OHRT Decision that an Employer's Requirement for Proof of Canadian Citizenship or Permanent Residency Discriminatory Reasonable Say Ontario Court of Appeal



Most of Canada is currently dealing with the effects of an unprecedented labour shortage and finding a suitable candidate is not the only potential challenge employers can face during the recruitment process. Some employers may be surprised to learn that employment obligations are created once an offer of an employment has been extended. This means that an employer may owe an incumbent reasonable notice if they choose to revoke the offer. In the case ***Imperial Oil Limited ("Imperial") v Haseeb*** the Ontario Court of Appeal (ONCA) considers that very issue and unfortunately the outcome is not a favourable one to employers.

Background

The appellant applied for an entry-level engineering position with Imperial. Imperial required candidates be able to permanently work in Canada, which could be established by either Canadian citizenship or permanent resident status. The appellant was offered the position but the offer was conditional on permanent eligibility to work in Canada. When the appellant disclosed that he was neither a Canadian citizen nor a permanent resident, and would have to initially work on the three-year post-graduation work permit program ("PGWP"), Imperial withdrew its job offer.

The Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"), prohibits discrimination in employment on the basis of citizenship. On this ground, the appellant brought an application before the Ontario Human Rights Tribunal (the "Tribunal") which found that Imperial did discriminate against the appellant. The decision was set aside by the Ontario Divisional Court. This case is the appeal of the Divisional Court's decision.

The Decision

The ONCA allowed the appeal and restored the order of the Tribunal finding that the Divisional Court incorrectly applied the reasonableness standard of review in overturning the Tribunal's decision. In coming to this decision, the ONCA was

required to step into the shoes of the Divisional Court and assess the reasonableness of the Tribunal's decision. In considering this, the ONCA applied the standard from *Canada (Minister of Citizenship and Immigration) v. Vavilov* ("*Vavilov*") which requires that the court consider whether the decision of the Tribunal "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and the law that constrain the decision maker."

The ONCA considered the reasonableness of four issues according to the *Vavilov* standard:

1. Was the Tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?
2. Was the Tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?
3. Was the Tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?
4. Was the Tribunal's decision that Imperial's defence under s. 16(1) of the *Code* was not available reasonable?

For the first issue, Imperial argued that the appellant did not have standing to bring the claim because during the relevant time period he was a foreign national and did not yet have the PGWP. The Tribunal found that the appellant had standing to bring the claim under the *Code* because he had a "direct interest" in the employment requirement imposed by Imperial. The ONCA determined that this conclusion was reasonable as it was well-grounded in precedent and the appellant fulfilled the direct interest test found in s. 34(1) of the *Code*. The appellant had a personal and direct legal interest since he was a genuine job seeker that would be entitled to a PGWP upon graduation, at which time he could commence work for the respondent.

As for the second issue, Imperial argued that its policy does not discriminate on the basis of citizenship, but rather on the basis of immigration status, which is not a prohibited ground under the *Code*. The Tribunal found that there was a *prima facie* claim of discrimination on the basis of citizenship as the appellant was able to show that the alleged discriminatory treatment was linked to his personal characteristic of being a non-citizen. The ONCA considered this finding to be reasonable as the *Code* does not limit citizenship to any particular country. Commenting on the PGWP program, the ONCA noted that the intent is to "create a pathway to Canadian citizenship for international students who come to Canada to study and intend to settle in the country." Therefore, discriminating against the PGWP by excluding permit holders from employment undermines the federal program.

Turning to the third issue, Imperial attempted to argue that the true reason behind their decision to revoke the job offer was due to the appellant's dishonestly about his citizenship status. However, the Tribunal rejected the argument finding that the dishonesty was not the sole reason the offer was withdrawn as the letter sent to the appellant revoking the offer did not reference the dishonesty and expressly referenced the appellant's eligibility to work permanently in Canada. The ONCA considered this to be a reasonable finding and determined that Imperial could only successfully rebut the claim of discrimination if it could demonstrate that the alleged discriminatory conduct was solely motivated by non-discriminatory factors.

Finally, the ONCA considered whether the Tribunal erred by not allowing Imperial to advance the defence found in s. 16(1) of the *Code* which provides that discrimination on the basis of Canadian citizenship is not infringed if Canadian citizenship is a "requirement, qualification or consideration imposed or authorized by law."

Interestingly, Imperial never raised this defence during the Tribunal hearing, even upon resuming the proceedings after a six-week break. Evidence before the ONCA demonstrated that Imperial chose not to pursue the defence as it would contradict its position that they revoked the offer due to the appellant's dishonesty. The ONCA found that Imperial should not be permitted to change its defence at the judicial review stage.

Takeaways

CCPartners anticipates that leave to appeal to the Supreme Court Canada will likely be sought and will keep readers apprised of any developments that arise. In the meantime, employers should exercise caution in the recruitment process to avoid any direct or indirect acts of discrimination. To protect themselves employers should review their hiring process to ensure that their practices minimize any potential legal liability. Further, employers should be cognizant that they trigger the employment relationship once they extend an offer to an applicant. If an employer is faced with a situation in which they are required to revoke an offer they should consult a legal expert to minimize possible legal ramifications.

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