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KNOWLEDGE OF ENGLISH AS A REQUIREMENT FOR EMPLOYMENT: A TOWER OF BABEL

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THE PURPOSE OF THIS NEWSLETTER IS TO RAISE THE AWARENESS OF EMPLOYERS REGARDING THE PROBLEMS RELATED TO MAKING KNOWLEDGE OF ENGLISH A REQUIREMENT FOR EMPLOYMENT.

SECTION 46 OF THE *CHARTER OF THE FRENCH LANGUAGE* (THE **"CHARTER"**)[1] PROVIDES THAT "[A]N EMPLOYER IS PROHIBITED FROM MAKING THE OBTAINING OF AN EMPLOYMENT OR POSITION DEPENDENT UPON THE KNOWLEDGE OR A SPECIFIC LEVEL OF KNOWLEDGE OF A LANGUAGE OTHER THAN THE OFFICIAL LANGUAGE, UNLESS THE NATURE OF THE DUTIES REQUIRES SUCH KNOWLEDGE."

A controversy exists in the case law with respect to what constitutes a "requirement" as a result of the various possible interpretations of section 46 of the Charter. Arbitrator Jean-Guy Ménard reviews the possible interpretations in *Syndicat des fonctionnaires municipaux de Québec (FISA) et Québec (Ville de)*[2] ("*Ville de Québec*" award), noting that there is no dominant trend. In his award, he notes that some arbitrators have interpreted the notion of "requirement" broadly, associating it with the reasonableness rule; others interpret it restrictively and strictly on the basis of the preamble of the Charter; some rely on the *bona fide* occupational requirement defence applicable in discrimination matters in accordance with the exception provided at section 46 of the Charter; lastly, others assess the notion of requirement according to qualitative and/or quantitative factors.[3]

Two recent decisions exemplify this controversy: *Syndicat des cols blancs de Gatineau inc. et Gatineau (Ville de)*[4] ("*Ville de Gatineau*" award) and the *Ville de Québec* award.

THE *VILLE DE GATINEAU* AWARD

In the *Ville de Gatineau* award, the City posted a finance clerk position for the Revenue Division of the Finance Department, which required the ability to communicate in English. The Revenue Division is responsible for, among other things, billing, collection and recovery of the City's revenues. It also provides customer service and answers to taxpayer questions regarding their invoices, a task which takes up 50% of their time. The tax statements and invoices are issued in French only. However, at the taxpayer's request, the City will communicate with him or her in English.

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1 *Charter of the French Language*, CQLR c. C-11.

2 *Syndicat des fonctionnaires municipaux de Québec (FISA)* et *Québec (Ville de) (grief syndical)*, (TA, 2013-10-29), D.T.E. 2013T-818 (Motion for judicial review dismissed (C.S., 2014-05-14), 2014 QCCS 2293; Motion for leave to appeal dismissed (C.A., 2014-10-31), 2014 QCCA 1987).

3 *Ibid* at para 26.

4 *Syndicat des cols blancs de Gatineau inc.* et *Gatineau (Ville de) (grief syndical)*, (TA, 2013-05-15), SOQUIJ AZ-51206332 (Motion for judicial review dismissed (C.S., 2015-06-25), 2015 QCCS 3066; Motion for leave to appeal granted (C.A., 2015-09-14), 2015 QCCA 1485).

Following this posting, the Syndicat des cols blancs de Gatineau Inc. filed a grievance opposing the City's requirement that employees be able to communicate in English, alleging that it was abusive, arbitrary and discriminatory and contrary to both the collective agreement and sections 45 and 46 of the Charter. The union argued that there was no relevant evidence as to the necessity of requiring knowledge of the English language.

The City, on the other hand, argued, among other things, that taxation is a fundamental element of its relationship with taxpayers, and that the Revenue Division provides an essential service. The person occupying the position of finance clerk must therefore be able to provide comprehensible answers to taxpayers' questions, including those from the significant portion of English-speaking taxpayers residing in the City of Gatineau.

