HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Davut Yildiz

Applicant

-and-

M.A.G. Lighting and Mustafa Goren

Respondents

DECISION

Adjudicator:	Andrew M. Diamond
Date:	November 29, 2012
File Number:	2010-06719-I
Citation:	2012HRTO 2232
Indexed as:	**Yildizv. M.A.G. Lighting**

APPEARANCES

Davut Yildiz, Applicant	)))	Dennis Robideau,Representative
M.A.G. Lighting and Mustafa Goren, Respondents	))	Erin Hallock, Counsel

INTRODUCTION

[1]This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employmentbecause of ethnic origin and place of origin.Specifically the applicant alleges that he was hired by the corporate respondent as an electrician, but when the principal of the corporate respondent, the individual respondent Mustafa Goren, who is Turkish, discovered that the applicant was Kurdish, the applicant's employment was terminated.

[2]The respondents claim that the applicant was never an employee of the corporate respondent, but instead was engaged for a one-daytryout to see if he had the skills necessary to be employed. The respondents submit that after the one-day tryout the respondents determined that the applicant did not have the necessary skills and as a result he was not offered a position.

*[3]*For the reasons set out below I find that the decision not to employ the applicant was not based on a prohibited ground. However, during the tryout the applicant was subject to an oral enquiry that contravened section 23(2) of the *Code.*

EVIDENCE AND FINDINGS

[4]The Tribunal had the benefit of testimony from the applicant; the individual respondentMustafa Goren, who is also the General Manager of the corporate respondent;Mr. Denis Felix, M.A.G. Lighting's foreman; and Mr. Pinarabasi, the past president of the Toronto Kurdish Community Centre.

[5]The applicant is a licenced electrician. He is 46 years of age and self identifies as being Kurdish. M.A.G. Lighting ("M.A.G." or the corporate respondent") is a small family-owned and run electrical contractor with five to eight employees.

[6]In August of 2010 M.A.G. was looking to hire a new electrician and the applicant was looking for a new position. The individual respondent gave evidence that he advertised the position on Kijiji and that the applicant, along with another individual, responded. The applicant's evidence is that a friend gave him the individual respondent's phone number and that he telephoned the individual respondent on or about August 11, 2010 to make enquiries. Both the applicant and the individual respondent agree that they did have a telephone conversation on August 11, 2010, and that this telephone call was in Turkish. On direct examination the individual respondent was asked if he could discern whether or not the applicant had any particular accent while speaking Turkish. Mr. Goren's evidence was that the applicant sounded like he was from eastern Turkey but he did not ask him about this at this time.

[7]Both parties agree that during that conversation the individual respondent asked the applicant how much he was paid in his last job. Both parties also agree that the individual respondent asked the applicant if he was available the next day and then gave him the address of a job site to report to. The applicant's evidence was that he believed he had been hired to start a new job with M.A.G. Lighting the next day. The respondents dispute this and it was their evidence that it is the practice in the industry and certainly it is M.A.G.'s practice that when it needs to hire a new employee two or three candidates are given tryouts for a period of time from as short as a day to several days before deciding which candidate to hire. The individual respondent testified that at the same time that he was trying out the applicant he was also trying out another candidate on another job site.

[8]The parties all agree that the applicant reported to the assigned job site on August 12, 2010, and was given instructions by the foreman, Mr. Felix, on the work the applicant was to do, which included the removal of old electrical components and the installation of pot lights in a bathroom.

[9] An hour or so after the applicant started work the individual respondent attended at the job site and introduced himself to the applicant. During their conversation both parties agree that the individual respondent, Mustafa Goren, asked the applicant where

he was from and that the applicant answered that he was from Kayseri, a city in central Turkey; the parties disagree on what Mr. Goren said next. It is the applicant's evidence that when he advised Mr. Goren that he was from Kayseri,Mr. Goren said, "you do not look like you are from Kayseri, you look like an easterner". Mr. Goren's evidence is that he told the applicant that the applicant "did not sound like he was from Kayseri". In any event, the parties agree that there was a conversation where the individual respondent asked the applicant where he was from and the applicant answered Kayseri and the individual respondent expressed an opinion that either the applicant did not look like or, in the alternative, did not sound like he was from that part of Turkey.

[10]The significance of where in Turkey the applicant is from is that Turkey is ethnically divided, with the Kurdish population living primarily in eastern Turkey and the ethnically Turkish population livingin the west and north of the country. Kayseri is in central Turkey and has a mixed Turkish and Kurdish population. The applicant's evidence is that he deliberately picked Kayseri so that his Kurdish ethnicity would not be so obvious to the individual respondent as he was fearful that if it was discovered he was Kurdish he might be discriminated against, as was his experience in Turkey.

[11]The individual respondent testified that in asking where the applicant was from he was using appropriate Turkish social norms and he did not ask the question for any improper purpose. The respondents drew the Tribunal's attention to the fact that M.A.G. employs individuals from many different ethnic backgrounds, including at least one Kurdish employee.

