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Bilingual candidate sought: The Court of Appeal clarifies the scope of this requirement in employment-related matters

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Last January 18, Lavery published a *Need to Know* entitled "Knowledge of English as a requirement for employment: A Tower of Babel", which considered a controversy in the case law surrounding the requirement of English as a condition of employment by employers in Québec. At the time, the authors expressed the hope that the Québec Court of Appeal would clarify the issue, which it has recently done. This newsletter provides an overview of the clarification provided by the Court of Appeal.

On October 3, 2016, the Québec Court of Appeal rendered an important judgment in the case of *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*,[1] (the "Ville de Gatineau" decision), which considered the problems raised where an employer makes knowledge of English a requirement of employment. In particular, this case clarifies the scope of section 46 of the *Charter of the French Language*[2] (the "*Charter*"), which states that employers are "prohibited from making the obtaining of an employment or office dependent upon the knowledge or a specific level of knowledge of a language other than the official language [French], unless the nature of the duties requires such knowledge."

Context

The facts of this case date back to 2009. In February of that year, the City of Gatineau posted a job opening for a finance clerk in the Revenue Division of the City's Financial Department. One of the general requirements indicated in the posting was the ability to communicate in English.

The list of tasks performed by the Revenue Division include billing, collections and recovery of amounts owed to the City. In addition, this Division provides a support service to answer taxpayer questions, which is available by telephone, electronic communication or in person. In this context, the interaction between the personnel and citizens is done in French however, the clerks will communicate in English when requested by the clientele. The same reasoning also applies to billing. Tax bills and all invoices are issued only in French, but the City will send an English version to the taxpayer upon request.

Background of the proceedings

After this posting, the Gatineau white-collar workers union (the "*Union*") filed a grievance alleging that [translation] "*the requirement of being able to communicate in English to obtain the position referred to in the posting [...] is abusive, arbitrary, discriminatory [...] and contrary to sections 45 and 46 of the Charter of the French Language.*"

On May 15, 2013, the arbitrator, René Turcotte, rendered a decision with respect to the grievance.[3] In his award, the arbitrator found that the City's requirement of proficiency in a language other than French was a violation of section 46 of the Charter. He agreed with the interpretation according to which an employer can only require knowledge of English in the following situations:

> [translation] "[A]ll cases in which proficiency in a language other than French is an integral part of the very essence of the position for which it is required, for example, the position of translator";
> "[W]here this requirement is imposed by a law of public order, for example, section 15 of the *Act respecting health services and social services*";
> "[W]here the lack of proficiency in a language other than French by the person holding the position would jeopardize the fundamental rights guaranteed by section 1 of the *Charter of Human Rights and Freedoms*, which states that "Every human being has a right to life, and to personal security, inviolability and freedom."[4]

Based on these criteria, the arbitrator found that the City had not shown that the performance of the tasks of a finance clerk required knowledge of English. He therefore allowed the grievance.

On June 11, 2013, the City of Gatineau applied for judicial review of this award. However, the Superior Court of Québec did not agree with the City's arguments and dismissed its motion on the grounds that the terms of the award were among the possible and acceptable outcomes.[5]

On September 14, 2015, the Court of Appeal agreed to hear the case.[6]

The Court of Appeal decision

On October 3, 2016, the Court of Appeal found in favour of the City of Gatineau, holding that the arbitrator's award is unreasonable and [translation] "*falls outside the bounds, and substantially so, of the range of decisions rendered under section 46 CFL: it is an anomaly.*[7]"

First, the Court considered the scope of section 46 of the Charter, noting that this provision states that an employer cannot require a person to have knowledge of a language other than French for a position "unless the nature of the duties requires such knowledge." Furthermore, this requirement (hereinafter referred to as the "criterion of necessity") has a more restrictive meaning than the simple notion of utility. The Court acknowledged that a finding that knowledge of another language is necessary will essentially be based on a specific factual situation and that the burden of proof is on the employer.