In his award issued on May 15, 2013, arbitrator René Turcotte concluded that the City's requirement of the mastery of a language other than French constitutes a violation of section 46 of the Charter. He adopted the interpretation whereby only the following situations allow an employer to require knowledge of the English language:

[TRANSLATION]

- "[I]n all cases where mastering a language other than French forms an integral part of the very essence of the position for which it is required, for example, a position as a translator";[5]
- "[W]hen this requirement is imposed pursuant to a law of public order, for example, section 15 of the *Act Respecting Health Services and Social Services*";[6]
- "[W]here by failing to master a language other than French, the position-holder would be endangering the fundamental right guaranteed by section 1 of the *Charter of Human Rights and Freedoms* which states that '[e]very human being has a right to life, and to personal security, inviolability and freedom'".[7]

In the arbitrator's view, the City failed to demonstrate, on the basis of these criteria, that performing the duties related to the finance clerk position requires knowledge of the English language.

THE *VILLE DE QUÉBEC* AWARD

In the *Ville de Québec* award, the City posted two collection agent positions for the Revenue Division, Collections and Management System Section, which required [TRANSLATION] "good knowledge of the spoken and written English language".[8] Collection agents are responsible for regularly following up on the amounts due to the City in specific files. According to the description of the position, the agents must provide explanations to taxpayers regarding the amounts owed to the City and inform them of their obligations and the consequences to which they may be exposed should they fail to pay these amounts. Agents also act as advisors to taxpayers and answer their questions regarding the payment of the City's invoices. Their objective is to collect debts and negotiate agreements as quickly as possible to avoid having to transfer the files to the City's legal department.

The Syndicat des fonctionnaires municipaux de Québec (FISA) filed a grievance denouncing this posting. According to FISA, this requirement violated the collective agreement and section 46 of the Charter. It argued that [TRANSLATION] "the exception set out at section 46 with respect to the requirement certainly cannot correspond to notions such as usefulness, expediency or a desire to provide services to the English-speaking community".[9]

For its part, the City argued that it should benefit from the requirement exception since in some cases, collection of unpaid accounts from commercial citizens mainly requires [TRANSLATION] "a specific knowledge of the files, a particular analytical ability and the ability to explain the situation and direct the discussion towards a solution."[10]

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5 *Supra* note 3 at para 29.

6 *Ibid.*

7 *Ibid.*

8 *Supra* note 2 at para 1.

9 *Ibid* at para 20.

10 *Ibid* at para 18.

Arbitrator Jean-Guy Ménard dismissed the grievance, concluding that the employer had demonstrated that the requirement was necessary to efficiently and normally perform the duties of a collection agent for the City of Québec. After reviewing the case law submitted by the parties, he stated that in order to determine whether the City had violated section 46 of the Charter, he had to ascertain [TRANSLATION] "whether the Employer had demonstrated, on a preponderance of the evidence, that 'proper knowledge of the spoken and written English language' allowed for the adequate performance of the duties related to the collection agent position at issue or whether performance of those duties would require such knowledge."[11]

JUDICIAL REVIEW

Judicial review was sought in respect of both of these awards.[12] In both cases, the Superior Court dismissed the motions on the bases that the arbitrators' awards fell within the range of possible and acceptable outcomes. Indeed, as the Supreme Court of Canada explained with respect to judicial review:

> "There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."[13]

COURT OF APPEAL

In *Ville de Québec*, the Court of Appeal also refused to intervene on the basis that the union failed to demonstrate that the arbitrator's award was irrational, contrary to the collective agreement and absurd in its result, or that the Superior Court had erred in its assessment of the reasonableness of the award.[14] The arbitrator's award fell within the range of the rational solutions available to him.

The City of Gatineau was recently granted leave to appeal the judgment of the Superior Court.[15]

COMMENTS

We hope that the Court of Appeal will not limit itself to deciding whether the arbitrator's award was reasonable, but that it will render a decision regarding the correct interpretation of section 46 of the Charter. The uncertainty created by this controversy affects all employers. A clarification would allow them to better determine the positions for which a requirement of proficiency in a language other than French is "required".

Lavery will follow the evolution of the law on this issue closely and will inform you of any developments.

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[11] *Ibid* at para 36.

[12] *Syndicat des fonctionnaires municipaux de Québec (FISA)* c. *Ménard*, 2014 QCCS 2293 and *Gatineau (Ville de)* c. *Turcotte*, 2015 QCCS 3066.

[13] *Syndicat des fonctionnaires municipaux de Québec (FISA)* c. *Ménard*, ibid at para 45, referring to *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12.

[14] *Syndicat des fonctionnaires municipaux de Québec (FISA)* c. *Québec (Ville de)*, 2014 QCCA 1987.

[15] *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*, 2015 QCCA 1485.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LABOUR AND EMPLOYMENT GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

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