

Canadian work experience not a basis to refuse jobs to newcomers

Ontario Human Rights Commission's recommendations not law but will be considered in tribunal decisions

| BY ERIN KUZZ |

ON July 15, 2013, the Ontario Human Rights Commission released its latest policy entitled “Removing the ‘Canadian Experience’ Barrier.” Intended to address one of the barriers identified by immigrant groups to finding jobs in Canada, the policy recommends employers amend their recruitment and hiring practices to de-emphasize “Canadian work experience” as a qualification for hiring.

The role of the commission – a brief overview

Prior to 2006, the role of the commission was to act as a “gatekeeper”, reviewing and investigating complaints under the Ontario Human Rights Code to determine whether they had sufficient merit to be forwarded to the Human Rights Tribunal for a full hearing.

Following significant changes to the code in 2006, the commission’s role has evolved away from a gatekeeper function to that of an education and policy-based one, including producing papers, reports and policy guidelines. Despite this role, commission policies are not considered law or binding on employers. However, they are used by the Human Rights Tribunal when interpreting and applying the code in its hearings.

‘The Canadian experience’ conundrum

According to Statistics Canada, lack of Canadian experience has been identified as the most common barrier for newcomers looking for meaningful employment in Canada. As identified by the commission, “when facing a requirement for Canadian experience,

newcomers are in a very difficult position: they can’t get a job without Canadian experience and they can’t get Canadian experience without a job.” A similar challenge presents itself when a newcomer seeks professional recognition or accreditation of experience gained outside Canada.

As a result, many newcomers find themselves working in unpaid positions in an effort to gain some form of Canadian work experience. And while potentially beneficial to the newcomer, benefiting from the efforts of unpaid workers can expose Canadian employers to unanticipated liability under the applicable employment standards legislation in their jurisdiction.

Employers are encouraged to take a flexible and individualized approach to assessing qualifications.

The commission’s recommendations – do’s

The commission’s policy provides a number of suggestions for employers (including regulators) to remove Canadian experience barriers. These include:

- Reviewing job requirements and descriptions, and recruitment and hiring practices to ensure they do not present barriers for newcomer applicants
- Taking a flexible and individualized approach to assessing qualifications of immigrant job applicants
- Using competency-based methods to assess an applicant’s skill and ability to do the job

•Considering all relevant work experience – regardless of where it was obtained

•Framing job qualifications or criteria in terms of competencies and job-related knowledge and skills.

Of some concern, the policy also suggests broad-based “best practices” including that employers:

“Examine their organizations as a whole to identify potential barriers for newcomers; address any barriers through organizational change initiatives, such as by forming new organizational structures, removing old practices or policies that give rise to human rights concerns, using more objective, transparent processes, and focusing on more inclusive styles of leadership and decision-making.”

Clearly, it will take time to see how the tribunal will interpret such vague recommendations.

The commission’s recommendations – don’ts

The commission has also set out a series of actions employers should avoid, including:

- Requiring applicants to have prior work experience in Canada
- Including a requirement for qualifications that could only be obtained by working in Canada
- Discounting an applicant’s foreign work experience or assigning it less weight than their Canadian work experience
- Requiring applicants to disclose their country of origin or the location of their work experience on the job application form
- Asking applicants questions that may directly or indirectly reveal where their work experience was obtained

- Asking for local references only

Advice for Ontario employers

Given the tribunal's consistent use of commission policies in its interpretation and application of the code, Ontario employers are wise to take note of the practices recommended in the Canadian experience policy in designing their own external and internal recruiting procedures.

However, as with virtually all code requirements, it is not enough to ensure the outcome of a recruiting process is compliant. It will be equally important that an employer document the process used to achieve the compliant result. This includes retaining copies of all job postings or advertisements and any documents demonstrating it assessed every candidate's qualifications and experience objectively and without regard to where the qualifications or experience was obtained. ■



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