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## TRIBUNAL AWARDS CONSIDERABLE DAMAGES FOR DISCRIMINATORY HIRING PRACTICE

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*By Barry W. Kwasniewski\**

### A. INTRODUCTION

On August 23, 2019, the Human Rights Tribunal of Ontario (“HRTO”) released its Decision on Remedy in *Haseeb v Imperial Oil Limited* (“Decision on Remedy”)<sup>1</sup> awarding damages to be paid by Imperial Oil Limited (“Imperial Oil”), in the amount of over \$120,000, as a result of discrimination in its hiring practices on the protected ground of “citizenship” in the Ontario *Human Rights Code* (the “Code”).<sup>2</sup> As was previously discussed in *Charity & NFP Law Bulletin* No. 430,<sup>3</sup> the HRTO released its interim decision for this case on the issue of liability (“Decision on Liability”)<sup>4</sup> on July 20, 2018, holding that Imperial Oil’s policy that required entry-level job applicants to disclose proof of their eligibility to work in Canada on a permanent basis was discriminatory on the ground of citizenship. In doing so, the HRTO adopted a novel approach by conducting a “detailed analysis of this ground in the *Code* and its relationship to various subgroups of non-citizens.”<sup>5</sup>

Following this, Imperial Oil filed a Request for Reconsideration, which was denied on February 14, 2019.<sup>6</sup> The HRTO ordered that the parties proceed with the hearing on remedial issues, which assessed the

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<sup>1</sup> 2019 HRTO 1174.

<sup>2</sup> RSO 1990, c H.19.

<sup>3</sup> Barry W. Kwasniewski, “Tribunal Rules that Eligibility to Work Permanently in Canada is Discriminatory” (27 September 2018) *Charity & NFP Bulletin* No. 430, online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2018/chylb430.pdf>>.

<sup>4</sup> 2018 HRTO 957.

<sup>5</sup> *Ibid* at para 102.

<sup>6</sup> 2019 HRTO 271.

damages that were awarded against Imperial Oil. This *Charity & NFP Law Bulletin* summarizes the Decision on Remedy.

## B. RELEVANT FACTS

Muhammad Haseeb (“Haseeb”), an international university student, had applied for an entry-level, full-time permanent position with Imperial Oil, which was advertised with the requirement for the applicant to be able to work in Canada on a permanent basis (“Requirement”). Despite being aware of this Requirement and only being eligible to work in Canada for a period of three years on a post-graduation work permit, Haseeb misrepresented to Imperial Oil in several instances that he met the Requirement and was eligible to work in Canada on a permanent basis. However, a month after being extended a job offer, when Haseeb was unable to prove his eligibility to work in Canada on a permanent basis, Imperial Oil rescinded the offer. Following this, Haseeb filed an application under section 34 of the *Code* and the HRTO, in its Decision on Liability, ruled that the “permanence factor” in Imperial Oil’s Requirement was contrary to subsection 5(1) of the *Code* for being discriminatory on the protected ground of citizenship, in addition to its company policy on requiring the applicant to disclose whether he or she was a permanent resident or citizen of Canada was also prohibited conduct, pursuant to subsections 5(1), 23(1) and (2) of the *Code*.<sup>7</sup>

On the hearing for remedial order, Imperial Oil argued that, regardless of the HRTO’s finding in the Decision on Liability that Haseeb was not hired due to his citizenship status, Haseeb would not have been hired in any event because of his dishonesty that he was eligible to work in Canada on a permanent basis. There was evidence presented that Haseeb had misrepresented to Imperial Oil that he was eligible to work in Canada on a permanent basis, and had received his permanent resident status. However, when asked to provide proof regarding the permanence factor after a job offer had been extended to him, Haseeb informed Imperial Oil that “he ‘came across’ the clause in the job offer stating that he has to be permanently eligible to work in Canada” and explained that “he initially would need to work on a post-graduate work permit for three years, during which he expected that he would obtain his permanent resident status. He further confirmed that he intended to work and settle in Canada on a permanent basis.”<sup>8</sup> Following this, Imperial Oil rescinded the offer which was communicated to Haseeb in a letter that, while

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<sup>7</sup> For further details on the facts and HRTO’s analysis on finding liability, see *Charity & NFP Bulletin* No. 430, *supra* note 3.

