MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
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No Passport Required – "Permanency" in Canada is a Discriminatory Job Requirement

In the recent case of *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957, the Human Rights Tribunal of Ontario ("Tribunal") held it was discrimination on the basis of "citizenship" to require a successful job applicant be able to work in Canada "on a permanent basis". The decision will impact Ontario employers covered by the province's *Human Rights Code* ("*Code*"), and may also indirectly impact employers operating in other jurisdictions where citizenship is a protected ground of discrimination, including Manitoba, Saskatchewan, Newfoundland and Labrador and the Territories.

Jeffrey Stewart
416.217.2228
jstewart@sherrardkuzz.com

What happened?

Mr. Haseeb was an international student in the McGill engineering program. On completion of his degree he was eligible for a Post-Graduate Work Permit allowing him to work for any employer in Canada for a three-year term. He was also part of a special immigration program that allowed him to be processed for permanent resident status while working in Canada. He anticipated he would be able to obtain permanent resident status within a three-year period.

Imperial Oil Limited ("Imperial") was recruiting for Project Engineers and Haseeb applied. He was aware Imperial required an applicant to have Canadian citizenship or permanent resident status so he lied to the recruiters and said he was able to permanently work in Canada. He ultimately ranked first and was offered a job conditional on proof he was able to permanently work in Canada. However, when Haseeb was unable to meet the residency requirement the offer was rescinded and he was invited to re-apply if his status changed.

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Imperial [argued] it did not violate the *Code* because citizenship was not a requirement for the position. A candidate need only be able to permanently work in Canada. A non-citizen with a permanent residency card was therefore eligible for hire.

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Allegation of discrimination

Haseeb filed an application with the Tribunal alleging Imperial discriminated against him on the basis of citizenship.

The Tribunal evaluated section 16 of the Code which expressly identifies three circumstances in which citizenship may be a requirement, qualification or consideration in hiring

In its defence, Imperial advanced two arguments: First, it did not violate the *Code* because citizenship was not a requirement for the position. A candidate need only be able to permanently work in Canada. A non-citizen with a permanent residency card was therefore eligible for hire. Second, even if the requirement of permanent residency is discriminatory, Haseeb lied during the hiring process providing another valid basis to withdraw the offer of employment.

The Tribunal rejected both of Imperial's arguments.

The Tribunal evaluated section 16 of the *Code* which expressly identifies three circumstances in which citizenship may be a requirement, qualification or consideration in hiring:

1. Where the requirement is adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents.
2. Where the position is a chief officer or senior executive position, and citizenship or domicile with the intent of obtaining Canadian citizenship is a requirement, qualification or consideration for the position.
3. Where the requirement of Canadian citizenship is otherwise permitted or imposed by law.

Relying on section 16, the Tribunal reached the following conclusions:

- Absent the three circumstances, preferential hiring could amount to discrimination.
- Haseeb does not fall within any of the three circumstances.
- The language of section 16 suggests "permanent residence" should be associated with the ground of "citizenship".

The Tribunal wrote:

> [T]he 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*.
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> A plain reading of the text above indicates that the Legislature, in drafting the s.16 *Code* defence(s) expressly associated "domicile in Canada", "permanent residence" with the concept of "Canadian citizenship". In the Tribunal's view, this association supports the view that "permanent residence", although not expressly a listed "ground", is properly associated with the ground of "citizenship" (or lack thereof) under the *Code*.

As for the argument Haseeb lying about his immigration status disentitled him to the job, the Tribunal held this was irrelevant to the central issue in the case – whether the permanent residence requirement violates the *Code*:

> For clarity, the fact that the applicant may be seen as untrustworthy is not relevant to a determination of whether [Imperial's] conduct up to the date of the offer letter's expiry is a violation of the Code... The advertising of and application of the impugned policy or "permanence requirement" is the central issue in this Application. Even if the Tribunal accepted the fact that the applicant misled [Imperial] may have factored in [the] decision to not grant a waiver and to not hire him, it is clear to the Tribunal that the applicant's inability to meet the permanence requirement contributed to [his] non-hire.
>
> … the Tribunal notes that the case law is clear that a protected ground need only be one of the factors involved for there to be a violation of the Code...

What does this mean for employers?

If you think Canadian citizenship or permanency in Canada is a relevant requirement for employment, consider the following two questions:

1. Does or could the requirement fall within section 16 of the *Code* (or a similar provision in another jurisdiction)?
2. If not, is it possible to achieve the organization's objectives in a way that does not run afoul of human rights legislation?

If you would like assistance addressing these questions and/or learning more about the options available to your organization, contact the employment law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

The Ontario Government has announced that, effective January 1, 2019, average WSIB premiums will be reduced by almost 30% due to the elimination of the WSIB's unfunded liability.

The Workplace Safety Re-employment Obligation – what it means for an employer

Daryl Seupersad
416.603.6952
dseupersad@sherrardkuzz.com

One of the more difficult decisions for an employer to make is whether to terminate the employment of a worker who has an active workers' compensation claim. Beyond the human rights, employment law and possible labour relations implications, in many Canadian jurisdictions an employer must also consider a re-employment obligation under applicable workers' compensation legislation. Failure to do so can expose an employer to thousands of dollars in penalties and an increase to its accident cost record.

