IN FACT AND IN LAW

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Labour and Employment

"I LIED, BUT I DID SO IN GOOD FAITH![1]"

ZEÏNEB MELLOULI

THE PRE-HIRING PROCESS IS A KEY STEP TO THE VIABILITY OF THE EMPLOYER-EMPLOYEE RELATIONSHIP. BOTH THE EMPLOYER AND THE APPLICANT MUST NOT UNDERESTIMATE THE IMPORTANCE OF THIS PROCESS WHICH ESTABLISHES THE BASIS OF THEIR CONTRACTUAL RELATIONSHIP. THIS PROCESS IS GOVERNED BY A LEGISLATIVE FRAMEWORK AROUND WHICH THE EMPLOYER MUST TAILOR ITS ACTIONS, ESTABLISHING A BALANCE BETWEEN THE NECESSITY OF COLLECTING SOME OF THE APPLICANT'S PERSONAL INFORMATION AND THE APPLICANT'S RIGHT NOT TO BE DISCRIMINATED AGAINST IN THE COURSE OF HIS OR HER EMPLOYMENT.

IN *SYNDICAT DES INFIRMIÈRES, INHALOTHÉRAPEUTES, INFIRMIÈRES AUXILIAIRES DU CŒUR DU QUÉBEC (SIIIACQ)* V. *CENTRE HOSPITALIER RÉGIONAL DE TROIS-RIVIÈRES*[2], THE COURT OF APPEAL ADDRESSES THIS ISSUE BY UPHOLDING THE DECISION OF ARBITRATOR MICHEL BOLDUC[3]. THIS DECISION OF THE COURT OF APPEAL REITERATES THE PRINCIPLES WHICH MUST GUIDE BOTH APPLICANTS AND EMPLOYERS WITH REGARDS TO THE COLLECTION OF PERSONAL INFORMATION DURING THE PRE-HIRING PROCESS.

THE FACTS

The employee previously held a position as a practical nurse at the Centre hospitalier régional de Trois-Rivières (CHRTR) from 1987 to 1994. He left his position in 1994 to continue his studies. It is at this time that he struggled with depression and alcohol and gambling addictions. In February 2005, after undergoing treatment to address his problems, he applied for a position as a practical nurse at the CHRTR. While completing the pre-hiring medical questionnaire, he failed to answer a question relating to his psychiatric history.

A little over a year after being hired by the CHRTR, the employee was placed on leave to undergo examinations for chronic enteritis. He filed a claim to obtain wage loss insurance benefits in order to extend his leave, this time, for depression and physical illness. The employer subsequently required the employee to undergo an examination by a physician from its occupational health and safety department. After concluding the medical assessment and reviewing the employee's past medical history, the designated physician suspected bipolar disorder and extended the employee's leave by six weeks. In the circumstances, the physician determined it would be appropriate to obtain the psychiatric medical file of the employee.

[1] Quote from Mr. Bernard Tapie from his hearing.

[2] *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ)* v. *Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867 (C.A.) (application for leave to appeal to the Supreme Court of Canada denied on March 21, 2013, 2013 CanLII 14333 (S.C.C.)).

[3] *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ)* et *Centre hospitalier régional de Trois-Rivières*, AZ 50665143 (T.A.).

The employee's psychiatric medical file revealed a history of depression and adaptation disorder with depressed moods for which the employee had been prescribed medication prior to February 2005. At the time the employee applied for employment as a practical nurse, he was in the midst of withdrawal from his medication. In February 2007, in light of the full extent of the employee's medical history, the physician designated by the employer concluded that the employee presented a high risk of absenteeism and was not "medically stable" at the time of hiring [4]. Noting that none of the employee's medical history had been disclosed in the pre-hiring questionnaire, the employer dismissed the employee on March 12, 2007, on the grounds that he made false declarations.

The union contested the dismissal on the grounds that the pre-hiring questionnaire violated the employee's fundamental rights under the *Charter of Human Rights and Freedoms* [5] (the "Charter"). According to the union, the employee should not be sanctioned for failing to answer discriminatory questions [6].

The employer's principle submissions were: (i) the questions asked of the employee were justified in light of the nature of the position sought; (ii) the union had not proved an abusive use of the questionnaire; (iii) it had the right and the duty to verify that applicants possess the qualifications necessary to safely perform the tasks entrusted to them.

According to the employer, the very nature of its mission requires it to be aware of the health of its employees in order to ensure the health of patients. The employer's informed consent which was necessary for the formation of the employment contract had been vitiated by the employee's false declarations.

Arbitrator Bolduc concluded that as a result of his false declarations, the employee misled the employer. The employer's consent had been vitiated because when hiring an employee, the employer must be in a position to establish that the applicant is able to perform his duties in an adequate and consistent manner. He therefore dismissed the grievance. The Superior Court, sitting in judicial review of this decision, concluded that the arbitrator's decision was reasonable [7].

[4] *Id.*, at par. 9.

[5] R.S.Q., c. C-12.

[6] *Supra*, note 2, at par. 36.

[7] *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, 2010 QCCS 5311 (C.S.).

[8] *Id.*, at par. 60.