[12]All parties agree that after the day's work the applicant contacted the individual respondent and asked where he should report to work the next day and that the individual respondent advised him that he would not be hired by M.A.G. The individual respondent's evidence is that he advised the applicant that he believed the applicant did not have the skills that M.A.G. was looking for.

[13] The applicant testified that when he was asked by the individual respondent where he was from and then was challenged on his answer, his dignity and self-respect were

injured as he clearly understood the individual respondent was suggesting that the applicant was Kurdish and that saying someone is from the east is code in Turkey for being Kurdish. The applicant testified that he believes the reason he was not hired was that the respondents discriminated against him because of his ethnic origin and place of origin.

[14]Mr. Dennis Felix has been employed by M.A.G. since 2005 and at the relevant time he was the foreman. I found Mr. Felix's evidence to be direct and credibleand it was essentially unchallenged by the applicant. Mr. Felix testified that it was M.A.G.'s regular practice to try out people for an opening and that on August 12, 2010, M.A.G. was assessing two candidates for one position. Mr. Felix testified that as foreman it was his job to assign and supervise the work being done by the job candidates and that it was Mr. Goren's regular practice after the tryout to ask Mr. Felix which candidate M.A.G. should hire. Mr. Felix testified that after having observed both the applicant and the other candidate do work of a similar difficulty level, he was satisfied that while the other candidate did not have as much experience as the applicant he was the better candidate for M.A.G. as he worked more quickly than the applicant and took instruction well. Both Mr. Goren and Mr. Felix testified that speed of work is a critical element for M.A.G. to maximize its profits on a job.When asked by the individual respondent which candidate M.A.G. should hire, Mr. Felix recommended the other candidate. The evidence is that that person was hired and is still employed by M.A.G. Mr. Felix testified that this is Mr. Goren's regular practice and that the individual respondent follows Mr. Felix's recommendations 98 percent of the time.

[15]I am satisfied that it was M.A.G's normal practice to tryout potential employees and that the decision not to hire the applicant was made by Mr. Felix based on the two candidates' job performance, and not because of a prohibited ground under the *Code*.

LAW AND ANALYSIS

[16]Despite my conclusion that the decision not to hire the applicant was not based on a prohibited ground, sections 5 and 23(2) of the *Code* prohibit asking a job candidate a

question that would elicit information about a prohibited ground. Specifically, section 23(2) of the *Code* states:

> The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

[17]The respondents make three arguments in support of their position that they did not violate section 23(2) of the *Code*. The respondents'first argument is that the conversation did not take place during the critical portion of the hiring decision; second,the respondents submit that asking where one is from does not directly or indirectly classify or indicate a qualification by a prohibited ground; and third, even if it does, under their analysis the respondentshavethe ability to provide evidence of a non-discriminatory explanation as a complete defense. I will deal with each of these arguments in turn.

[18]I find that it is inconsistent for the respondents to argue on one hand that the applicant was in the middle of a tryout, the result of which may or may not lead to his being employed, but on the other hand argue that during this period when the applicant had not yet been hired, he is not a job "applicant". He either is an employee and his employment was terminated or, as the respondents have argued and I have found, the applicant was a candidate for a position who was being vetted for the job. I find that on August 12, 2010,the applicant was on a tryout and as such he was still a job applicant as contemplated by section 23(2) of the *Code.*

[19]The respondents' second argument is that the question "where are you from" does not "directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination". Frankly, I cannot think of a clearer question that would elicit the applicant's place of origin than"where are you from," even without the cultural overlay of ethnically-divided Turkey.By directly soliciting information with respect to the applicant's place of origin, the respondent made an oral inquiry that had the effect of classifying the applicant on the basis of a prohibited ground.This is not, for example, a case in which

information about prohibited grounds was incidentally obtained in the course of soliciting or obtaining non-*Code* related information and where there might be an argument that classification on a prohibited *Code* ground did not occur.

*[20]*In advancing their third argument, counsel for the respondents took me to a line of cases which hold that section 23(2) of the *Code* is an explanatory section that expands section 5 and as a result the respondent may successfully defend an application by providing a non-discriminatory explanation for asking the question.While I agree there is such a line of cases, there is another line of cases including *Lannin v. Ontario (Ministry of the Solicitor General)* (1993), 26 CHRR D/58 (Ont. Bd. Of Inquiry) ("*Lannin*") and*Shaw v. Ottawa (City),* 2012 HRTO 593, which suggest a different interpretation of the relationship between section 5 and section 23(2). These casessuggest thatsection 5 is violated by the making of the inquiry, despite the intention or result of the inquiry, by reason of section 23(2) of the *Code.* See, for example, *Lannin* at para. 55:

> It is important to note … that for s. 23(2) to be violated, there need not be any intention to discriminate, nor is there any requirement that the information obtained by the improper questions result in actual discrimination.

[21]Ultimately, the effect of section 23(2) is a question of statutory interpretation. While it may be helpful to refer to particular rules of statutory interpretation, the fundamental principle in interpreting any statute, including the *Code*, is to take a purposive and contextual approach. Statutes are interpreted in "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1; *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Ontario Human Rights Commission v. Christian Horizons,* 2010 ONSC 2105 at para. 42. In applying this principle in the context of the *Code*, rights are to be interpreted broadly and exceptions narrowly.