What is the re-employment obligation?

Using Ontario as the example, under section 41 of the *Workplace Safety and Insurance Act* ("WSIA"), when an injured worker is medically able to return to the essential duties of his or her pre-injury employment, or can perform suitable work, the employer must offer the worker either:

- the position the worker held at the date of injury
- a comparable position, or
- suitable work that may come available within the life of the obligation.

The re-employment obligation lasts until the earlier of:

- two years from the date of injury
- one year from the date the worker is medically able to perform the essential duties of the pre-accident position
- the date the worker turns 65.

Similar legislative provisions apply in Yukon, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

Is there a penalty for failure to comply?

Under the WSIA, violating the obligation to re-employ can carry a stiff penalty of up to one year of the worker's pre-injury net average earnings payable directly to the Workplace Safety and Insurance Board ("WSIB") and up to one year of loss of earnings benefits payable to the worker. Fortunately, the WSIB will warn an employer in writing before levying a penalty, allowing time to comply.

If a penalty is issued and thereafter the employer re-employs the worker, the penalty can be reduced by as much as 50% if the job is considered suitable and does not result in a relative wage loss to the employee.

A re-employment penalty can be appealed to the WSIB Appeals Branch within one month from the date of the decision letter (rather than the usual six months for a WSIB appeal). The appeal time-line is therefore fairly tight.

Beware the rebuttable presumption...

Under section 41(10) of the WSIA, if an employer stops employing a worker within six months of re-employment, the WSIB will *presume* the termination was related to the worker's injury and the re-employment obligation has been breached. An employer can rebut this presumption by proving the worker's injury had no impact on the decision to terminate employment.

If employment is terminated after six months of being re-employed but within the life of the re-employment obligation (see earlier), the WSIB may investigate the termination but the rebuttable presumption will not apply.

Note: Quebec and Yukon do not apply a rebuttable presumption.

Does the re-employment obligation apply to every employer?

Each jurisdiction has its own criteria in terms of which employers must comply with the obligation.

Under the WSIA, for example, the re-employment obligation applies to a non-construction employer with twenty or more workers if the injured worker has been continuously employed with the employer for more than one year. The obligation does not apply to a non-construction employer with fewer than 20 employees, or if the worker at issue has not been continuously employed for more than a year. For a construction employer[1], the obligation applies regardless of the number of workers or length of service of the injured worker.

Best practices for employers

The re-employment obligation is triggered when a worker is medically able to fulfill the essential duties of their pre-injury positon or perform suitable work. Where termination of employment is the preferred route, and the rebuttable presumption applies, the employer must be able to demonstrate termination was not related to the injury. To proactively prepare for this potential situation, consider the following best practices:

- ***Have an Accurate Job Description:*** For each position in your workforce, have an up to date record of the essential duties (and if possible, a Physical Demands analysis).
- ***Keep the Functional Abilities Form Up To Date:*** After an injury, ensure the worker's Functional Abilities Form is completed by a treating health professional in a timely manner and then kept up to date.
- ***Have a Discipline and Discharge Policy:*** The adjudicator will want to review the employer's policy on discipline and discharge to verify whether it was followed and the injured worker was not singled out for an injury related reason.
- ***Document Progressive Discipline:*** The adjudicator will inquire into the progressive discipline, if any, issued to the worker before employment was terminated.
- ***Demonstrate Consistent Past Practice:*** Be ready to show the adjudicator a few examples in which the employment of a worker with a similar record was terminated for similar reasons.

[1]A "construction employer" is an employer engaged in the business activities listed at Class "G" of Schedule 1 of *Workplace Safety and Insurance Act, 1997, O. Reg. 175/98.*

To learn more and for assistance, contact the workplace safety and insurance experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Out With The Old, In With The New: 2018 Year in Review What to Expect in 2019...

In 2018 we experienced *significant, material* change to employment and labour law in Ontario and across Canada. 2019 looks to be more of the same! Join us as we discuss how these changes impact employers and learn about proactive steps to minimize the negative effects.

Topics include:

1. **Legislative Update:** There have been significant changes to employment standards and occupational health and safety legislation in 2018. Are you aware?
2. **Drugs and Alcohol:** Employers are understandably concerned about the potential impact of cannabis legalization. We will review recent cases on drug and alcohol testing and use in the workplace and how an employer can proactively address this issue.
3. **WSIB Update:** Learn about the new Chronic Mental Stress policy and how it may impact the handling of workplace harassment claims. We'll also address changes to WSIB rates and premiums in 2019.
4. **Case Law Roundup:** A review of some of the most important labour, employment and human rights decisions of 2018 and what they mean for your operations.

DATE: **Wednesday December 5, 2018; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Mississauga Convention Centre - 75 Derry Road West, Mississauga**
COST: Complimentary
REGISTER: **By Monday November 26, 2018 at www.sherrardkuzz.com/seminars.php**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.
HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz