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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

"Language" is not a protected ground under the *Code*. However, there may be circumstances in which an individual's ability to speak English is connected to his or her 'place of origin', which *is* a protected ground.

Employer Receives Tongue-Lashing for Language-Based Discrimination

In many Ontario workplaces there is an expectation employees will be proficient in English. The question we are often asked is: *Can an employer terminate an employee because of poor English proficiency? Would this termination run afoul of the Ontario Human Rights Code (the "Code")?*

In *Liu v. Everlink Payment Services Inc.*, 2014 HRTO 202, the Human Rights Tribunal of Ontario (the "Tribunal") considered this tricky question and provided employers with useful guidelines on how to navigate English proficiency requirements in the workplace.

What happened?

Mr. Liu, a Chinese - Canadian who immigrated to Canada ten years prior, was employed by Everlink Payment Services Inc. ("Everlink") as a Helpdesk Support Analyst. In this role, he provided IT troubleshooting services to Everlink's employees. He started with Everlink in 2009 and remained until his termination from employment on May 31, 2012.

Throughout his employment, Mr. Liu had few documented performance concerns. He received merit increases and incentive bonuses and, in 2011, was promoted to full-time status.

Mr. Liu provided IT assistance to Everlink employees in English and there was no dispute he was required to speak English in the performance of his duties. He also appeared to acknowledge his English language skills could be improved, noting in his 2010 and 2011 performance evaluations that he intended to complete an English as a Second Language ("ESL") course.

Despite Mr. Liu's performance record, in February of 2012, Everlink's Vice-President directed Mr. Liu's supervisor to terminate Mr. Liu's employment on the basis there had been complaints about his English language communication skills. Instead of termination, however, Mr. Liu's supervisor met with him to inquire into the status of the ESL course, encouraging him to enrol. Mr. Liu did enrol in a course that started on May 12, 2012. However, a few weeks later his employment was terminated.

Allegation of discrimination

Mr. Liu launched a complaint before the Tribunal, asserting he had been discriminated against on the basis of a number of grounds, including race, ethnic origin, place of origin and colour.

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In response to the claim, Everlink maintained the decision to terminate Mr. Liu's employment was part of a larger restructuring and not related to his language issues. In the alternative, Everlink argued if the termination was as a result of poor language skills, this was unrelated to any protected ground under the *Code*, thus Mr. Liu's complaint should be dismissed.

Deciding the case in favour of Mr. Liu, the Tribunal addressed three key questions:

1. Is "language" a protected ground under the *Code*?
2. Was Mr. Liu's termination related to a protected ground under the *Code*?
3. Can language skills be a *bona fide* occupational requirement?

Is "language" a protected ground under the *Code*?

The short answer is 'no', language is not a protected ground under the *Code*. However, there may be circumstances in which an individual's ability to speak English is connected to his or her 'place of origin', which *is* a protected ground. As the Tribunal noted:

> *[L]anguage is not a ground protected under the Code. In order to make out discrimination, I must be satisfied that there was a nexus between the applicant's perceived difficulties in communicating verbally in English and a ground protected under the Code. In this case, it was not disputed that the applicant's perceived difficulties communicating verbally in English arose from the fact that English is his second language. English is his second language because he was born in China. These circumstances alone might be sufficient to establish a connection to the Code. However, in my view, additional evidence in this case supports a nexus to the applicant's place of origin.*

An employer may be able to establish a certain level of English language proficiency is a bona fide occupational requirement for a given position. However, in order to do so, the employer must demonstrate the language requirement meets a three-part test.

Was Mr. Liu's termination related to a protected ground under the *Code*?

The answer to this question was 'yes'. While Everlink led some evidence of a restructuring and employees being let go as a result, the Tribunal was comfortable concluding that Mr. Liu's English language skills were at least a factor in his termination. Thereafter, the Tribunal noted evidence related to Mr. Liu's accent, grammatical sentence structure, pronunciation and syntax, all factors the Tribunal concluded were associated with Mr. Liu's 'place of origin', a ground protected under the *Code*.

Can language skills be a *bona fide* occupational requirement?

An employer may be able to establish that a certain level of English language proficiency is a *bona fide* occupational requirement for a given position. However, in order to do so, the employer must demonstrate the language requirement meets the following three-part test:

1. It is rationally connected to the work performed.
2. It was adopted with an honest and good-faith belief it is necessary for the fulfillment of a work-related purpose.
3. It is reasonably necessary to accomplish a work-related purpose and it would be impossible to accommodate an employee with the characteristics at issue without imposing undue hardship.

In the case of Mr. Liu, there was no evidence of a language proficiency standard for an employee in his role, or that Mr. Liu had failed to meet any language standard.

The Tribunal therefore concluded that Mr. Liu had been discriminated against on the basis of his place of origin. He was awarded 11 months of lost wages and $15,000 as compensation for injury to his dignity, feelings and self-respect.

Tips for employers

Making decisions about existing and potential employees based on English language proficiency can give rise to considerable liability. To maximize flexibility and minimize risk to your organization, consider the following:

- Avoid hiring criteria that may discriminate based on *how* a candidate speaks (*e.g.,* a requirement that a successful candidate have 'unaccented' English language skills).
- If there are concerns with an existing employee's ability to meet language proficiency requirements, advise the employee of the specific concerns and give him or her an opportunity to address them.
- If a position requires a specific degree of English language proficiency, have and apply an objective assessment that can pass the Tribunal's three-part test.

To learn more, or for assistance addressing human rights and accommodation issues in your workplace, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

A settlement in the Scotiabank overtime class action recently received Court approval. Scotiabank employees may submit a claim for unpaid overtime directly to the bank, and any disagreement will be decided by an independent arbitrator. In a similar class action, CIBC has confirmed it has no intention of settling and will defend its overtime policies vigorously at trial. Ontario employers will follow that case with great interest – stay tuned!