The Court then considered the case law as well as commentary by Québec authors addressing this specific issue, referring in particular to the decision by the arbitrator Jean-Guy Ménard in the case of *Syndicat des fonctionnaires municipaux de Québec (FISA) et Ville de Québec*[8] (the "*Ville de Québec*" decision), which is similar in several ways to the Ville de Gatineau decision. Indeed, in the Ville de Québec decision, the arbitrator took an approach which was much more flexible with regards to the criterion of necessity, resulting in the dismissal of the grievance. He found that it was sufficient to determine [translation] "whether the employer has shown, on a preponderance of the evidence, that "good knowledge of spoken and written English" is likely to allow for the adequate performance of the positions […] in question, or whether the performance of these tasks required such knowledge."[9]

The Court of Appeal assessed the arbitrator's decision in *Ville de Gatineau* in light of the decision in the *Ville de Québec* case. Reiterating [translation] "the three propositions on which the interpretive

theory advanced by the arbitrator is based, and which he characterizes as teleological,"[10] and assessing his first assumption,[11] the Court held that the interpretation preferred by the arbitrator was contrary to the legislator's intention insofar as it would mean applying a criterion of "absolute necessity".[12] On this point, the Court stated as follows:

> **[Translation] [33] […] The legislator was addressing another issue: it wished to facilitate the resolution of actual and concrete difficulties, with supporting evidence and arguments, which one could characterize as cases of "relative necessity". One can assume, for example, that many tour guides, maîtres d's, waiters, hotel reception clerks, limousine chauffeurs, call center telephone operators, public relations agents, official spokespersons of someone or something, can practice their trade with no linguistic knowledge of any other language than the official language. But, depending on the circumstances, which again are crucial for this examination, it may be necessary to hire a tour guide who, if familiar with a language other than the official language, will be able to serve a clientele who speaks that language. This is true of all the examples I have just given and for many other analogous cases. This may then raise questions relating, for example, to the place of business, the make-up of the clientele, the frequency of contact, the appropriate level of knowledge, the importance of the service offered (based on the user's perception, considered objectively), the organization of the work and the reciprocal accommodations – all of which are basically questions of fact. This was the goal of the legislator. And the economic viability of such a job or position, even its very survival, may depend on such considerations.**

Subsequently, the Court reviewed the arbitrator's second and third assumptions,[13] and concluded that his interpretation of section 46 of the Charter was much too narrow. Indeed, to endorse such a reasoning would have the effect of rendering any evidence presented by an employer regarding the necessity of understanding and speaking another language illusory.

The Court of Appeal therefore allowed the appeal and authorized the Union to submit the grievance to another arbitrator.

Comments

This decision by the Court of Appeal clarifies the state of the law regarding knowledge of English as a requirement for employment. In addition, the Court also noted that any decision by an employer under section 46 of the Charter must be [translation] "based on a specific and well documented understanding of the actual constraints of the service being provided."[14]

In practice, a prudent and diligent employer should properly document the reasons why knowledge of a language other than French is a requirement for a position. For example, where the majority of an employer's clientele is English speaking and the employer believes that this justifies the hiring of an employee who also speaks English, they would be well advised to document the frequency of this employee's contact with said clientele as well as the desired level of knowledge of English.

As of the date of drafting of this article, the Union had not applied to the Supreme Court of Canada for leave to appeal this judgment. Lavery will follow the evolution of the law on this issue with interest and keep you informed of new developments.

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1. 2016 QCCA 1596.
2. RLRQ c. C-11.
3. *Syndicat des cols blancs de Gatineau inc. et Gatineau (Ville de) (grief syndical)*, (T.A., 2013-05-15), SOQUIJ AZ-51206332.
4. *Ibid.*, para. 29.
5. *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*, 2015 QCCS 3066.

6. *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*, 2015 QCCA 1485.
7. *Supra*, note 1, para. 41.
8. D.T.E. 2013T-818 (A.T.) (motion for judicial review dismissed, 2014 QCCS 2293; motion for leave to appeal denied, 2014 QCCA 1987). For a detailed summary of this decision, see our *Need to Know* newsletter dated January 18, 2016.
9. *Supra*, note 8, para. 36.
10. *Supra*, note 1, para. 31.
11. Namely, that the criterion of necessity is met in [translation] “all cases where proficiency in a language other than French is an integral part of the very essence of the position for which it is required, for example, the position of translator”.
12. *Supra*, note 1, para. 33.
13. The second assumption being that the criterion of necessity is met [translation] “when this condition is imposed by a law of public order, for example, section 15 of the *Act respecting health services and social services*”, and the third being that the criterion of necessity is met “where the lack of proficiency in a language other than French by the person holding the position would jeopardize the fundamental right guaranteed by section 1 of the *Charter of Human Rights and Freedoms*, which states that “Every human being has a right to life, and to personal security, inviolability and freedom.”
14. *Supra*, note 1, para. 25.