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TRIBUNAL RULES THAT ELIGIBILITY TO WORK PERMANENTLY IN CANADA IS DISCRIMINATORY

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A. INTRODUCTION

On July 20, 2018, the Human Rights Tribunal of Ontario ("HRTO") released an interim decision in *Haseeb v Imperial Oil Limited* (the "Haseeb Decision"),[1] holding that a company's policy requiring all job applicants for an entry level position to disclose proof of their eligibility to work in Canada on a permanent basis was discriminatory on the ground of "citizenship." In reaching its decision, the HRTO adopted a novel analysis on the protected ground of "citizenship" and its relationship to other statuses of non-citizenship.[2] In doing so, the tribunal expanded the meaning of "citizenship" in certain contexts under the Ontario *Human Rights Code* ("*Code*") to include people who are permanent residents or domiciled in Canada and intending to obtain citizenship.[3] It also held that the addition of a non-prohibited ground to a policy did not cure the discriminatory nature of the policy. The Haseeb Decision may be significant to charities and not-for-profits that may want to hire non-Canadian citizens, either on a temporary or long term basis.

B. BACKGROUND

The applicant, Mr. Muhammad Haseeb ("Haseeb"), was an international university student who had applied for a full-time, entry-level, permanent position as an engineer with Imperial Oil ("IO") with the intention to work there after he graduated. Haseeb was part of a special immigration program that would

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[1] 2018 HRTO 957.

[2] *Ibid* at para 102.

[3] *Ibid* at paras 108, 109.

allow him to work full-time in Canada while being processed inland for permanent residency, and was also eligible for a post-graduation work permit ("PGWP") that permitted him to work full time with any employer in Canada for a period of three years.

IO advertised its job with the requirement that any applicant must be able to work in Canada on a permanent basis ("Criteria"). Haseeb, despite his awareness of this Criteria, applied for the position and repeatedly represented himself to the company as someone who was eligible to work permanently in Canada, despite the fact that his PGWP was only valid for three years. IO offered Haseeb the position on the condition that he was able to work permanently in Canada and provide proof thereof. When Haseeb was unable to prove his eligibility to work permanently in Canada, he notified IO. A month after the deadline to accept the job offer, IO withdrew the job offer by way of rescission letter to Haseeb. Haseeb filed an application under section 34 of the *Code* alleging discrimination in employment under the prohibited ground of citizenship in violation of subsection 5(1) of the *Code*. Subsection 5(1) of the *Code* reads as follows:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.[4]

IO argued that its Criteria was not a matter of citizenship, as non-citizens could still qualify for the position so long as they had permanent residency. Rather, the Criteria was based on immigration status which is not protected under the *Code*. Secondly, IO argued that even if the Criteria was discriminatory, a requirement that prospective employees be eligible to work in Canada permanently was a "*bona fide* occupational requirement" ("BFOR"). This, it argued, was justified under section 11 of the *Code*, which, as described by the HRTO, may permit "indirect" or "constructive" discrimination "where a prohibited ground is not directly engaged but where the requirement 'results in exclusion, restriction or preference of a group of persons identified by a prohibited ground…'"[5] Thirdly, IO argued that it had rescinded its job offer to Haseeb not because of Haseeb's failure to meet the Criteria, but because of his dishonesty, in that he knowingly misrepresented his work status in Canada.

[4] *Human Rights Code*, RSO 1990, c H.19, s 5(1)
[5] *Supra* note 1 at para 15.

C. ANALYSIS

The HRTO held that IO's Criteria was discriminatory on the ground of citizenship. It disagreed with IO's contention that its policy was a matter of immigration status rather than citizenship, and held that the fact that the Criteria could benefit a non-citizen (*i.e.* a permanent resident of Canada) did not excuse the Criteria from discriminating against those on the basis of citizenship:

> …For further clarity, the addition of "permanent residence" as a second criterion does not transform the analysis to one concerning "immigration status". In the Tribunal's view, the fact that Canadian citizenship is invoked by [Imperial Oil] as a requirement governs the Code analysis; it is immaterial that it is not the only requirement.[6]

The HRTO further held that the definition of "citizenship", which is not defined under the *Code,* included people of permanent residence or those intending to obtain citizenship, in that "any requirement, consideration *etc.* that distinguished among individuals on the basis of either 'Canadian citizenship', 'permanent residence' status or 'domicile in Canada with intention to obtain citizenship' is discrimination unless the requirement is imposed or authorized by law, or the other criteria are met for each of three defences".[7] In reaching this conclusion, the tribunal analyzed the *Code*'s defences under section 16 with respect to the prohibition against discriminatory hiring. Section 16 of the *Code* is as follows:

> (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.
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> (2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.
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> (3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions[8]

