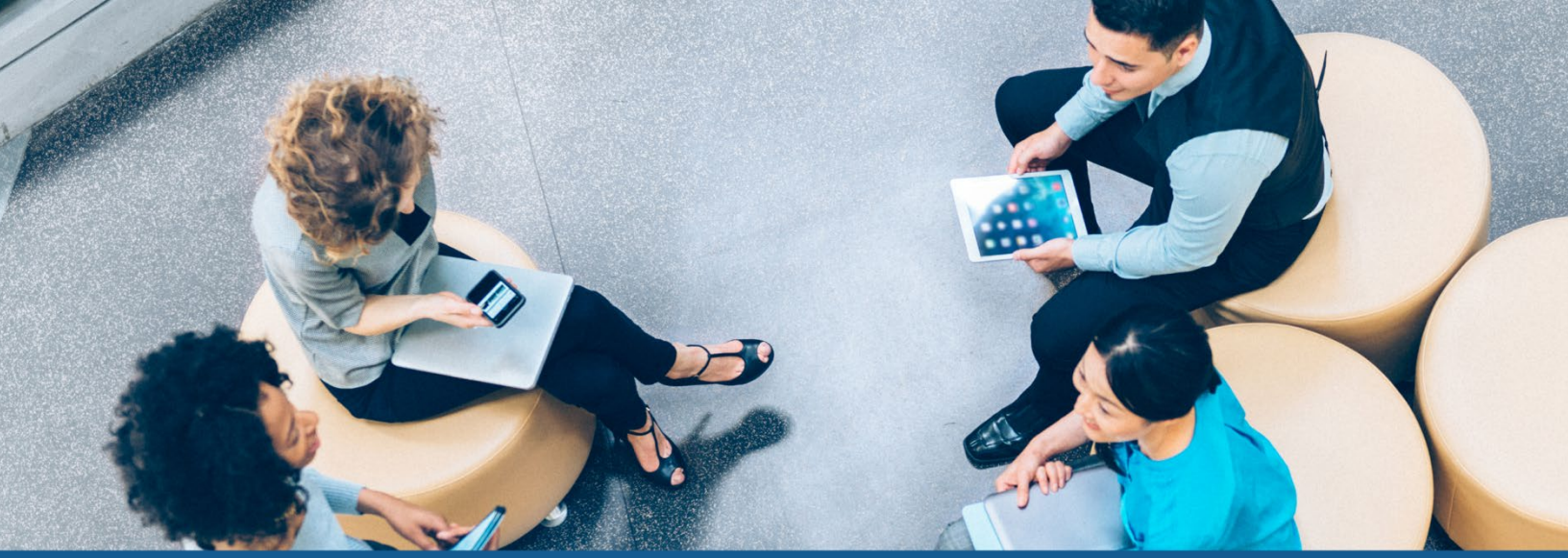

What's New in HR Law

Job Posting Limited to a "Qualified Woman" Not Discriminatory, HRTO Finds

January 15, 2025 | By Caroline DeBruin

Bottom Line

In *Horne v. Public Service Alliance of Canada* ("*Horne*"), the Human Rights Tribunal of Ontario ("Tribunal") dismissed an application claiming that a job posting requiring a successful candidate to be a "qualified woman" was discriminatory. In dismissing the application, the Tribunal relied on section 14 of the Ontario *Human Rights Code* ("*Code*"), which states that "special programs" designed to support disadvantaged groups do not infringe any right under the *Code* to be free from discrimination.

Background Facts

In *Horne*, an employer, the Public Service Alliance of Canada (the "Respondent"), posted a competition for the position of Grievance and Adjudication Officer. In doing so, the Respondent stated that,

> As a result of the PSAC Workforce and Availability Analysis and in accordance with the PSAC Employment Equity Plan, the successful candidate for this appointment will be a **qualified woman**. [Emphasis in original]

The Applicant – a male lawyer – applied to the position. When he applied for the position, the Applicant was prompted to complete a self-identification questionnaire, which asked questions about several *Code*-protected grounds, including one's race, sexual orientation and disability.

The Applicant was not interviewed or hired for the position, and filed an Application at the Tribunal alleging that the Respondent discriminated against him on the basis of sex. The Applicant also challenged the self-identification questionnaire in the job application on the basis that it constituted discrimination on the basis of ancestry, colour, disability, ethnic origin, gender expression, gender identity, race, sex and sexual orientation.

In its decision, the Tribunal stated that the Applicant argued that "nothing about the position justified hiring women only and that gender was irrelevant" (para 16).

In response to the Applicant's arguments, the Tribunal noted that the Respondent relied on section 14 of the *Code*, and stated that the decision to limit the position to women was done in accordance with the Respondent's Employment Equity Plan (the "Equity Plan"). Under the Equity Plan, the Respondent's equity committee conducted an equity assessment analysis, and subsequently recommended that the position be filled by a qualified women. The Respondent adduced evidence in the form of both the Equity Plan and their own Gender Equity Task Force Report, which referenced historic and continuing under-representation of women in the workforce and the conditions of disadvantage in employment experienced by women. This evidence was not challenged by the Applicant (para 9).

Analysis

The Tribunal dismissed the application, finding that the Respondent did not discriminate against the Applicant on the basis of sex or any other protected ground.

In doing so, the Tribunal first found that the Equity Plan constituted a "special program" under section 14 of the *Code*. Section 14 of the *Code* states as follows:

> 14 (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

In finding that the Equity Plan was a "special program", the Tribunal acknowledged that women are, "underrepresented and disadvantaged in the workforce as compared to men, especially in professional and management roles such as the one at issue in this Application" (para 21). The Tribunal assessed the Respondent's Equity Plan, and found that it was created to address this underrepresentation and, "the conditions of disadvantage in employment experienced by women and other specified equity-seeking groups" (para 21).

Based on this finding, the Tribunal held that the Applicant did not prove that he was discriminated against on the basis of sex.

When addressing the self-identification questionnaire portion of the Applicant's complaint, the Tribunal noted that the questionnaire was not mandatory but voluntary. Accordingly, the Applicant – again – failed to prove that the questionnaire was discriminatory. The Application was dismissed in full.

Takeaways

This decision highlights a potentially overlooked provision of the *Code*, which allows employers to engage in actions that might otherwise be impermissible, provided such actions promote substantive equality to address historic disadvantages or help eliminate discrimination. This provision is also used to safeguard affirmative action programs from being classified as infringing the *Code*.

If implementing a similar policy or program, employers should consult with legal counsel to ensure such policies and programs fulfill the necessary conditions to qualify as "special programs" under the *Code* and therefore compliant with the legislation. In developing special programs, employers should also ensure that: (i) the special program has a clear rationale that is consistent with section 14 of the *Code*; (ii) eligibility criteria are clear outlined and related to the underlying rationale of the program; and (iii) they consult with stakeholders, where appropriate, in implementing the special program.

Need More Information?

For more information or assistance with human rights or equity initiatives/affirmative action programs, contact Caroline DeBruin at cdebruin@filion.on.ca or your regular lawyer at the firm.

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