



What's New in HR Law

Ontario Court of Appeal Finds Hiring Policy Discriminated Based on Citizenship

November 6, 2023 | By Brendan Egan

Bottom Line

In *Imperial Oil Limited v Haseeb*, 2023 ONCA 364, the Ontario Court of Appeal restored a decision of the Human Rights Tribunal of Ontario (the “HRTO”), finding that an employer discriminated against a job applicant based on the applicant’s citizenship contrary to Ontario’s *Human Rights Code* (the “Code”).

In July 2018, [we wrote about](#) the HRTO’s decision, and [later covered](#) the now overturned Divisional Court Decision. Because citizenship discrimination rarely goes before the courts, the Ontario Court of Appeal’s ruling provides welcome insight on the extent to which employers can consider this *Code*-protected ground in hiring decisions.

Facts

Muhammad Haseeb (“Haseeb”) was an international student who applied for a position with Imperial Oil Limited (“Imperial Oil”). Haseeb graduated from McGill University and was eligible for a Post-Graduation Work Permit (a “PGWP”). PGWPs are special permits provided by the federal government that allow graduates of Canadian postsecondary institutions to live and work in Canada for extended periods. Haseeb was eligible for a PGWP that would have allowed him to work anywhere in Canada for three years.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

Imperial Oil had a policy that required permanent eligibility to work in Canada, established by proof of either Canadian citizenship or permanent resident status, as a condition of employment. Imperial Oil made a conditional job offer to Haseeb, but since Haseeb was unable to provide the required proof, Imperial Oil withdrew the job offer.

The Previous Decisions

The HRTO found that Imperial Oil violated the *Code* when it denied Haseeb the position because he was not a permanent resident. Citizenship is a protected ground under the *Code*, and the HRTO found that Imperial Oil's conduct directly discriminated against Haseeb. The HRTO awarded Haseeb over \$120,000 for lost income, injury to dignity, feelings and self-respect, and pre-judgment interest.

A panel of judges at the Divisional Court quashed the HRTO decision. Briefly, the Divisional Court held that "permanent residency" did not fall into the narrow definition of "citizenship" under the *Code*. Accordingly, Imperial Oil's hiring policy did not contravene the *Code*.

At the Ontario Court of Appeal

The Ontario Court of Appeal allowed Haseeb's appeal and restored the HRTO's decision.

Because this was an appeal of a judicial review decision, the Court largely limited its analysis to whether the HRTO's findings were reasonable. The Court found that it was reasonable for the HRTO to conclude that Imperial Oil contravened the *Code* when it withdrew Haseeb's job offer because he was not a Canadian citizen or permanent resident of Canada.

The Court of Appeal agreed with the HRTO that a policy that restricts successful applicants to only Canadian citizens or permanent residents of Canada amounts to discrimination on the basis of citizenship.

The Unsuccessful Defences

Imperial Oil argued that it did not discriminate based on citizenship, but merely refused to make job offers on the basis of "immigration status". Since immigration status is not protected by the *Code*, it would follow that Imperial Oil did not contravene the *Code*. The Court rejected this argument. It instead found that Imperial Oil's policy denied candidates like Haseeb, non-Canadian citizens eligible to work in Canada, employment on the basis of their citizenship. The Court also held that Imperial Oil's policy discriminated on the basis of citizenship even though it exempted one class of non-Canadian citizens (i.e. permanent residents). The Court stated that policies that discriminate based on a prohibited ground are not saved on because they only partially discriminate.

Additionally, the Court of Appeal found that Imperial Oil could not rely on the *bona fide* occupational requirement defence. Generally, a *bona fide* occupational requirement is one that is essential to a particular position and cannot be changed without undue hardship to the employer. If an employer can establish a *bona fide* occupational requirement, a court or tribunal will not find that the *Code* has been contravened. Imperial Oil argued before HRTO that accommodating PGWP-holders, or candidates who were eligible for PGWPs, would affect its succession planning and risk its investment in training new hires. Agreeing with the HRTO, the Court held that this argument was without merit. The Court drew particular attention to the fact that Imperial Oil had, in the past, waived the hiring policy for certain positions and had also hired PGWP-holders.

The Court of Appeal also reviewed the specific defences to citizenship discrimination set out in the *Code*, but held that Imperial Oil could not rely on them. Specifically, the *Code* provides that no discrimination occurs when Canadian citizenship is a requirement, qualification, or consideration required by law. This defence is rarely used and likely only applies where a rule or law requires that a person hold Canadian citizenship before being offered a position. Since Imperial Oil did not advance this defence at the HRTO, the Court found that Imperial Oil could not attempt to rely on it now.

Check the Box

The Court of Appeal's decision provides welcome clarity on discrimination based on citizenship in the hiring process. The *Code* does not define "citizenship". Citizenship was added to the *Code* as a protected ground relatively recently and Ontario courts have only considered it on rare occasions. The Court's decision is also timely, as the rise of remote work has increased the likelihood that employers will receive applications from applicants who are not Canadian citizens.

Based on the Court of Appeal's decision, a policy of restricting job offers to only Canadian citizens and permanent residents is likely discriminatory and contrary to the *Code*; however, this decision should not be read as preventing employers from screening candidates' entitlement to work in Canada. Rather than asking applicants about their citizenship or permanent residency status, we continue to recommend that employers instead ask job applicants whether they are legally entitled to work in Canada. This question does not infringe the *Code* and can provide employers with an appropriate amount of information to guide their hiring decisions.

Need More Information?

For more information or assistance with human rights and discrimination matters, contact Brendan Egan at began@filion.on.ca or your regular lawyer at the firm.



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