's defences, including that it was a bona fide occupational requirement for this position to be able to work on a permanent basis because of the amount of time, money and resources the Company invests in training entry-level engineers. The Tribunal further excused the Applicant from having lied to the Company, finding that if the Applicant had not been asked improper screening questions about his ability to work permanently in Canada, he would not have been forced to lie about it.

The Divisional Court Decision

We noted in our previous article on the Tribunal's decision in this case that it was extremely controversial. For employers, it meant that merely asking whether a job applicant had a temporary work permit during the recruitment process could constitute a breach of the Code and trigger a potentially substantial damages award. Further, it ostensibly put employers in the problematic position of having to hire the top job candidate for permanent positions regardless of the fact that the person may only have a short period of time left on a work permit.

We predicted that this case would likely be appealed, particularly given the fact that the Tribunal's decision on the definition of 'citizenship' was inconsistent with federal immigration legislation and the findings in cases at the Federal Court of Appeal and the Ontario Court of Appeal. This is exactly what happened here; the Company was successful in having the decision overturned on an application for judicial review to the Divisional Court.

The majority of the Divisional Court found that permanent residence is not a ground of discrimination under the Code, and it cannot be subsumed within the definition of 'citizenship'. The Court found that the Tribunal failed to consider the plain and ordinary meaning of 'citizenship' under the Code, and that there is nothing in the plain and ordinary meaning of the applicable words that would support such a finding. Rather, the Court stated that in its ordinary meaning, "permanent residence" is separate from and extends beyond citizenship; including it as a part of the protected ground of citizenship added substance to the ground it would not otherwise have. Therefore, the Court quashed the Tribunal's decision and opted not to remit it back to the Tribunal. The Company was awarded $15,000 in costs.

What Does this Mean for Employers?

The Court's decision is a positive sign for employers, indicating that making distinctions based on 'immigration status' as opposed to 'citizenship' will not constitute prohibited discrimination under the Code. However, the Court recognized that there are still certain situations in which questions or requirements that touch upon job candidates' immigration status may constitute discrimination based on citizenship; for instance, where a job requirement excludes all non-citizens including permanent residents.

In any event, it seems likely that this decision will be appealed to the Court of Appeal, or that further decisions by the Divisional Court or Court of Appeal will follow that come to differing conclusions. The Divisional Court's decision in this case included a strong dissenting opinion questioning why the legislature would have included exemptions in section 16 of the Code allowing employers to favour "persons lawfully admitted to Canada for permanent residence" in certain situations if it did not intend to include 'permanent residence' under the definition of 'citizenship'. Although the majority addressed this point briefly, it may prove to be an attractive point of statutory interpretation for courts to analyze in the future. Further, there are other protected

grounds under the Code that may apply to similar situations which may be used successfully in future cases, such as ethnic origin or place of origin.

As such, employers should not interpret this decision as giving them cart blanche to ask job applicants wide-ranging questions about their immigration status during the recruitment process. Rather, it is still best practice for employers to require applicants to confirm in writing early on in the recruitment process that they are legally entitled to work in Canada for the company in question.

In the event that an applicant on a temporary work permit is the preferred candidate for the position, employers should require a copy of the permit, note its expiration date, and either ensure that the employee renews the permit on time or require that the employee stop working upon the expiry of the permit. There are many different types of work permits in Canada with varying requirements for renewal; some work permits cannot be renewed at all, and some individuals may transition to permanent residence.

It is an offence to employ an individual who does not have the legal ability to work in Canada. We strongly recommend that employers consult with a corporate immigration lawyer to ensure that they comply with the law, and that they take proactive and strategic steps to retain talented foreign workers where necessary.

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