[22]Having regard to the interpretive principles above, I cannot accept the interpretation of the relationship between section 23(2) and section 5 urged on me by the respondent.

Reading section 23(2) in its ordinary, grammatical sense, it is directory; it states that the "right under section 5to equal treatment with respect to employment *is infringed* where… [emphasis added]". By contrast section 5 provides a more general right to equal treatment without discrimination. Moreover, the construction of section 23 as a whole is both more specific and more directory than the general prohibitions on employment related discrimination found in section 5. It is difficult to discern why the legislature would enact directory provisions under section 23 in relation to specific types of conduct, which would otherwise potentially be captured under the general provisions of section 5, unless it was intended that the conduct in section 23 be treated uniquely. Additionally, section 23(3) does provide an explicit exception to the operation of section 23(2). Section 23(3) allows the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such grounds is permitted under the *Code*. This has been found to encompass the asking of questions relating to the essential duties of a position and presumably encompasses the exemptions under section 24, including the exemption allowing discrimination in employment for reasons set out under section 24(b) in relation to reasonable and *bona fide* qualifications. See for example *Visic v. Elia Associates Professional Corporation*, 2011 HRTO 1230, and *Kolev v. McDonnell Douglas Canada Ltd.* (1992), 18 C.H.R.R. D/213 (Ont. Bd. Inq.).

[23]A prohibition against asking candidates for employment questions that would elicit information about prohibited grounds has been a fundamental part of the law of Ontario since at least its inclusion in *The Fair Employment Practices Act, 1951*, S.O. 1951, c. 24. In most hiring circumstances more candidates will be unsuccessful than successful in obtaining the position. Those who are not hired will rarely have an opportunity to discover why it was they were unsuccessful; however, they should be able to take comfort in the fact that the law of the Province of Ontario contains protections to help ensure that hiring decisions are not made based in anyway on prohibited grounds. By preventing prospective employers from asking any questions that "directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination", regardless of the motivation for the asking of the question by the employer, all job candidates will

have some degree of comfort that an employer's decision to hire was based on merit and not prejudice.

[24]ThereforeI agree with the line of cases that include *Lannin* and *Shaw*, which hold the asking of a question that "directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination"establishes an infringement of the *Code* under section 5,regardless of why the question was asked, except to the extent that section 23(3) applies.

DECISION

*[25]*The fact that Mr. Goren asked the applicant where he was from is a violation of section 5 by virtue of section 23(2) of the *Code.* While the respondents offered no direction submissions with respect to section 23(3), to the extent that they argued that there was a "non-discriminatory explanation" for the question I have no basis to conclude that such an explanation would have fallen with the scope of section 23(3). In particular, there was no suggestion that the question was related to *bona fide* qualifications or the essential duties of the position. I find both the individual and organizational respondent are liable for the infringement; Mr. Goren based on my findings above with respect to his conduct and the organizational respondent by virtue of section 46.3(1) of the *Code*.

REMEDY

[26]The Tribunal has long recognized that in addition to specific and calculable special damages it is appropriate to award general damages where the conduct of the respondents has resulted in an injury to the applicant's self-respect or loss of dignity of the applicant, see for example *Arunachalam v. Best Buy Canada,*2010 HRTO 1880 at paragraphs 46 to 54. The applicant was very clear in his evidence that he honestly believed that the decision not to hire him was made by Mr. Goren, who is Turkish, because the applicant was Kurdish. The applicant further testified, as set out above, that he had suffered from ethnic discrimination while in Turkey and as a new Canadian

was deeply upset that he would be the subject of the same discrimination in Canada, a country that has a reputation for equality. The applicant testified that he was deeply upset and his self-respect was injured. Based on the evidence I am satisfied that as a person of Kurdish origin, the applicant's dignity and self-respect was injured by such an enquiry made by a prospective employer who self-identifies as being Turkish. This injury is made worse in the circumstances of this case where the decision not to hire the applicant was made after the question was asked and he had worked for a day, whether as a tryout or not.

[27]In determining the appropriate compensation for damage to dignity, self-respect and feelings the Tribunal looks at a number of factors, including the impact the breach of the *Code* had on the applicant. The applicant testified that unfortunately he was used to such treatment and while he was very upset he was able to continue to search for work and went out and found himself another job within days of the incident. I compare this to cases where the breach of the *Code* results in applicants being unable to get on with their lives and results in medically-diagnosed depression and anxiety.

ORDER

[28]The Application as against M.A.G. Lighting and Mustafa Goren is allowed in part, based on my findings, above, in relation to a breach of section 23(2) of the *Code*. The Tribunal orders as follows:

> M.A.G. Lighting and Mustafa Goren shall pay the applicant the sum of $1,500 together with pre-judgment interest calculated in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Post-judgment interest shall be payable commencing 10 days from the date of this Decision.

Dated at Toronto, this 29th day of November, 2012.

"Signed by"

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Andrew M. Diamond

Member