[6] *Ibid* at para 104.
[7] *Ibid* at para 11.
[8] *Supra* note 4, *s 16(1).*

Based on a plain reading of the defences under section 16, the HRTO held that the defences supported an interpretation that "citizenship" encompassed people who had been admitted to Canada for permanent residence:

> In the Tribunal's view, the very fact that the Legislature saw fit to deem that in certain situations, hiring preference for "Canadian citizens" and "permanent residents" is not discrimination, means that *conversely*, in the absence of the s. 16 defence, HRTO can find that preferential hire on the basis of Canadian citizenship and permanent residence status amounts to discrimination under the Code. The language chosen by the Legislature in formulating a defence in s. 16 clearly contemplated that "permanent residence" (or "domicile in Canada with intention to obtain citizenship") as well as "Canadian citizenship" are requirements that in certain context may properly found a claim of discrimination *on the ground of citizenship*."[9]

Therefore, while permanent residency was not explicitly recognized in section 5 of the *Code*, it was contemplated in association with "Canadian citizenship" when the Legislature drafted the defences in the *Code*.

The HRTO rejected IO's use of the BFOR defence because the discrimination at issue was direct, and the BFOR defence could only be applied to indirect discrimination.[10] Since the company's policy was, on its face, not neutral, but plainly distinguished applicants based on the permanence attribute, it did not have an indirect or disparate effect on the applicant. The HRTO confirmed that "a respondent in a direct discrimination case has only statutory defence(s) available to excuse a conduct or policy that is found to discriminate in a direct (or express, targeted) manner 'where the requirement expressly included a prohibited ground of discrimination.'"[11] Nevertheless, the HRTO added that even if the BFOR was available, IO had not sufficiently established the defence. This is because IO had waived the Criteria in the past, indicating that it was optional and not necessary to the job,[12] and because IO could not otherwise demonstrate that the Criteria was linked to the job tasks done at the company.

Finally, the HRTO rejected IO's argument that it had rescinded its offer to Haseeb on the basis of Haseeb's dishonesty. The HRTO noted that the deadline to accept the job offer had already expired by the time the

[9] *Supra* note 1 at para 108.
[10] *Supra* note 1 at para 122. The HRTO, in considering the non-applicability of the BFOR defence to direct discrimination matters, applied the law as reviewed in *Entrop et al v Imperial Oil Limited et al*, 2000 CanLII 16800 (ONCA), 137 OAC 15.
[11] *Ibid* at para 122.
[12] *Ibid* at para 133.

rescission letter was sent to Haseeb. Further, the rescission letter did not mention Haseeb's alleged dishonesty, but rather stated that the offer had been rescinded "because [Haseeb had] not met the conditions of employment…[to produce proof of citizenship or permanent resident status]".[13] It even invited Haseeb to re-apply if he became eligible to work in Canada on a permanent basis in the future. This, along with other evidence, led the HRTO to conclude that "there is insufficient evidence to demonstrate on a balance of probabilities that the applicant's dishonesty was the *sole* reason for his non-hire."[14]

Interestingly, the HRTO accepted Haseeb's explanation that his dishonesty was a "ruse in seeking to have an opportunity to 'sell' himself and then educate IO about his route to permanent status" due to a fear that IO would not even consider him if it knew of his immigration status.[15] The HRTO commented that "the Tribunal finds that the applicant's fear was well-founded. It is clear that the applicant, a young graduate … did not appreciate that his ruse might be viewed unsympathetically as a measure of untrustworthiness." It also noted that "in the Tribunal's view, 'but for' IO's permanence requirement, the applicant would have no need for a ruse to circumvent the requirement."[16]

In the result the HRTO ordered the parties were to advise within 45 days of the Haseeb Decision if they were interested in engaging in a mediation to settle this matter. If mediation is not to proceed, the HRTO was to schedule two days for a hearing regarding any monetary damages payable to Haseeb, and to determine an appropriate remedial order.[17] If the hearing proceeds a final decision will then be released by the HRTO.

[13] *Ibid* at para 157.
[14] *Ibid* at para 161.
[15] *Ibid* at para 164.
[16] *Ibid.*
[17] *Ibid* at para 169.

D. CONCLUSION

Subject to any judicial review and appeals in these proceedings, the current implication of the Haseeb Decision for Ontario employers, including charities and not-for-profits, is that employment hiring decisions cannot be made on the basis of *permanent* eligibility to work in Canada. Employers can still ask and require proof (such as a valid work permit) that a prospective employee is legally able to work in Canada. In fact, hiring any person who is not legally permitted to work in Canada will expose the employer to serious consequences pursuant to federal immigration laws. However, as of now, it will be considered a breach of the *Code* to discriminate based on *permanent* ability to work in Canada. Charities and not-for-profits which recruit and hire employees who are not Canadian citizens should therefore update any policies and hiring practices that may be seen as discriminatory on the grounds of citizenship.