IT'S NOT WHAT YOU ASKED, IT'S HOW YOU ASKED IT: EMPLOYER PAYS THE PRICE FOR ASKING HUMAN RIGHTS-BASED QUESTIONS OF JOB APPLICANT

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A recent decision of Ontario's Human Rights Tribunal may have some employers rethinking how they frame questions to job applicants. In *Haseeb v Imperial Oil Limited*[1] the Tribunal confirmed that some questions can be costly if phrased in a manner that is contrary to the *Human Rights Code* ("**Code**")[2] – even if the job applicant lies in their answers.

Background

In 2014, Mr. Haseeb submitted an application for an entry-level engineering position with Imperial Oil. As part of the application process, Mr. Haseeb completed Imperial Oil's candidate information form. One of the questions asked on this form was: "Are you eligible to work in Canada on a permanent basis?" He answered: "Yes".

However, Mr. Haseeb was *not* eligible to work in Canada on a permanent basis. And throughout the interview process, Mr. Haseeb repeatedly lied to Imperial Oil by telling them that he had already obtained his permanent resident status and received a social insurance number when, in fact, he had not. Instead, Mr. Haseeb was on a study permit and planned to obtain a post-graduate work permit, but he feared that he would be disqualified from employment with Imperial Oil if he was truthful in his answers.

After several interviews, Imperial Oil extended an offer of employment to Mr. Haseeb on the basis that he was the top-ranked applicant for the job; however, the offer was later rescinded when Mr. Haseeb admitted that he was not actually eligible to work in Canada on a permanent basis.

Mr. Haseeb then filed a complaint with the Tribunal alleging discrimination in employment based on the protected grounds of place of origin, citizenship and ethnic origin.

The Tribunal's Decision

At the hearing, Imperial Oil testified that the decision to rescind Mr. Haseeb's offer was made solely as a result

of his dishonesty during the application process. In response, Mr. Haseeb testified that he had adopted the "ruse" of claiming he was eligible to work in Canada on a permanent basis in order to have the opportunity to "sell" himself to Imperial Oil based on his true qualifications, abilities and experience.

In the result, the Tribunal found that the permanence requirement amounted to direct discrimination based on the protected ground of citizenship. While the Tribunal acknowledged that all employers are legally required to obtain proof of eligibility to work in Canada at the outset of the employment relationship, there was no evidence that the applicant's eligibility to work in Canada on a permanent basis was an occupational requirement of the job being applied for.

The Tribunal also found that Mr. Haseeb's dishonesty was not relevant to deciding whether the Code had been breached. In the Tribunal's view, there would have been no dishonesty on Mr. Haseeb's part but for Imperial Oil's discriminatory questions about his eligibility to work in Canada on a permanent basis.

In terms of damages, the Tribunal ordered Imperial Oil to pay $120,360.70 to Mr. Haseeb as follows:

- $101,363.16 in lost wages, representing the difference between the income he would have earned with Imperial Oil from the expected start date until the date that he resigned from employment with his next employer (*a period of over four years*);
- $15,000 in damages for injury to dignity, feelings and self-respect; and
- $3,997.54 in pre-judgment interest.

The Tribunal did not order any public interest remedies because it was satisfied that Imperial Oil had taken appropriate steps to correct its recruitment processes for new job applicants.

Lessons for Employers

Employers are not strictly prohibited from asking questions that are based on Code-protected grounds, such as sex, sexual orientation, family status, race, citizenship or disability. In fact, the Ontario Human Rights Commission's policy on collecting human rights-based data suggests that data collection can play an "essential role in creating strong human rights and human resources strategies for organizations in the public, private and non-profit sectors".

That said, employers who do ask questions that are based on Code-protected grounds risk exposing themselves to significant liability, particularly in cases where the job applicant is not successful. Therefore, employers should steer well clear of questions that are based on Code-protected grounds unless they are collecting data solely for a purpose that is consistent with the Code, for example:

- monitoring and evaluating discrimination;

- identifying and removing systemic barriers;
- lessening or preventing disadvantage; and/or
- promoting substantive equality for persons identified by Code grounds.

In cases where human rights-based data is being collected, employers should familiarize themselves with the Commission's policy and speak with a member of McMillan's Employment & Labour Relations Group in advance of such collection.

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[1] 2018 HRTO 957; 2019 HRTO 1174.
[2] RSO 1990, c. H.19.

A Cautionary Note