To ask or not to ask: Hiring foreign workers without discriminating

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Whether it be in an attempt to respond to certain needs of the business, to diversify their workforce or out of sincere curiosity, some employers have found themselves in a delicate situation when attempting to obtain information about a candidate's legal status in Canada or about their national or ethnic origin.

This article provides a concise overview of a few recent decisions in order to warn employers against asking certain questions, as well as to provide practical advice as to questions that can be asked when interviewing candidates whose status in Canada may raise some issues.

Legal requirements or discriminatory questions

In recent years, human rights tribunals have reminded us that almost any question relating directly or indirectly – even remotely – to a candidate's ethnic or national origin is discriminatory and must be avoided.

This lesson was recently learned the hard way, by a company that required candidates seeking employment to have legal status permitting them to work permanently in Canada. They would have to be permanent residents or Canadian citizens. In this case, one candidate had a valid, three-year work permit. The candidate, intending to apply for permanent residence, received a job offer conditional on proof of his legal status in Canada. Unable to produce any document attesting to his status as a permanent resident or a Canadian citizen, the candidate's job offer was withdrawn by the company. He filed a complaint with the Human Rights Tribunal of Ontario (the Tribunal).[1]

In ruling on the complaint, the Tribunal found that the company's refusal to hire this candidate was discriminatory because such refusal was based, *inter alia*, on a prohibited ground of discrimination under the Ontario Human Rights Code, namely the candidate's citizenship.[2] The Tribunal condemned the company to pay the candidate the salary to which he would have been entitled for a period of approximately 39 months, as well as damages for injury to his dignity.[3]

Similarly, in a series of decisions, summarized in greater detail in our previous publication on this subject,[4] the Québec Human Rights Tribunal decided that for an

employee to be asked “the origin of his name” in an interview, even if only to stimulate conversation and create a more relaxed atmosphere,[5] constituted an unlawful question contrary to Québec’s *Charter of Human Rights and Freedoms*. That was the case even where such questions were not posed in the context of a formal interview. In these decisions, the implicated companies were ordered to pay sums of between $4,000 and $6,000 in moral damages, and even punitive damages on one occasion.

Best practices

Employers must be particularly careful when asking questions relating to the ethnic origin or citizenship of any candidate, regardless of when in the hiring process the question is asked and the company’s reason for posing such a question.[6] A requirement for Canadian citizenship, for example, although it may be justified by internal requirements of staff training and retention, will not justify such questions.

How, then, can employers ensure compliance with their obligations (under the *Immigration and Refugee Protection Act*, for example), or certain government programs, while still respecting the rights of the candidates they hire? The key to maintaining this fragile balance seems to be the exact phrasing of the question posed.

For example, to confirm that an employee holds a valid work permit or is a permanent resident or a Canadian citizen, they must not be asked about their specific status in Canada or to provide a copy or evidence of that status. Rather, they must be asked to confirm that they are legally allowed to work in Canada.

Once an appropriate precise formulation is identified, this should be standardized on forms relating to the pre-hiring process, as well as in instructions and training provided to the company’s employees involved with recruitment.

In brief, and in light of the foregoing, employers would be well advised to review their pre-hiring processes, as well as the questions ordinarily asked in interviews. This way they can make sure they comply with the human rights legislation in force and avoid any condemnations that may be ordered by human rights tribunals. Should there be any doubt about what sort of questions may be asked in the hiring process, or about the legal status of a candidate or an employee in Canada, do not hesitate to contact our Business Employment and Immigration Law specialists.

[1] See *Haseeb v Imperial Oil Limited*, 2018 HRTO 957 and 2019 HRTO 1174.

[2] Id., 2018 HRTO 957, para 166.

[3] Id., 2019 HRTO 1174, para 124.

[4] *Kerdougli c. GE Renewable Energy Canada Inc.* (*Alstom réseau Canada inc*.), 2018 QCTDP 7, *Kerdougli c. La Vie en Rose*, 2018 QCTDP 8 and *Kerdougli c. Les Aliments Multibar inc.*, 2018 QCTDP 19.

[5] *Kerdougli* c. *GE Renewable Energy Canada Inc. (Alstom réseau Canada inc.)*, 2018 QCTDP 7.

[6] Except where the questions concerned are useful in applying an equal access program, which must exist at the time when the question is posed: see Section 18.1 of the *Charter of Human Rights and Freedoms*. For federally regulated businesses, see Section 16(1) of the *Canadian Human Rights Act*, which also protects employers implementing social advancement programs.

By

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