
HUMAN RIGHTS TRIBUNAL AWARDS \$75,000 IN DAMAGES TO UNPAID INTERN

*By Barry W. Kwasniewski **

A. INTRODUCTION

On February 26, 2018, the Human Rights Tribunal of Ontario (“HRTO”) released its decision in *G.M. v X Tattoo Parlour*.¹ The applicant was an unpaid intern/volunteer (the “Applicant”), who alleged discrimination with respect to employment because of sex, sexual harassment, sexual solicitation or advances, gender identity and age, contrary to the Ontario *Human Rights Code* (the “Code”).² The discrimination was alleged to have occurred when the Applicant was a 15-year-old high school student. In its decision, the HRTO ordered the business and its owner (the “Respondent”), to pay the Applicant “the sum of \$75,000.00 as monetary compensation for injury to dignity, feelings and self-respect.”³ This decision is relevant to Ontario charities and not-for-profits, as it indicates that an employment relationship for purposes of the Code may be found to exist even in situations that would otherwise not be thought of as employment, such as with unpaid interns or volunteers. Consequently, unlawful discriminatory conduct contrary to the Code may give rise to substantial potential liability to volunteers and interns.⁴

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters’ Ottawa office. The author would like to thank Luis Chacin, LL.B., M.B.A., LL.M., Student-at-Law, for his assistance in preparing this Bulletin.

¹ 2018 HRTO 201.

² RSO 1990, c H.19.

³ *Supra* note 1 at para 67.

⁴ For a discussion on the legalities of unpaid internships pursuant to the Ontario *Employment Standards Act, 2000*, SO 2000, c 41, see Barry W Kwasniewski, “Unpaid Internships Under Ontario Ministry of Labour Scrutiny”, *Charity & NFP Law Bulletin* No. 339 (29 April 2014), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2014/chylb339.pdf>>.

B. BACKGROUND

During the summer of 2014, the Applicant volunteered to work at the tattoo parlour of the Respondent for several hours every week. The Applicant had shown interest in becoming a tattoo artist and the families of both the Respondent and the Applicant were close friends. As a volunteer, the Applicant would set up the equipment and complete some clerical tasks, including control of the music at the shop. This was also how the Applicant hoped to earn her mandatory volunteer hours for high school.⁵

In separate criminal proceedings, the Respondent pled guilty to criminal charges of sexual assault, invitation to sexual touching and sexual interference against the Applicant,⁶ and was sentenced to 9 months in prison, a subsequent period of probation and other conditions.⁷ In this regard, at the Applicant's request, the HRTO adopted the findings of fact from the criminal proceedings.⁸ In light of the *Criminal Code* publication ban on the identities of the parties, the HRTO anonymized its decision by using only their initials. Accordingly, both parties agreed that the only issue before the HRTO was the remedy for breaches of the Code.

C. POSITION OF THE PARTIES

The HRTO recognized that both parties were in agreement regarding the characterization of the Applicant's unpaid internship as "employment" for the purposes of section 5 of the Code, which provides:

Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

In the Applicant's submissions regarding the appropriate remedy, she indicated that the experience had had a negative effect on her life, causing her to fall behind in her studies, changed her aspired career path as a tattoo artist, affected her personal and professional relationships, and led to high levels of anxiety and

⁵ *Ibid* at paras 10-13.

⁶ *Ibid* at para 15.

⁷ *Ibid* at paras 27 and 38.

⁸ *Ibid* at paras 15-19.

emotional instability.⁹ Taking the position that she should be awarded substantial damages, the Applicant cited several decisions involving sexual harassment and sexual assault in the workplace in which the HRTO awarded compensation for injury to dignity, feelings and self-respect.¹⁰ The Applicant also requested the HRTO to order the Respondent to undergo training in human rights and sexual harassment in the workplace.¹¹

The Respondent accepted all the facts based on transcripts of the criminal proceedings, but argued that the remedy should not be punitive, taking into account he was already subject to a criminal conviction, and that the cases cited by the Applicant were not comparable, as the actions of the offenders in those cases were more egregious than the Respondent's. The Respondent cited other cases of sexual harassment in which lower compensation was ordered, and further stated that since the business was gone, training regarding sexual harassment in the workplace would be unnecessary.¹²

D. ANALYSIS BY THE HRTO

The HRTO reviewed the relevant factors in exercising its remedial authority under section 45.2 of the Code, which allows the HRTO to make an order, upon a determination that a party has infringed a right of another party under Part I of the Code, for the infringing party to provide monetary compensation, restitution other than monetary compensation, or to do anything else that, in its opinion, a party ought to do to promote compliance with the Code. Relevant factors considered included the humiliation experienced by the Applicant, her hurt feelings, loss of self-respect, dignity, self-esteem, confidence, the experience of victimization, her vulnerability, as well as the seriousness, frequency and duration of the offensive treatment.¹³ Moreover, referring to the decision of the Divisional Court in *ADGA Group Consultants Inc. v. Lane* (2008),¹⁴ the HRTO held that the compensation award cannot be set so low as to trivialize the social importance of the Code.¹⁵

The HRTO further referred to previous decisions in which it was determined that compensation should be at the high end of the relevant range when the applicant has experienced emotional difficulties as a result

⁹ *Ibid* at paras 19-24.

¹⁰ *Ibid* at paras 31-37.

¹¹ *Ibid* at paras 28-30.

¹² *Ibid* at paras 44-45.

¹³ *Ibid* at para 48.

¹⁴ 2008 CanLII 39605 (ON SCDC).

¹⁵ *Supra* note 1, at para 49.

of the event. Particular attention was given to the highest compensation ever awarded by the HRTO for injury to dignity, feelings and self-respect, the case of *A.B. v Joe Singer Shoes* (2018),¹⁶ in which the HRTO ordered the respondents to pay \$200,000.00.¹⁷

Finally, the HRTO held that the Respondent breached sections 5(1), 7(2) and (3) of the Code,¹⁸ and ordered him to pay \$75,000.00 to the Applicant as compensation for injury to dignity, feelings and self-respect.¹⁹ Also, being that the Respondent was a “directing mind” of the business, the HRTO found the corporate entity jointly and severally liable with the Respondent.²⁰ Regarding the Applicant’s request for an order that the Respondent take human rights training, the HRTO found that, according to the pre-sentencing report following the criminal proceedings, the Respondent participated and is expected to continue in counselling but, as he no longer works in the business, training on sexual harassment would not serve any public interest.²¹

E. CONCLUSION

This decision is relevant to charities and not-for-profits as it demonstrates that volunteers and unpaid interns can be deemed to be in an employment relationship for purposes of the Code, and demonstrates the HRTO’s willingness to award significant damages where appropriate. Charities and not-for-profits should therefore be aware that their scope of liability for conduct in violation of the Code can extend beyond “traditional” employees to volunteers and unpaid interns as well.

¹⁶ 2018 HRTO 107.

¹⁷ *Supra* note 1, at paras 51-52.

¹⁸ *Ibid* at para 53.

¹⁹ *Ibid* at para 59.

²⁰ *Ibid* at para 60.

²¹ *Ibid* at para 66.