

Asking the Wrong Interview Questions Can Cost Employers

by J. Geoffrey Howard

Sometimes just asking the wrong question during a job interview is enough to trigger employer liability for discrimination, as the owner of the Quarterway Hotel recently learned to his cost. In the recent B.C. Human Rights Tribunal decision *McGregor v. Quarterway Hotel*, the Tribunal almost seems to have based its finding of discrimination on the “inappropriateness” of the questions asked, rather than on any conclusion about the employer’s discriminatory motives. The decision also illustrates how well-intended but poorly crafted employer communication to the wrong job applicant can embroil the employer in a lengthy legal proceeding.

In *McGregor*, the complainant, Carie McGregor, responded to a classified ad for a server at the Quarterway Hotel. According to McGregor, the first 3 questions at her interview with hotel owner Marty Morelli were about her age, her marital status and whether she had children. Morelli could not recall the specific interview with McGregor, but admitted asking such questions when interviewing. Although McGregor had previous experience as a waitress, she stated she was not even asked about her experience in food service. According to her, the interview came to an abrupt end after she gave her age and explained that she was a single mother.

Ironically, Morelli testified that he actually preferred employees with family responsibilities, who he had found over the years were more reliable than young single employees without children. He explained that far from excluding single parents from working at the hotel, he had hired and continued to employ single mothers. He added that the hotel was quite prepared to accommodate scheduling requests to meet parenting responsibilities for such employees.

The Tribunal held that asking an applicant’s age is generally “inappropriate”, unless related to a job requirement such as being old enough to serve alcohol or drive a car. As Morelli did not try to explain asking her age to determine whether McGregor was over 19, he could not

rely on this justification. Similarly, Morelli's questions about marital and parental status were held to be irrelevant, being unrelated to any job requirement.

The Tribunal's use of the term "inappropriate" is interesting, and presumably reflects the fact that the *Human Rights Code* does not explicitly ban such questions, only discrimination based on the information that would be received in response.

Although the Tribunal accepted Morelli's explanation that the questions were aimed at assessing the applicant's "reliability", the Tribunal also found that the "negative impression" of McGregor formed by Morelli in the brief interview was due, at least in part, to McGregor's negative reaction to the questions. The Tribunal concluded that the inappropriate questions and the answers given must have been at least "a factor" in the decision not to hire McGregor, which it concluded constituted unlawful discrimination.

This ruling is a curious one. It seems that the Tribunal was really saying that asking such irrelevant questions justifies a job applicant becoming upset. If the employer does not like the applicant's reaction and declines to hire the applicant, then the employer is guilty of discrimination, even though the employer did not decline to hire because of the information given, only the applicant's negative reaction to the questions. This is a very liberal interpretation of the *Code*, which, unlike the legislation of Ontario, does not explicitly ban asking for such information.

Employers sometimes ask whether they can ask questions directly relating to prohibited grounds such as age, family status, ethnic origin, handicap, criminal record, etc. in interviews or on job applications. The McGregor decision highlights the risks associated with asking them. Practically speaking, employers should be able to justify such questions as relating to a "bona fide occupational requirement" ("BFOR"). While a discussion of the legal requirements to establish a BFOR is beyond the scope of this article, an employer has the onus of proving the job requirement is one that has been set in good faith (i.e. not with the intention of excluding members of protected groups) and is objectively required to perform the job. For example, it is still permissible to ask a prospective bank teller about criminal convictions for fraud or similar offences.

As the Tribunal pointed out in the McGregor decision, employers can use other ways to obtain the information they really want about those hard to assess but critical character traits such

as “reliability”, “honesty” or the ability to “get along with others” in job applicants. A direct approach can work for some characteristics. Instead of asking about age, marital status or ethnic background and then making assumptions about how they gauge reliability based on stereotypes or past experience, why not ask about the applicant’s past attendance record or any restrictions on the applicant’s availability for work. Many employers use “behavioural interviewing” questions about how the applicant has dealt with common workplace situations to try to assess how applicants will perform on the job. Of course, good old-fashioned reference checking can provide further valuable information. Consider going beyond the references provided and checking with people familiar with the applicant’s work history but not nominated by the applicant. However, in the new era of privacy rights, employers will need proof of the applicant’s consent to such enquiries.