[9] *Id.*, at par. 67.

ANALYSIS OF COURT OF APPEAL'S DECISION

In any contract, the parties each have an obligation to disclose all relevant information in order to ensure the exchange of free and informed consent in the context of their contractual relationship. For the Court of Appeal, the employee had the obligation to act in good faith in answering the pre-hiring questionnaire.

However, an employee's false declaration does not automatically result in the capital punishment that is dismissal. The justification of one's dismissal for having made false declarations remains subject to the following criteria developed by arbitral case law and confirmed by the Court of Appeal:

1) the subject of the false declaration;

2) the relation between the withheld information and the employee's position;

3) the effect of the false declaration on the employer's consent;

4) the voluntary nature of the false declaration [8].

These criteria are not cumulative and any one of them may be enough to justify dismissal. However, for a false declaration in a pre-hiring medical questionnaire to serve as a basis for dismissal, the questions which the employee failed to answer must be compliant with the Charter.

In fact, section 18.1 of the Charter prohibits, at the pre-hiring stage, any attempt to gain information regarding any ground mentioned in section 10, including one's race, colour, sex, pregnancy, sexual orientation, disability or the use of any means to mitigate the effects of one's disability.

Indeed, a person's health is linked to the concept of disability set out at section 10 of the Charter. Incidentally, any question on this subject will, at first glance, constitute a discriminatory practice.

However, this does not mean that an employer is not justified in collecting information on this subject. In this judgment, the Court of Appeal clarifies this position, reminding us that in such circumstances, one must demonstrate on a preponderance of probabilities that the information sought regarding the applicant's health creates a distinction or preference based on the qualifications or skills required for the employment sought [9], as permitted under section 20 of the Charter.

In relying on the criteria developed by the Supreme Court [10] with respect to "justified professional requirements", the Court of Appeal teaches us that to determine whether a given qualification or skill is required by the position in accordance with section 20 of the Charter, it is necessary to evaluate the goals and objectives sought by the employer and the rational relationship they bear with the objective requirements of the position [11].

This is why, in the words of the Court of Appeal, [translation] "[...] the right of the employer to obtain information from the applicant must be assessed on the basis of the position sought and the tasks to be accomplished."

In the case under review, the employee had proved *prima facie* discrimination under section 18.1 of the Charter, but the employer succeeded in establishing the direct relationship between the questions asked and the position of practical nurse. In the absence of truthful answers to the questions asked of the employee, the employer could not adequately assess the applicant's qualifications.

Therefore, to the extent that the collection of information is legitimate, a false declaration by an applicant on this subject may result in dismissal without it constituting a discriminatory measure.

RECENT APPLICATION OF THIS DECISION IN ARBITRAL CASE LAW

Without referring directly to it, arbitrator Mtre Maureen Flynn followed the Court of Appeal's approach in *Syndicat des chauffeurs d'autobus, opérateurs de métro et employés des services connexes au transport de la STM, section locale 1983- S.C.F.P.* et *La STM* [12], rendered on April 17th, 2013.

The arbitrator had to determine whether the withholding of information by the employee regarding the fact that he had, in the past, been the victim of an industrial accident and had had a herniated disk, had the effect of vitiating the employer's consent at the hiring stage. She placed much emphasis on the fact that, by failing to disclose this information which was: 1) directly related to the employment, and: 2) of sufficient importance that it may have had an effect on the decision to hire him. The employee made a false declaration while fully aware of the consequences.

[10] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[11] *Id.*; also see: *Hôpital général juif Sir Mortimer B. Davis v. Commission des droits de la personne et des droits de la jeunesse*, 2010 QCCA 172 (C.A.) (application for leave to appeal to the Supreme Court of Canada denied on July 8, 2010 (no 33631)); *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R.. 279.

[12] 2013 CanLII 26264 (QC SAT).

CONCLUSION AND COMMENTS

Although an employer is entitled to ask the questions necessary to guide its assessment of an applicant's ability to perform the duties of his or her employment and to make an informed hiring decision [13], the applicant is entitled to a hiring process free from discrimination.

The collection of information pertaining to the health and history of an applicant must not be used to automatically exclude anyone who is not in a state of perfect health nor should it be used to discriminate in the hiring process. This collection of information must be carried out by the employer for legitimate purposes.

However, an applicant must demonstrate good faith when responding to the employer's questions. He or she cannot, when in doubt, hide information which may harm his or her application in order to claim the protection afforded to him or her by the Charter, once the subterfuge is discovered, to justify his or her false statements [14].

An applicant must rely on the good faith of the employer. Remedies under the Charter remain available in cases of abuse, but the Charter is not a cure-all which an applicant may subsequently rely on to justify false statements regarding things the employer had a right to know.

The employer must restrict its collection of information to what is necessary to proceed with an informed assessment of the individual's application, without abusing the process. It must rely on the applicant's good faith, keeping in mind that any false statements pertaining to an essential part of the assessment of the required qualifications for the position being filled can ultimately be sanctioned by a justified dismissal.

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[13] *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières, supra.*, note 3, at par. 77.

[14] *Id.*, at par. 78.

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