HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Muhammad Haseeb

Applicant

-and-

Imperial Oil Limited

Respondent

DECISION ON REMEDY

Adjudicator: Mark Hart

Date: August 23, 2019

File Number: 2015-20082-I

Citation: 2019 HRTO 1174

Indexed as: **Haseeb v. Imperial Oil Limited**

APPEARANCES

Muhammad Haseeb, Applicant	)	Jo-Ann Seamon, Counsel and Zahra Vaid, Student-at-law
Imperial Oil Limited, Respondent	)	Richard Nixon and Duncan Burns-Shillington, Counsel

[1] This is a Decision on Remedy further to the liability findings made by this Tribunal in Interim Decision 2018 HRTO 957, dated July 20, 2018 (the "Decision on Liability").

[2] In the Decision on Liability, the Tribunal found that the respondent had violated the applicant's rights under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), in two respects: (1) on the basis that the respondent's "permanence requirement" was a factor in its decision not to hire the applicant, which constitutes discrimination in employment because of citizenship contrary to s. 5(1) of the *Code*; and (2) on the basis that the respondent's policy of requiring a job applicant to disclose in writing and verbally that she or he is a citizen or permanent resident of Canada is prohibited conduct in violation of s. 5(1) and ss. 23(1) and (2) of the *Code*.

[3] As the hearing in this Application was bifurcated as between liability and remedy, the Tribunal directed that a two-day hearing on remedy be scheduled to hear evidence and argument to determine an appropriate remedial order.

[4] The Decision on Liability was rendered by the Tribunal's former Associate Chair. As her term had expired, the remedial portion of the hearing was assigned to me for determination.

[5] The hearing on remedy proceeded before me on June 25 and 26, 2019, at which time I heard testimony from the applicant and two witnesses called by the respondent. I also have considered the documents marked as exhibits at the remedial hearing, the documents marked as exhibits at the liability hearing that the parties identified as relevant to the remedial hearing, and the portions of the transcript from the liability hearing that the parties identified as relevant to the remedial hearing.

[6] I will start by first addressing the respondent's position regarding the applicant's dishonesty in the hiring process and its impact on the appropriate remedial order. I will then address the applicant's claims for compensation for lost income, for general damages and for public interest remedies.

The Applicant's Dishonesty

[7] The respondent takes the position that, notwithstanding the Tribunal's finding that the applicant's citizenship was a factor in its decision not to hire the applicant, the applicant would not have been hired in any event due to his dishonesty in the hiring process. While the respondent went even further in its submissions on the issue of remedy to take the position that the applicant's dishonesty was the only reason the applicant was not hired, that position is not consistent with the Tribunal's Decision on Liability. Any challenge to the Tribunal's finding that the applicant's citizenship was a factor in the respondent's decision not to hire the applicant is not open for review at this remedial stage of the Tribunal's process.

[8] Where the issue of dishonesty arises in the context of a human rights proceeding, there is an aspect of this issue that is potentially relevant to liability and an aspect of this issue that is potentially relevant to remedy.

[9] In relation to the determination of liability, the issue of dishonesty is relevant to the question of whether an applicant's dishonesty was the sole reason for the respondent's decision and represents a non-discriminatory reason for this decision, or whether a discriminatory ground protected under the *Code* was at least a factor in the respondent's decision. This liability issue was determined in the Decision on Liability. In the Decision on Liability, the Tribunal found at para. 161 that there was insufficient evidence to demonstrate on a balance of probabilities that the applicant's dishonesty was the *sole* reason for his non-hire. The Tribunal found at para. 166 that, for the purpose of determining liability, it was sufficient that the applicant's citizenship was one of the factors involved in the decision.

[10] In relation to the determination of the appropriate remedy based on the violations of the *Code* found in the Decision on Liability, and as discussed in greater detail below, the issue of dishonesty is 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*. For example, where an applicant's dishonesty is unrelated

to any *Code* violation, the issue would be whether on a balance of probabilities it is more likely than not that the respondent's decision still would have been made if the discriminatory factor had not been considered. If so, then but for the *Code* violation found, the applicant still would not have been hired due to dishonesty, and therefore would not be entitled to compensation for lost income. A good example of this situation is found in the *Davis* case, discussed in detail below.

[11] In the next section, I will review the evidence before me regarding the applicant's dishonesty in the hiring process. While this evidence comes from the documents and testimony given at the liability hearing, it also was referred to and relied upon before me for the purpose of the hearing on remedy. Further, while the Decision on Liability generally discusses the applicant's dishonesty to the extent that it was relevant to the determination of liability, I will review this evidence in greater detail in the context of the potential relevance of this evidence to the issue of remedy.

