Employment Law

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Illegal Questions

Canadian human rights legislation stringently forbids an employer from taking into account gender, ethnic origin and race, age (with a few qualifications), marital and family status, religion, source of income, sexual orientation, and disability in any employment-related decision. Unless any of these *prohibited grounds of discrimination* can be shown to be directly related to job performance, these personal attributes can never be a factor in any employment decision.

This is the essence of equality rights in employment law. The rule applies equally to private and public sector employers. The law further reasons that if an employer must be blind to these attributes in all employment-related decisions, it should not be able to stipulate such attributes in job advertisements or to ask for disclosure of these attributes on application forms or orally in job interviews.

For example, section 8(1) of Alberta's *Human Rights, Citizenship and Multiculturalism Act* is typical of most provincial human rights legislation in this regard. It reads: "No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant …that expresses … any limitation, specification or preference … or that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person." The theory in barring employer inquiries is that if the employer cannot ask the employee about these attributes, it will possess no knowledge of them and, accordingly, it cannot illegally discriminate by considering them.

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Even informal banter over dinner about an applicant's marital partner, children, and age is ill-advised. Inquiries about what an applicant did in previous jobs should reflect more on qualifications than on age. One should be careful about stereotypes about another's religious practices to avoid such assertions as, "We are a very collegial group. Often we eat out together, but you wouldn't be able to do that." Or "the fitness centre is excellent, but I don't suppose you would go there."

An employer usually asks personal questions — not with malicious intent, but to inform a candidate about the workplace. If it wants a candidate to know about great local day care, wonderful schools, and relocation assistance for spouses, these benefits

might be stated without asking direct personal questions.

Human resource departments should be trained on how to pose questions in a way that elicits legal information. A common technique, for example, is to outline the job requirements and ask whether the applicant is able to do that job.

This leads, however, to the inevitable question: *Do the requirements of application forms, résumés, and in-person interviews themselves compel disclosure of some of these prohibited grounds of discrimination?* An application form and résumé that record a university degree in 1972 are going to say something about age, not to mention the gray hair in plain view at the interview. Merely asking the applicant's name is likely to disclose gender and ethnic origin. Religious affiliation might be identified by head coverings or jewellery worn, and these symbols may have an undue, not to mention illegal, influence on recruiting employers.

Gender, race, disability, age, and perhaps religion – prohibited grounds of discrimination which could not be stipulated in a position posted or requested on an application form — will be involuntarily *disclosed* in an interview. Yet many job interviews provide little further valuable information about a candidate beyond an impressionistic *feel* of the candidate which remains the type of vague evaluation that is fraught with illegal discrimination.

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Some recruiters might argue that interviews elicit other qualification-related information, and they could be structured nominally to always appear to do so, but some interviews will be pretexts to observe the physical attributes of the candidate including some prohibited grounds.

A decade ago, we hired a student assistant in another city via the Internet. Throughout the project, communications with the student employee were made entirely by email. We never met the employee in person and still do not know whether that employee was a man or woman. While this may seem curious, it did not matter to job performance, and it is as unnecessary to ask about gender now as it was then.

Job interviews might be conducted with the applicant behind a screen so that the interviewer could not see what the applicant looks like. This would prevent a visual observation of such characteristics as the applicant's age, race, disability unrelated to performance, and gender. Even then, the applicant's voice would likely betray the applicant's gender and age. The screen would hinder visual observation of the applicant's grooming, dress, and demeanour, which are legitimate hiring decision factors.

The involuntary disclosure problem in interviews may be merely hyper-sensitivity of human rights advocates. Canadian law and human rights commissions have not intervened in the traditional practice of employers meeting with — and drawing conclusions from observations with — prospective employees. The job interview is

not illegal or unwise.

Every recruiting employer weighs a myriad of objective and subjective factors in its decision-making. It is not humanly possible to ensure that all of the employer's publicly-stated values about diversity will invariably match what individual human decision-makers do in the process of private consideration and selection. Face-to-face contact may not be defensible in every hiring assignment, but it is so well entrenched in modern corporate practice that it is unlikely to be more regulated than it is now with only direct questions about certain personal attributes being prohibited.

In conclusion, one also notes that this equality legislation merely imposes a *don't ask* limitation upon employers. It leaves employees open to freely tell employers about their protected personal attributes in applications forms, résumés, and at interviews. The burden then shifts to employers to demonstrate that they were not illegally influenced by such factors in its employment decisions. That is to say, the more employers create the opportunity for employees to disclose protected personal information, the greater the legal obligation they will have to properly manage it.

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