HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

LINA ROCHA

Applicant

-and-

PARDONS AND WAIVERS OF CANADA, A DIVISION OF 1339835 ONTARIO LIMITED

Respondent

DECISION

Adjudicator: Judith Keene

Date: November 29, 2012

File Number: 2011-09370-I

Citation: 2012HRTO2234

Indexed as: **Rochav.Pardons and Waivers of Canada**

WRITTEN SUBMISSIONS

Lina Rocha, Applicant	)	Self-represented

INTRODUCTION

[1]This is a decision in respect of an Application filed on July 13, 2011,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 age.

[2]On October 25, 2011, the Tribunal issued a Notice of Application ("Notice") to the respondent in which it directed the respondent that a Response to the Application must be filed with the Tribunal not later than November 29, 2011. The Tribunal received a letter on letterhead bearing the name of the respondent on November 21, 2011.The letter indicated that "We have no knowledge of the person, Lina Rocha." It further stated: "We did not place an ad on kajiji [sic] as alleged and no person under our employment did so or spoke with Lina Rocha." The letter stated "I am redirecting this complaint file to OT Financial Consulting Corp", although this entity was not named in the Application and the respondent failed to explain why this entity might have an interest in this proceeding. The letter was unsigned. The letterhead gave an address and the information that "Pardons and Waivers Canada is a division of 1339835 Ontario Limited".

[3]The Tribunal responded to this letter on November 25, 2011, indicating that a complete response was required. The respondent sent one further letter saying that "MsHassen (sic) is not associated with Pardons and Waivers of Canada" and saying that it had "no intention of forwarding this recent letter of yours to OT Financial Consulting Corp." Again this letter was unsigned.

[4]On March 27, 2012, the Tribunal issued a Case Assessment Direction ("CAD") regarding the respondent's failure to file a Response to the Application. The CAD was delivered to the respondent by courier and email.

[5]The CAD noted that, in the circumstances where a respondent has failed to respond to an Application, the Tribunal may deem the respondent to have accepted all of the allegations in the Application and proceed to deal with the Application without further notice to the respondent. The respondent's attention was drawn to Rule 5.5 of the Tribunal's Rules of Procedure ("Rules").

[6]The CAD ordered the respondent to file a Response within 35 days of the date of the CAD and indicated that if a Response was not received by that date, the Tribunal would proceed without further notice to the respondent, and may take any or all of the other steps set out in Rule 5.5.

[7]On May 28, 2012, the Tribunal received a phone call and email request for a copy of the file from Richard Breslin, who indicated that he would be acting for the respondent in this matter. In his email, Mr. Breslin sought an extension of the 35-day deadline for filing a Response.

[8]A copy of the file was sent by email to Mr. Breslin on April 11, 2012 by the Tribunal, along with an email that informed him that if he required an extension of the deadline in the CAD, he should send an email the Registrar and copy the applicant.

[9]No further correspondence was received from the respondent or its representative. The respondent has not filed a Response. By Interim Decision 2012 HRTO 1490, dated July 31, 2012, the Tribunal ruled that the respondent is deemed to have waived all rights to notice or participation in these proceedings and is further deemed to have accepted all of the allegations set out in the Application. Despite the respondent's deemed waiver of notice, the Tribunal will send a copy of this decision to the respondent.

[10]From the material submitted by the respondent, it appears that the full corporate name of the respondent is "Pardons and Waivers Canada, a division of

1339835 Ontario Limited".The style of cause in this matter is amended accordingly.

[11]I have concluded that the respondent breached ss. 5 and 23(2) of the Code. The facts and my analysis are set out below.

THE FACTS

[12]The facts alleged by the applicant and deemed to have been accepted by the respondent are that:

a) The applicant applied for "a job/placement [with the respondent] through an ad on kijiji".

b) The applicant had a brief e-mail correspondence with Julie Hosson, representative of the respondent, in which they discussed the possibility of a "placement".

c) Ms. Hosson sent an invitation to come in for an interview at 2 PM that day.

d) Ms. Hosson followed up with a telephone call in which she asked the applicant how old she was and heard from the applicant that she was 45 years old.

e) Ms. Hosson said that she was going to confirm with her boss, and shortly thereafter sends the applicant and e-mail saying "I've been advised that a placement is not suitable for this position".

