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Gap widens between available workforce and available workflow

By **Tara Vasdani**

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(September 25, 2018, 11:36 AM EDT) -- The year 2018 has been filled with many advances in employment law. At times, in favour of the employer (*United Steelworkers, Local 2020 v. Bristol Machine Works Ltd. [Grievance GB-01-18, Sick Days]*) while at others, we have seen escalating awards for both human rights damages and reasonable notice periods. As always, I refer back to my guide of human rights versus civil law damages published earlier this year.

September 2018 bore witness to many precedents, significant and telling. In *Haseeb v. Imperial Oil* 2018 HRTO 957, for the first time the Human Rights Tribunal of Ontario (HRTO) interpreted the prohibited ground of discrimination based on "citizenship" found in the *Human Rights Code* (Code). The HRTO held that Imperial Oil (the employer) had discriminated against a job applicant when it required in its written and online application forms that the applicant be a Canadian citizen, or permanent resident, as a condition precedent to employment.

The decision has wide implications for professionals and foreign-trained workers alike. The tribunal's analysis seems to indicate that where a) the employee possesses the skills and qualifications necessary for a position, and b) the employer cannot prove that citizenship or permanent residency status is a bona fide occupational requirement, the employer may not discriminate against an employee's residency status.

Although Imperial Oil argued that it had a legitimate business objective — namely, securing lifelong corporate employees and ensuring the longevity of the careers of its workers — the tribunal still found that the discrimination was "direct" and the employer liable for breach of the Code. What does this mean in 2018?

Well, provided we continue to be advancing into an age where human rights damages are available on an escalating basis, notably with the passing of s. 46.1 allowing them to be pursued in Ontario's civil courts, and the general trend in rising damage awards, the tribunal has yet again opened the door in favour of the employee. If permanent residency and/or citizenship are not a bona fide occupational requirement for employees, an influx of foreign professionals can expand into the market. The possibilities are enormous.

In *Talos v. Grand Erie District School Board* [2018] O.H.R.T.D. No. 525, the tribunal again sided with the employee and held that the provision of the Code which purported to allow employers to terminate benefits for workers over the age of 65 was unconstitutional. In 2006, the Code was amended to effectively eliminate mandatory retirement, however, an exception was created through s. 25(2.1) to allow employers to cut off certain types of group health and life insurance benefits at 65. More specifically, s. 25(2.1) of the Code when read in combination with the *Employment Standards Act*, *2000* permitted employers to terminate employee benefits at age 65, without the risk of infringing the right to freedom from discrimination on the basis of age.

The tribunal held that the impugned statutory provisions created a distinction between workers under the age of 65, and those who are 65 and older and perform the same work by exempting workers above 65 from the Code's protections such as differential treatment on the basis of age in respect of workplace benefit plans. The tribunal held that the distinction created by section 25(2.1) was a prima facie violation of s. 15 of the *Canadian Charter of Rights and Freedoms*, which prohibits

discrimination on the basis of age.

This decision, combined with *Imperial Oil,* does two things. Firstly, it opens the door to a foreign and elder workforce — great news for the economy, and great news for workers. Second, it reinforces the corporate marketplace — more workers, more production and more profits.

But what is another consequence of these decisions? With respect to *Imperial Oil,* workers are now indistinguishable based on residency status, which means that the pool is larger and jobs scarcer. With the rise of Bill 148 and changes to minimum wage, this deepens the gap between welfare and the wealthy.

With respect to *Talos,* workers are encouraged to work longer with the incentive of benefit plans and security past the age of 65. The aftermath? More workers in the workforce, and less jobs available to younger "trainees" looking to fill their shoes. Again, we've created a larger gap.

In a follow-up piece, I will discuss the countereffects available from two subsequent decisions, which have placed more power into the hands of the employer (eradication of the requirement of PEL days, and an LTD decision proving the employer will the ability to prove frustration of the employment contract on a lower threshold), which at least attempt to ensure workflow stability.

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