<sup>8</sup> Decision on Remedy, *supra* note 1 at para 19.

not making any mention of the reason behind the rescission being Haseeb's dishonesty, Imperial Oil claimed was "simply a form letter sent to candidates who are unable to provide proof of their eligibility to work in Canada on a permanent basis."<sup>9</sup> Haseeb took the position that "he needed to adopt the 'ruse' of claiming that he was eligible to work in Canada on a permanent basis in order to have the opportunity to 'sell' himself to the company on the basis of his true qualifications, abilities and experience, and then later educate the company about his route to permanent resident status."<sup>10</sup>

Haseeb had conducted an extensive job search in his final year of university and had received two other job offers, in addition to the offer from Imperial Oil. Another company, Accenture, had made a job offer in December 2014, which was subsequently rescinded in January 2015. Haseeb then accepted another job offer with the Deloitte firm in January 2015, in a non-engineering position. Haseeb was able to obtain his permanent resident status while working at Deloitte, but eventually resigned from that firm after having worked there for approximately three years. As discussed below, Imperial Oil raised the other rescinded job offer and the employment with Deloitte as relevant to issues of damages and mitigation.

## C. ANALYSIS

In its Decision on Remedy, the HRTO awarded a substantial amount of damages, totaling over \$120,000 in favor of Haseeb, which included compensation for lost income and general damages, as follows:

- a. The respondent shall pay to the applicant the sum of \$101,363.16 as monetary compensation for lost income, subject to applicable statutory deductions;
- b. The respondent shall pay to the applicant the sum of \$15,000.00 without deduction as monetary compensation for injury to dignity, feelings and self-respect;
- c. The respondent shall pay to the applicant the further sum of \$3,997.54 as pre-judgment interest on the foregoing amounts; and
- d. Post-judgment interest shall accrue on all amounts unpaid by 30 days from the date of this Decision on Remedy at the rate of 3% per annum.<sup>11</sup>

In coming to this conclusion, the HRTO first conducted an in-depth analysis on the relevance and effect of Haseeb's dishonest conduct in determining the quantum of the monetary compensation. While the

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<sup>9</sup> *Ibid* at para 21.

<sup>10</sup> *Ibid* at para 24.

<sup>11</sup> *Ibid* at para 124.

relevance of the applicant's dishonest conduct in finding liability was not up for review, the HRTO nonetheless considered the dishonesty issue as being relevant to "applying the general remedial principle that the applicant should be put in the position that he would have been in but for the violation(s) of his rights under the *Code*."<sup>12</sup>

Based on the evidence, the HRTO found that Haseeb correctly feared that if he had been truthful about not being able to work in Canada on a permanent basis, he would have been screened out or found ineligible for the position. After addressing the relevant case law on the issue of dishonesty, the HRTO held that "the respondent is not entitled to rely on his dishonesty in response to an impermissible question as an 'independent basis' to support its decision not to hire the applicant."<sup>13</sup> Further, the HRTO found that "but for the discriminatory act of considering his permanent eligibility to work in Canada as a factor in its decision not to hire him . . . the applicant would have been hired based on his top ranking in the competition and the offer of employment that was actually made to him."<sup>14</sup> In doing so, the HRTO also clarified that the intention behind such a conclusion was "not to excuse or condone dishonesty, or to suggest that an employer cannot terminate a person's employment or refuse to hire a person due to dishonesty. Obviously, if a person's dishonesty is unrelated to a *Code*-protected ground, then it is not this Tribunal's proper role or jurisdiction to address a decision made by an employer due to any such dishonesty. Rather, this Decision is restricted to a person's dishonesty solely in response to questions asked during a hiring process that are themselves found to be in violation of the *Code*."<sup>15</sup> Thus, given that it was not Haseeb's dishonest conduct but rather Imperial Oil's discriminatory Requirement that caused the rescission of the offer, the HRTO used this as the basis for determining the granting of monetary compensation for lost income and damages.

