FIELD LAW

Labour and Employment

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Headhunter Discriminates in Hiring; Employer Found Liable

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Synopsis

Reiss v. CCH Canadian Limited, 2013 HRTO 764 is the latest case out of the Ontario Human Rights Tribunal dealing with age discrimination in hiring. *Reiss* is important in general because the tribunal found an employer liable for the discriminatory acts of an outside human resources consultant retained by that employer.

This case is important in Alberta because the *Alberta Human Rights Act* also requires that an employer not discriminate on the basis of age in hiring.

Facts

This case involved a 60-year-old lawyer who had worked in private practice for many years when he applied for a position with a legal publishing company which provided information for legal planning and human resources professionals. He was ultimately not selected for an interview and he claimed that in the circumstances this amounted to discrimination on the basis of age.

The hiring process involved the human resources consultant forwarding applications from applicants who appeared to the consultant to meet the qualifications. Applicants who qualified in follow-up testing by the employer were then offered an interview.

In this round of hiring, there were two positions to be filled. Two applicants had been selected for testing as promising candidates before the complainant had applied.

Two days after the complainant applied, a former employee of the employer was offered one of the two positions.

When the complainant applied for the position, he omitted certain information from his application, such as when he became a lawyer and the dates of his earlier jobs. The application was also unclear as to whether he worked for a firm or was a sole practitioner.

The complainant was soon contacted by the consultant respecting his salary expectations. He provided a salary range that was lower than what was budgeted for the position. When the application was forwarded to the employer, the employer had concerns that the salary expectation was unusually low and thought the omissions in his application were strange. The complainant provided an amended application which clarified the deficiencies.

Internal correspondence of the employer indicated that although there was interest in the complainant, he might be “overqualified”. The employer emailed the consultant and noted that it was concerned by the fact that he had not been upfront about how senior he was in practice and that his reasons for such a big change provided in his covering letter were not convincing. The email concluded, “… we’ll just keep this application on hold for now until we decide whether to pursue it. I’ll keep you posted.” Soon after, the employer notified the consultant that they had interviewed one of the applicants who had applied before he had, that she was a hopeful candidate and they intended to interview the other previous applicant as well.

The next day, the complainant emailed the consultant asking when he could expect to hear about an interview. The consultant responded, “… unfortunately they did not select your application at this time.” When asked whether this was due to his credentials being out of date, the consultant responded, “I don’t have all the feedback on everyone yet, individually, but it is looking like they are moving toward candidates that are more junior in their experience and salary expectation.”

Further correspondence between the employer and the consultant indicated that the job would be offered to one of the applicants who had applied before the complainant, and if she refused it, the other previous applicant. The correspondence also notes that if they both refused the position, they would consider whether to test the complainant.

The position was taken by one of the applicants, who quit a week later. The other applicant had accepted a job in the meantime, and the position was ultimately filled by a writer who had previously held the position. The complainant was not contacted and soon filed the complaint of age discrimination.

Discussion

Age Discrimination

The tribunal noted first that there was no direct evidence of age discrimination because there was no evidence of anyone stating that he would not be hired because of his age. It then considered whether purely circumstantial evidence could establish discrimination in this case.

The tribunal noted that the complainant's burden was to establish that it was more probable than not that age was a factor in the decision to refuse to provide the complainant with an interview, and adopted the following test for whether there was *prima facie* discrimination in hiring on the basis of age:

> a) That the applicant was qualified for the particular employment;
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> b) That the applicant was not hired; and
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> c) That someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

The tribunal noted that the complainant was clearly qualified for the position, as were the other applicants, but the other applicants were significantly younger.

The tribunal found that the employer had shown an interest in the two prior applicants before the complainant applied and that the employer had legitimate concerns with respect to the lack of forthrightness of the complainant, his low salary expectations and his lack of a good explanation for his decision to make a substantial career transition. The employer had an apprehension that the complainant may not want to stay in the job if he ultimately took it on. The tribunal noted that these were non-discriminatory reasons to refuse to offer an interview.

The tribunal also considered cases suggesting that "overqualified" was a euphemism for "too old". The tribunal noted that while this could be evidence of a discriminatory pretext, in this case the context of the concern was the employer's apprehension about why he would in fact want to switch from private practice to this job. Combined with the fact that the employer had legitimate non-discriminatory reasons to refuse to offer him an interview, the tribunal concluded that age was not a factor in the decision of the employer and thus, discrimination was not established on the part of the employer.

The tribunal found that the consultant's email indicating that the employer was seeking candidates with more junior qualifications and salary expectations was false in that his salary expectations were lower than those of the other applicants and found that this circumstantially suggested a stereotypical assumption on his part that an older person would necessarily want a higher salary and would therefore not be a good candidate.

The tribunal also found that the consultant's email indicating that the complainant had not been selected had prevented the complainant from following up with the employer going forward, which, considering what happened with the position, had an adverse effect on the complainant. This amounted to discrimination on the basis of age.

Perhaps most importantly, the tribunal attributed the discriminatory act of the consultant to the employer, on the basis that the consultant was acting as the employer's agent.

The tribunal noted that this was not a denial of an interview but the prevention of follow up, which was damage of a more limited nature because it was not guaranteed that he would have been given an interview had he followed up.

Damages

The tribunal found that the complainant was not entitled to damages for lost wages, because the ultimate decision-maker was the employer and the employer had not discriminated against him. However, the tribunal awarded $5000 in damages against the employer for injury to dignity, feelings and self-respect as a result of the consultant's discrimination in providing the complainant with false information on the status of his job application.

Guidance

Most of the cases in Alberta and otherwise dealing with age discrimination are concerning terminations, retirement and pension policies.

There are several decisions on point in Ontario and elsewhere, but not many in Alberta. One example of an Alberta decision involved an employee whose job was discontinued and who was then refused employment in the lower classification that replaced her previous job: *Cowling v. Alberta Employment and Immigration*, 2012 AHRC 4.

Reiss is important because the employer was found liable for discrimination in employment despite not directly participating in that discrimination; it was not the employer's discrimination but rather that of the consultant.

The damages were not substantial in this case, but the reasoning suggests that they could be substantial in a slightly different factual context. If the tribunal had found that the human resources consultant had greater authority in determining which candidates would in fact be given interviews and ultimately hired (i.e. the recommendations were rubber-stamped by the employer), then the human resources consultant could be considered the employer's agent as final decision maker. Applying the reasoning of *Reiss* to facts such as these could result in liability to the employer for all lost wages as a result of the discrimination of the consultant.

Field law's Labour and Employment group can help employers develop hiring practices to protect themselves from human rights complaints.