Hiring Process: Can Knowledge of a Language Other Than French Be Required by an Employer?

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In a decision rendered on September 16, 2024,[1] the Administrative Labour Tribunal (the "**ALT**") found that a company (the "**employer**") had violated the *Charter of the French language*[2] (the "**CFL**") by requiring knowledge of languages other than French as part of a hiring process. This is one of the first decisions ruling on the new complaint mechanisms introduced by Bill 96, *An Act respecting French, the official and common language of Québec*[3] ("**Bill 96**"), aimed at amending the CFL.

The Legislative Changes Made in 2022

On May 24, 2022, the Quebec government passed Bill 96, which received royal assent on June 1, 2022. This law made significant amendments to the CFL and other laws.

Even before the amendments introduced by Bill 96 were adopted, the CFL prohibited employers from requiring that a person have knowledge or a specific level of knowledge of a language other than French to keep or obtain a position, unless the nature of the duties required such knowledge. Bill 96 has clarified the scope of employer obligations in this respect. In particular, employers must have taken all reasonable means to avoid imposing such a requirement,[4] and, if they do impose it, they must indicate the reasons justifying this requirement in their job postings.[5] Bill 96 also made it possible for job applicants and employees to challenge employers' requirements respecting knowledge of a language other than French. The CFL now stipulates that if an employer does not meet the "necessity" conditions described below, requiring knowledge of a language other than French will be deemed a prohibited practice.

The notion of a complaint for “prohibited practice” already exists in the *Act respecting labour standards*,[6] notably in section 122. It enables employees to file a complaint if they believe they have been subjected to sanctions, discriminatory measures or reprisals for exercising a right provided under this law. The amendments introduced by Bill 96 have thus broadened the concept of prohibited practice to also include the exercise of certain language rights.

The CFL was further amended to allow employees to directly file a complaint with the Commission des normes, de l’équité, de la santé et de la sécurité du travail (the “**CNESST**”)[7] if they believe that an illegal requirement to know a language other than French is being imposed on them.

These are the issues addressed by the ALT in this decision.

The facts

On March 3, 2023, the complainant, Byung Chan Kim, filed a complaint for prohibited practice under the CFL. He believed that he was not granted a position posted by the defendant, the employer, because it required knowledge of a language other than French as part of a hiring process.

The complainant came across a job posting in the defendant’s procurement and logistics department, which it had published in January 2023. The posting appeared exclusively in Korean in an online newspaper aimed at the Korean community.

The complainant submitted his application in February along with his resume, which was written in French only. A representative of the defendant requested the complainant to provide an English version of the document, which the complainant provided. The complainant then participated in an interview, during which the defendant’s representative asked the complainant to speak in English and Korean because he did not understand French.

Since the complainant’s application was not selected, he filed a complaint for prohibited practice based on the provisions of the CFL.

Presumption of Prohibited Practice

Section 46 of the CFL prohibits an employer from requiring knowledge of a language other than French, except when such a requirement is necessary for the performance of duties. The provision reads, in part, as follows:

> 46. An employer is prohibited from requiring a person, in order for the person to be able to keep a position, or to obtain a position through, in particular, recruitment, hiring, transfer or promotion, to have knowledge or a specific level of knowledge of a language other than the official language, unless the nature of the duties requires such knowledge; even in the latter case, the employer shall first take all reasonable means to avoid imposing such a requirement.

[...]

The second paragraph of section 45 of the CFL equates the requirement for knowledge of a language other than French in the context of employment to a prohibited practice:

> 45. The fact that an employer requires a person to have knowledge or a specific level of knowledge of a language other than the official language to keep a position or to obtain a position, in particular through recruitment, hiring, transfer or promotion, is considered a prohibited practice under the first paragraph, unless the employer shows, in accordance with sections 46 and 46.1, that the performance of the duty requires such knowledge and that he first took all reasonable means to avoid imposing such a requirement.

Based on these provisions, the ALT confirmed that a person in a hiring process, and therefore not bound to the employer by an employment agreement, bears the burden of demonstrating that the following conditions exist to benefit from a presumption of prohibited practice. They must:[8]

apply to a position in response to a job posting by the employer;[9]
demonstrate that the employer requires knowledge, or a specific level of knowledge, of a language other than French to access the position;[10] and
file a complaint within 45 days after the occurrence of the practice complained of.[11]

The ALT concluded that the complainant did indeed prove that all the conditions to apply the legal presumption of prohibited practice were met, such that it is presumed that the language requirements associated with the employer's job posting violated the CFL. At that stage, it was a simple presumption.

The presumption in favor of the complainant places the burden of proof on the employer, requiring it to demonstrate why the language requirement associated with the position was necessary, and that all reasonable means were taken to avoid imposing it. In order to prove the second criterion, the employer must show that it conducted an analysis of reasonable means before imposing the language requirement, and that it had indicated the reasons justifying this requirement in the job posting.