What a Difference a Month Makes

While the notion of a *fixed term employment contract* may seem like a straight-forward matter, this is not always the case. How a fixed term contract may come to an end without further liability requires careful drafting, monitoring and action. Even when this appears to have been the case, one Alberta-based employer suffered a rude and expensive surprise due to its failure to strictly adhere to the precise terms of the agreement *(Thompson v. Cardel Homes Limited Partnership)*.

What happened?

Geoffrey Thompson was an executive with a new home builder, Cardel Homes, in Calgary. Under the first of his two employment contracts with Cardel, Mr. Thompson was entitled to one-year's pay in the event of non-renewal or early termination of his contract without cause. However, under his renewal contract the termination provisions were revised. Mr. Thompson remained entitled to one year's pay if Cardel terminated his employment without cause prior to the end of the term, however, there was no longer any similar provision for a one year salary payment if the contract was not renewed.

One month before the expiry of his contract, Cardel notified Mr. Thompson in writing that his contract would not be renewed. Mr. Thompson was told he would be paid until the end of his term in accordance with his employment contract, but would not be required to attend work. He was also asked to return all company property, Cardel's President assumed his duties of employment, and an announcement was issued advising that Mr. Thompson was no longer with Cardel.

The issues and trial decision

According to Cardel, once the decision had been made to end the employment relationship, it had no obligation to provide work to Mr. Thompson – only to continue to pay him until the end of his employment term.

Mr. Thompson was not happy with this turn of events, not having received any earlier indication his contract would not be renewed. He sued Cardel for the full one-year's severance payment alleging he had been constructively dismissed prior to the conclusion of his employment term.

The legal concept of constructive dismissal applies if an employer commits a unilateral, negative act, such as a change in working conditions, which amounts to a "repudiation" of the employment relationship. The test as to whether an employment relationship has been repudiated is an objective one, but is applied from the perspective of a reasonable person in the position of the employee. The trial judge explained the doctrine as follows:

> *[I]f the change to the employment relationship is minor, or if the change reflects a proper interpretation of an existing provision of the employment contract, the employee may not consider such change to be an act of repudiation. However, if a particularly important term is altered unilaterally, the employee may have his or her remedy. An employer's repudiatory words or conduct must be such as to constitute a repudiation of the essential obligations imposed on him by the contract.*

Against this backdrop, the trial judge found that a reasonable person in Mr. Thompson position would have felt he had suffered a "total usurpation of [his] duties and powers", constituting a repudiation by the employer of the employment contract. The judge ordered payment of one year's salary-- $285,000.

The employer appealed

Cardel appealed to the Alberta Court of Appeal, which upheld the trial judge's decision. Significantly, the Court of Appeal held that if Cardel had wished to avoid the problem it unwittingly created, it should have sought Mr. Thompson's agreement to an early termination with pay. If agreement could not be reached, Cardel ought to have confined its notification to informing Mr. Thompson that his services were not required effective the expiry date of the agreement, rather than immediately.

Tips for employers

Cardel may have believed its fixed term employment agreement provided protection from substantial severance liability if employment ended at the expiry of the term, however, its experience in court proved otherwise. This decision adds to a list of notorious judgments in which employers end up with liability they thought a fixed term agreement would avoid.

To minimize the risk to which Cardel exposed itself, employers contemplating or currently working with a fixed term employee should consider the following and, where appropriate, seek the advice and assistance of experienced employment counsel:

- Prior to making an offer of fixed term employment, carefully analyse why a fixed term is being offered. There can be good legal or practical reasons to do so, but many times a fixed term agreement may not be an appropriate vehicle.
- If already working with a fixed term contract, maintain strict surveillance of any time limits set out in the contract. For example, many fixed term contracts contain due dates by which notice must be given to an employee to avoid an automatic renewal.
- If a fixed term agreement is coming up for renewal, this may be the opportunity to transform it to another form of contract more suitable for the employment relationship, or to revise problematic terms in the existing agreement.
- If proceeding to terminate employment, the provisions of the contract should be scrutinized to ensure unintended liability is not incurred. Most employees, if requested, will agree to leave early rather than be a 'lame duck' and would prefer to be paid without having to work. If an employee does not agree, it will be necessary to consider how to manage the risk of the employee staying in the workplace, or how short a period of working notice can be imposed with minimal risk.

To learn more, or for assistance in the preparation of a fixed term agreement or an upcoming renewal or expiry, please contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

2014's Hottest Employment and Labour Developments
Is your organization prepared for 2015?

2014 was a busy year with important legislative amendments and the release of significant labour and employment decisions from courts, tribunals and labour arbitrators. Join us to learn how developments in the following areas could impact the way your organization does business in 2015:

1. Labour Law

- Store Closure Following Union Certification: Supreme Court of Canada finds against Wal-Mart.
- Union Rights Follow Change of Location: Richtree Natural Markets before the Ontario Labour Relations Board.

2. Employment Law

- Severance Pay: New, employee-friendly, test for determining eligibility.
- Reasonable Notice: Trending higher and higher.
- New Legislation:
  i. Marijuana laws create a buzz in the workplace.
  ii. New statutory leaves now in force.

3. Human Rights

- Family Status: Federal Court clarified what has to be accommodated and how.
- Religious Accommodation: What counts as religion; and practical ways to accommodate religious days off.
- Internal Investigations: There's been a human rights complaint. When is an internal investigation not required?

DATE: **Thursday November 27, 2014; 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, L5W 1G3

COST: Complimentary

RSVP: **By Friday November 21, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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