In considering the period for which compensation for lost income should be awarded, the HRTO reasoned that unlike wrongful dismissal cases where the award for lost income is limited to a period of reasonable notice; in human rights cases, this award "extends over such period of time as is required to restore an applicant to the position they would have been in but for the discrimination."<sup>16</sup> As such, this period began when Haseeb would have commenced employment with Imperial Oil and ended on the date of his resignation from his employment with Deloitte, less the 10 months period during which Haseeb took a

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<sup>12</sup> *Ibid* at para 10.

<sup>13</sup> *Ibid* at para 67.

<sup>14</sup> *Ibid* at para 36.

<sup>15</sup> *Ibid* at para 49.

<sup>16</sup> *Ibid* at para 89.

voluntary leave of absence. The HRTO also held that Haseeb had tried to mitigate his losses by trying to pursue other opportunities, albeit unsuccessfully, both before accepting employment at Deloitte and also while he was employed there. Further, in response to Imperial Oil's argument that Haseeb did not mitigate his losses by not pursuing litigation against Accenture for their rescission of a job offer to him, the HRTO stated that "it is not reasonable to expect the applicant to have pursued litigation against Accenture in order to reduce his claim against the respondent."<sup>17</sup> Finally on the issue of the quantum of compensation for lost income, the HRTO, for the most part, accepted Haseeb's calculation for the average annual salary that he would have received by Imperial Oil, less what he was actually paid at his employment at Deloitte.

Next on the issue of damages for injury to dignity, feelings and self-respect, the HRTO stated the following:

The Tribunal's decisions primarily apply two criteria in evaluating the appropriate award of damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct; and the effect on the particular applicant who experienced discrimination. The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.<sup>18</sup>

On the first part of the criteria, the HRTO concluded that this was objectively serious discriminatory conduct because Haseeb was denied employment at the very start of his career. On the second part, the HRTO stated that medical evidence to support significant health impact is not required for the subjective component to make an award for compensation and noted that "the objective facts are that the applicant was a young man at the very start of his career who had aspirations to work as an engineer in the oil and gas sector, and these dreams were effectively taken away from him. I also note the applicant's particular vulnerability as an immigrant to Canada with uncertainty as to his status at the relevant time."<sup>19</sup> Further, being consistent with awards in similar cases, the HRTO awarded \$15,000 as compensation for injury to dignity, feelings and self-respect, while also noting that a higher award might have been warranted for the loss of the engineering position. Notwithstanding the finding that Haseeb's dishonesty would not have

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<sup>17</sup> *Ibid* at para 82.

<sup>18</sup> *Ibid* at para 108.

<sup>19</sup> *Ibid* at para 110.

occurred but for Imperial Oil's Requirement, "the applicant's conduct contributed at least in some measure to the impacts that he described in his testimony, particularly in relation to his reputation being put on the line as a consequence of the human rights application and being called a liar in the media"<sup>20</sup> and as such, the HRTO's amount awarded was limited to \$15,000 in this instance.

Lastly, the HRTO did not award any public interest remedies because following the Decision on Liability, Imperial Oil had revised its policies and procedures and had removed the Requirement, making an order for public interest remedy unnecessary.

## D. CONCLUSION

This case is important for employers, including charities and not-for-profits, as they will want to avoid engaging in any discriminatory hiring practices. Employers must also be mindful of the questions being asked of the applicants during the hiring process. Compliance with the *Code* is essential and employers should take note to review their company policies and procedures for hiring in order to ensure that the organization is not engaging any discriminatory practices, even if unintentionally. This case shows that violation of the provisions of the *Code* can come with a hefty price for an employer.

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<sup>20</sup> *Ibid* at para 115.