[13]With her Application, the applicant enclosed copies of the advertisement from the Kijiji website, and e-mail correspondence dated July 13, 2011, between herself and an individual identified as Julie Hosson, who included "PWC" under her e-mail signature.

[14]The advertisement reads as follows: "Looking for a personal assistant/receptionist for a sales associate at Pardons and Waivers of Canada.

Basic admin duties, some accounting and answering the phone. $11/ hour, Approx. 30 hrs/week."

[15] The applicant's e-mail response to the advertisement enclosed her résumé and said that she would be graduating from "MicroSkills" and that she was looking for a "placement" or a full-time job. The applicant's e-mail indicates that she would be willing to work "for 6 weeks free".

[16]The e-mail response from Ms. Hosson asks "what field is the placement for? Is this for high school or University?". The e-mail goes on to say "the six weeks would only start the first week of August, is that acceptable?" The applicant replied that "the first week of August will be great". The responding e-mail asked if the applicant would be "available to come in today around 2 PM" and gives an office address that corresponds with that on the respondent's letterhead.

[17]The Application states that Ms. Hosson telephoned the applicant to continue the communication. "She asked me how old I was…I told [her] my birthday was on Saturday I turned 45. She said she was going to confirm the interview with her boss. Then I get an email saying the job is not suitable to me". The e-mail, attached with the applicant's materials, says "I've been advised that a placement is not suitable for this position but I am looking [unreadable] comes up."The applicant understood this to mean that she would not be considered for this opportunity. There was no further contact from the respondent.

ANALYSIS

[18]The relevant provisions of the Codeare set out below:

> 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.
>
> …
>
> 23.(2) 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.

[19]All employment relationships, unionized or non-unionized, long-term or short duration, fixed-term or indefinite, whether formed by oral or written agreement, whether casual or formal, are covered by the Code; see for example Roberts v. Club Expose (1994), 21 C.H.R.R. D/60 (Ont. Bd. Inq.) at paras. 10 to 18, Payne v. OtsukaPharmaceuticals Co. (2002), 44 C.H.R.R. D/203. The process of applying for and being considered for paid employment is clearly covered within the concept of employment.

[20]Clearly, the applicant was prepared to work without pay for a period of time.Does this fact remove the Application from the scope of the employment provisions of the Code?

[21]In my view it does not. The broad application of Part I of the Code is signalled by the use of the term “with respect to”. It is not qualified in any way. A phrase similar to “with respect to” was interpreted by the Supreme Court of Canada in Nowegijick v. The Queen, [1983] 1 S.C.R. 29 at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[22]In the factual context of this case, it is clear that the applicant made this offer with a view to achieving paid employment. In view of the above facts and

the use in the Code of the phrase “with respect to”, I find that an offer to work without pay in the process of achieving paid employment does not operate to remove this fact situation from the ambit of the employment provisions of the Code.

[23]In the alternative, I find that volunteer employment can be considered “employment” for the purposes of the Code. Volunteer work has been included in the area of "employment" in cases decided under the human rights legislation of other jurisdictions: Brown v. Robinson (1989), 10 C.H.R.R. D/6286 (B.C.C.H.R.); Thambirajah v. Girl Guides of Canada (1995), 26 C.H.R.R. D/1;Nixon v. Vancouver Rape Relief Society (No. 2) (2002), 42 C.H.R.R. D/20, 2002 BCHRT 1. This is not surprising in view of applicable principles of statutory interpretation of human rights legislation.

[24]In numerous decisions, the Supreme Court of Canada has ruled that a broad, policy-based and liberal interpretation must be given to human rights legislation and the policies behind such legislation: see Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665; B. v. Ontario (Human Rights Commission), [2002] 3 S.C.R. 403 at para. 44.

