Human Rights Tribunal Dismisses Discrimination Claim Against School Board Relating to Language Proficiency Job Requirement

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On October 7, 2015, the Human Rights Tribunal of Ontario released a significant decision on the issue of whether a school board's denial of a promotion to an existing employee on the basis that the employee did not meet a language proficiency requirement of the job constituted discrimination.

In the decision, *Vyas v. Peel District School Board,* 2015 HRTO 1336 ["Vyas"] the Tribunal held that Peel District School Board's denial of the position of custodian to an employee employed as an attendant on the basis that he did not pass a language proficiency test was not discriminatory. The decision sets out helpful guiding principles for school boards with respect to decision-making relating to staff whose first language is not English.

In Vyas*,* the applicant, Ashvin Vyas, was employed as an attendant by the respondent Peel District School Board (the "Board"). He applied to the higher-level position of custodian. That application process involved (1) a written test that evaluated both basic knowledge of school cleaning and maintenance and English language proficiency; and (2) a five-day custodial training course that was followed by a Basic Custodial Test ("BCT") which entailed both written and performance components.

The applicant failed the written test when he first took it in 2008. After filing a complaint with his union, the applicant re-took and passed the written test in 2010, but did not pass the written or performance component of the BCT. The Board attributed much of the applicant's failure to his limited language proficiency, and resulting limitations in the applicant's ability to read written questions or understand oral instructions.

Notably, the applicant did not make efforts to consult with the Board about how he might improve his test results, despite being offered multiple opportunities to do so. Nevertheless, the applicant repeatedly requested an opportunity to re-write the BCT after 2011.

After being refused an opportunity to re-write the BCT on the basis that he had not made any effort to improve his skills since last writing the BCT, the applicant alleged that he had suffered discrimination on the protected grounds of race, colour, ancestry, place of origin, ethnic origin, creed, sex, family status, age, and association with a person identified by a Code ground.

Notably, the applicant's union, the Canadian Union of Public Employees, Local 2544, participated as an intervener in the proceedings before the Tribunal. The union had previously represented the applicant in grievance proceedings arising from these facts, but had chosen not to pursue the matter to arbitration.

At the hearing of the application, the applicant argued that while language proficiency is not, in and of itself, a protected ground under the Ontario *Human Rights Code* (the "Code"), the applicant claimed discrimination on the basis of his place of origin — citing the following passage from the Ontario Human Rights

Commission's *Policy on Discrimination and Language:*

Language is a characteristic that is often closely associated with ancestry, ethnic origin or place of origin. Thus, the Code may be breached where a language requirement, such as "proficiency" in English, excludes, gives preference to, or restricts persons because of their ancestry, ethnic origin or place of origin.

Additionally, the applicant alleged that the Board had provided him with numerous conflicting messages about the level of ESL certification required for him to apply for a custodial position, and that these conflicting messages amounted to a "moving target" with respect to the English proficiency required for that position.

The Tribunal noted that even if such a changing standard had been imposed by the Board, the applicant's failure to become a custodian had resulted solely from his failure on the BCT, which did not amount to discrimination on the basis of place of origin. Further, the Tribunal held that the Board's refusal to permit the applicant to retake the BCT was legitimately based on the Board's conclusion that the applicant had not taken any actions to improve his BCT scores. It was legitimate for the Board to recommend that the applicant improve his proficiency prior to rewriting the test based on its belief that the applicant's failure was due to difficulties in language proficiency.

Further, the Tribunal was sceptical of the applicant's claim to have been told that his failure on the BCT was due to his English proficiency, as this allegation had not been claimed or advanced in any of the applicant's prior claims, and had not been contained in any of the materials submitted by the applicant before the Tribunal.

In dismissing the application, the Tribunal remarked as follows:

[E]ven if the applicant was able to prove that he was subject to arbitrary and changing English proficiency levels and that this was a barrier to his becoming a Custodian, this would not be enough to prove discrimination under the Code.

As noted earlier, English proficiency is not a Code-protected ground. In itself, it is not discriminatory for an employer to require that an applicant for a position have a certain

level of English proficiency or literacy; rather, there must be a connection between the applicant's perceived difficulties communicating and a Code group.

…[t]he fact that the Code *may* be breached where language proficiency is required does not mean that it is necessarily breached in such circumstances.

In the present case, the applicant had failed to establish a connection between his language proficiency and a Code-protected ground.

Significance of Decision

The *Vye* decision affirms that a school board employee alleging discrimination in employment on the basis of a language proficiency requirement must be able to prove a connection between his or her perceived difficulties communicating and a Code-protected ground. The decision also stands for the principle that unless such a connection is established by the employee, even if a school board makes an employment-related decision on the basis of arbitrary and changing English proficiency levels, this will not necessarily be sufficient to prove discrimination under the Code.

Nevertheless, school boards should evaluate each employment-related decision relating to a language proficiency requirement on a case- by-case basis in order to mitigate the risk that a connection is made between the employee's language proficiency and a Code-protected ground.

By

Maria Gergin Phillips

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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