Assessment of Language Requirements

The defendant argued that the requirement for knowledge of English and Korean is necessary because the position includes tasks such as acquiring equipment on the international market, and because the defendant's representative and employees communicate in Korean.

In its analysis of these arguments, the ALT reaffirmed that the legislator has provided that any law must be interpreted in a manner that promotes the use and protection of the French language.[12] Thus, the ALT emphasized that, to achieve the objectives of the law, a narrow interpretation must be made of the exceptions set out in the CFL, and that the criteria set out in sections 46 and 46.1 of the CFL are cumulative for each language requirement involving a language other than French. The ALT further noted that any decision to require knowledge of a language other than French to access a position must be based on a thorough and well-documented understanding of the actual constraints of the service in question.[13]

In this case, the ALT found that the defendant had failed to meet its burden of proof. First, the reasons justifying the English and Korean language requirements were not included in the job posting, an omission which in itself contravenes section 46 para. 2 of the CFL. Furthermore, the defendant failed to provide evidence regarding the nature of the positions already held within the company and the tasks associated with them, nor did it demonstrate the English language proficiency that was already required of employees. Lastly, according to the evidence, all employees in the company's supply and logistics department spoke Korean. However, the defendant failed to prove that it had ascertained, prior to publishing its job posting, that the knowledge of English and Korean already required of other employees was insufficient. It also failed to demonstrate that it had limited the number of positions involving tasks requiring knowledge of either of these languages to the greatest extent possible. As a result, the ALT concluded that the defendant had not taken all reasonable measures to avoid imposing these requirements and, therefore, did not succeed in rebutting the presumption of prohibited practice.

Limited Defence

The defendant claimed that it was not because the complainant had insufficient knowledge of languages other than French that he was not hired, but rather because he lacked the skills required for the position.

However, the ALT concluded that the CFL does not allow a defendant to raise an additional defence, such as having another just and sufficient cause that does not relate to the requirement for knowledge of a language other than French, to be used to avoid the application of the presumption.

Since the defendant failed to prove that the performance of the task required knowledge of a language other than French, and because it failed to previously take all reasonable measures to avoid imposing such a requirement, the simple presumption became an absolute presumption, and the defendant cannot counter it with any other defence.

Consequently, when a hiring process includes language requirements other than French and does not comply with the conditions of section 46.1 of the CFL, the process becomes irreparably tainted by an unlawful motive.

The ALT thus confirmed that the only way to rebut the presumption of section 45, paragraph 2, and section 46 of the CFL, is to demonstrate that the performance of the duties requires knowledge of a language other than French, and that the employer has preemptively taken all reasonable means to avoid imposing such a requirement.

The ALT therefore upheld the complainant's complaint and reserved its powers to determine the appropriate remedies.

Conclusion

This decision marked a significant turning point in the application of the CFL. The ALT emphasized the importance of complying with the new provisions introduced by Bill 96, which aims to strengthen the language rights of Quebec workers.

This decision serves as a reminder to employers of the obligation to clearly justify any language requirement and to demonstrate that they have taken all reasonable measures to avoid imposing conditions contrary to the CFL. Furthermore, this decision unequivocally rules out the possibility of defending against such a complaint with a defence based on the existence of another just and sufficient cause to justify the employer's decision.

It is crucial for businesses in Quebec to ensure compliance with these rules to prevent potential litigation, while respecting the fundamental right of workers to carry on their activities in French. Moreover, in light of this decision enforcing the prohibition on imposing language requirements under the amended CFL, it will also be pertinent to monitor how the ALT might eventually interpret the notion of "unreasonable reorganization" of a business. Indeed, the CFL stipulates that the first paragraph of section 46.1 must not be interpreted in a way that imposes on an employer an unreasonable reorganization of its business. Such an interpretation could provide employers with a way to avoid being bound by the conditions provided by the CFL. It will be important to closely follow any subsequent developments.

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1. ***Kim* c. *Ultium Cam***, 2024 QCTAT 3295.
2. CQLR, c. C-11.
3. SQ 2022, c. 14.
4. S. 46 para. 1 of the CFL.
5. S. 46 para. 2 of the CFL.
6. CQLR, c. N-1.1.
7. S. 47 of the CFL.
8. S. 47.2 para. 2 of the CFL, which refers to the *Labour Code*, CQLR, c. C-27, s. 17 with the necessary modifications.
9. S. 46 of the CFL.
10. S. 46 of the CFL.
11. S. 47 of the CFL.
12. *Interpretation Act*, CQLR, c. I-16, s. 40.3.
13. *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc*., 2016 QCCA 1596.