Is it Discriminatory to Fire an Employee because of Poor English Proficiency?

Many employers grapple with the issue of how to approach or deal with employees who have trouble communicating proficiently in English, particularly when the nature of the employment is customer-service based. Front and foremost in most employers and human resource professionals' mind is whether it amounts to discrimination to terminate an employee if they are having difficulties with English-language proficiency. In *Liu v. Everlink Payment Services Inc.,* 2014 HRTO 202 ["*Everlink*"], the Tribunal had to tackle this issue head-on when a Chinese- Canadian employee was terminated.

In *Everlink*, Mr. Liu, a Chinese-Canadian employee of Everlink was terminated due to a "company restructuring". Prior to his termination, Mr. Liu was employed as a Helpdesk Support Analyst and in this role, was responsible for troubleshooting IT issues for Everlink's employees. Throughout Mr. Liu's employment, he received positive performance reviews overall, and received merit increases and bonuses, and in 2011, was promoted to full-time status. In the context of some his reviews, he acknowledged that his English language skills could be improved, noting in his 2010 and 2011 performance reviews that he planned on completing an English as a Second Language ("ESL") course. On one occasion in May of 2012, Mr. Liu's supervisor met with him to inquire into the status of his ESL course, which Mr. Liu did not begin yet. Mr. Liu subsequently enrolled in an ESL course starting on May 12, 2012, but his employment was terminated a few weeks later.

Following his termination, Mr. Liu filed a human rights application alleging discrimination on the basis of race, ethnic origin, place of origin and colour. In response to these allegations, it was the Company's position that his termination was unrelated to *Human Rights Code* ("Code") grounds, and instead was attributed to a bona fide company restructuring. It was the Company's alternative position that even if his termination occurred due to poor language skills, this was unrelated to any protected ground under the Code.

In deciding in favour of Mr. Liu, the Tribunal made the following findings of fact and law that provides well-needed guidance to employers in this area:

- While language is not a protected ground under the Code, there may be circumstances in which an individual's ability to speak English is connected to his or her "place of origin".In order to establish this, there must be a nexus between the Applicant's perceived difficulties in communicating verbally in English and a ground protected under the Code.
- Applying this to the facts at hand, the Tribunal found that Mr. Liu established that English was his second language, and that his perceived inability to communicate proficiently in English was a factor that led to his termination.Further, the Tribunal took into consideration a number of emails that were led in evidence that demonstrated that his supervisor did in fact have concerns with his English language skills, which ultimately led to his termination.
- The Tribunal left open the possibility that an employer may be able to establish that a certain level of English language proficiency is a bona fide occupational requirement ("BFOR"), but it must first demonstrate that it has satisfied the traditional three-part test, which requires that the requirement is connected to the work performed; was adopted with an honest and good-faith belief it is necessary for the fulfillment of the work-related purpose; and was reasonably necessary to accomplish a work-related purpose and would be impossible to accommodate an employee with the characteristics without imposing undue hardship.

In applying the above three-part test, the Tribunal concluded that there was no evidence led that a language proficiency standard for an employee in this role was necessary, or that Mr. Liu had failed to meet this language standard. As a result, the Tribunal concluded that Mr. Liu was discriminated on the basis of his place of origin and was awarded 11 months of lost wages and $15,000 as compensation for injury to his dignity, feelings and self-respect.

What can employers take away from this decision? It is clear from this decision that employers face considerable liability if they terminate employees in whole or in part due to a requirement of English language proficiency. To avoid such liability, employers should consider the following:

- Employers should avoid requirements in its job postings that require "unaccented" English language skills.
- If there are concerns with an existing employee's ability to meet language proficiency requirements, this should be addressed with the employee as part of the performance review process.Employees should also be given the opportunity to address these issues, and to the extent it is possible, employers should consider assisting the employee by either paying for ESL courses, or other methods that may assist the employee in achieving better English-language proficiency.
- In the event that a position does require a high degree of English language proficiency, employers should carefully consider whether this requirement will withstand human rights scrutiny, particularly when applying the three-part BFOR test as outlined above.

If your organization requires further assistance in navigating through this thorny issue, please do not hesitate to contact one of the lawyers at CCP.