[25]The Supreme Court of Canada has also stated that when the legislature intends to limit the scope of a statutory provision, it usually says so clearly: Pharmascience Inc. v. Binet, 2006 SCC 48; Glykis v. Hydro-Québec, 2004 SCC 60 at para. 13; Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70 at para. 3.The Code being a quasi-constitutional statute, a legislature would have to use very clear language to limit the ambit of a term; it is not open to the Tribunal to read in a limitation that the legislature has not created: Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667 at para. 81; University of British

Columbia v. Berg, [1993] 2 S.C.R. 353. Reading in limitations could not be said to be interpreting the legislation to advance the policy behind it.

[26]The fact situation as accepted by the respondent reflects the wording of s.23 (2) of the Code.An “oral inquiry” about age, or any other personal characteristic reflected in the prohibited grounds of discrimination, contravenes the Code. Subsection 23(2) is one of seven specific proscriptions set out in part 2 of the Code that inform the rights set out more generally in Part 1.The language of s.23(2) is clear, narrowly worded and in line with the overall intent of the legislation. Since it is not an exception to the rights set out in Part 1, it is not to be subjected to construction that would further narrow its meaning. Establishing a breach of s.23(1) does not require proof of intent to discriminate: Taylor v. ViaSecurity Systems Inc. (1987), 8 C.H.R.R. D/3970, Lannin v. Ontario (Ministry of the Solicitor General) (1993), 26 C.H.R.R. D/58 (Ont. Bd. Of Inquiry), Shaw v. Ottawa (City), 2012 HRTO 593, Thompson v. Selective Personnel Ltd., 2009 HRTO 1224.Further, it appears on the accepted facts that the offer to attend for an employment interview was withdrawn after the applicant gave the information about her age, which is a further breach of s.5.

REMEDY ISSUES

[27]Section 45.2 (1) of the Code provides that, if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application, it may make the following orders:

> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

[28]In addition to addressing a successful applicant's request for order(s), the Tribunal may make an order that has not been requested by the applicant: *Payne v. Otsuka Pharmaceutical Co. et al*(2002), 44 C.H.R.R. D/203, *Lepofsky v. Toronto Transit Commission*, 2007 HRTO 41.

[29]The applicant was directed to submit, within 30 days of the Interim Decision, any additional materials, evidence, and written submissions she wished the Tribunal to consider in deciding this Application, and to advise the Tribunal as to whether she wished to make oral submissions via conference call before the Tribunal finally determined the Application. The applicant, who is not represented by legal counsel, did not contact the Tribunal.

[30]In respect of monetary compensation, the applicant requested $3,960. The Application very briefly sets out the assumptions upon which this calculation was based: that the applicant would be paid $11 an hour for a 30-hour week, and limited her request for compensation for lost wages to a three-month period which she apparently associated with a "probation" period.

[31]The applicant has not made any specific request for "monetary compensation…for injury to dignity, feelings and self-respect", but her Application states that after this incident she felt "stressed" and "depressed, and started to think that it would be hard to find a job with my age… that no one would want to hire me".

[32]The Application as filed is not sufficiently clear about information relevant to the remedy; for example, it is not clear whether the applicant meant the three-month period she mentioned to include the six weeks that she was willing to work without pay. For this reason, I will remain seized on the issue of remedy. The applicant will

be given an opportunity to give further information relevant to remedy, failing which I will decide the remedy issue based on the material already filed.

ORDER

[33]The Tribunal makes the following order:

a) The respondent has breached sections 5 and 23(2) of the Code.

b) The Tribunal will contact the applicant to set up a brief teleconference during which the applicant will be permitted to give further evidence relevant to remedy.

c) The respondent will be sent a copy of this Decision and of the Notice of Hearing for the teleconference.

d) I will remain seized of this matter to dispose of the issue of remedy.

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

"Signed by"

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Judith Keene
Vice-chair