The Evidence

[12] The respondent relies upon the applicant's repeated dishonesty in the application and hiring process on the issue of whether he was eligible to work in Canada on a permanent basis, in support of its position that the applicant would not have been hired in any event due to this dishonesty. The evidence of the applicant's dishonesty in the application and hiring process is not in dispute.

[13] On September 4, 2014, the applicant submitted his application for an engineering position at the respondent. As part of the application process, the applicant completed the respondent's candidate information form. One of the questions asked on this form is, are you eligible to work in Canada on a permanent basis? The applicant answered "yes" to this question. This was untrue. While the applicant would have been eligible to work in Canada following his graduation from McGill and after receiving his post-graduate work permit and SIN, this would not have made him eligible to work in Canada on a permanent basis. He would have needed to obtain his permanent resident status

or Canadian citizenship before he truthfully could say that he was eligible to work in Canada on a permanent basis.

[14] The applicant then participated in an on-campus interview with a respondent representative on October 23, 2014. In his testimony at the liability hearing, the applicant confirmed that as part of this interview, he was asked again whether he was entitled to work in Canada on a permanent basis, and he answered that he had already received his permanent resident status. This was untrue.

[15] On November 19, 2014, the applicant attended three separate interviews at the respondent's Sarnia refinery. In at least two of these interviews, the applicant confirmed that he once again was asked whether he was entitled to work in Canada on a permanent basis and was told that proof of such eligibility required permanent resident status, Canadian citizenship or a Canadian birth certificate. The applicant further confirmed that he once again informed the respondent representatives who conducted these two interviews that he already had his permanent resident status. Once again, these answers were untrue.

[16] Notwithstanding the applicant's answers to these questions, the evidence indicates that there was still doubt on the respondent's part as to whether the applicant was truly entitled to work in Canada on a permanent basis. In an internal e-mail dated November 27, 2014, a respondent representative raised the fact that the applicant had said that he was permanently eligible to work in Canada, but noted that some candidates interpret that question to be asking whether they are eligible to work in Canada upon receipt of a post-graduate work permit, and respond affirmatively to the question when in fact a post-graduate work permit does not entitle the candidate to work permanently in Canada. The respondent representative asked other respondent employees whether they had tested the applicant's answer by seeing whether he had his permanent resident card or birth certificate. The respondent notes that the applicant has never suggested that he laboured under any such misunderstanding, and at all times knew he was not eligible to work in Canada on a permanent basis.

[17] On November 28, 2014, an internal e-mail from one of the interviewers indicates that they missed asking the applicant for proof during his interview. This resulted in a respondent representative speaking directly to the applicant about this issue on December 1, 2014. An e-mail confirming the result of this call is in evidence before me. The e-mail records the applicant as saying that he had received his permanent resident card the previous year, which is untrue, and that he also had received his SIN, which is also untrue. In his testimony at the hearing, the applicant confirmed that he had given these answers, and knew they were untrue at the time.

[18] On the basis of the confirmation provided by the applicant, the respondent issued an offer of employment on December 2, 2014, which included a requirement for him to provide proof that he was eligible to work in Canada on a permanent basis, by providing a Canadian birth certificate, a Canadian citizenship certificate or a Canadian certificate of permanent residence. He was required to submit this proof by December 11, 2014, along with his acceptance of the respondent's offer of employment.

[19] On December 10, 2014, the applicant contacted two respondent representatives and then followed up by e-mail that same morning. In this e-mail, the applicant states that he "came across" the clause in the job offer stating that he has to be permanently eligible to work in Canada. This was untrue, as the applicant was aware of this requirement all along. In his e-mail, the applicant explains 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 and that he was interested in the position and in working for the respondent, and asked whether the respondent was able to make an exception on its end.

[20] Further internal e-mails are in evidence before me following the applicant's acknowledgement that he was not in fact eligible to work in Canada on a permanent basis. One respondent representative notes that what the applicant had acknowledged on December 10, 2014 was not what he had said when she had spoken with him on December 1, 2014, and refers to this as "frustrating to say the least." A question arose

as to whether to extend the applicant a conditional offer or to rescind the offer that had been made. Ultimately, the decision was made by the respondent to rescind the offer. This was communicated to the applicant by letter dated January 8, 2015.

[21] While the January 8, 2015 letter does not make any reference to the offer having been rescinded due to the applicant's dishonesty, the respondent's explanation is that this 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.

[22] The respondent representative who made the decision to rescind the offer of employment and who testified at the liability hearing, testified that this decision was made because of the applicant's dishonesty.

[23] For his part, the applicant testified at the liability hearing that he felt that he was in a "Catch 22" situation when being asked for a response to the question of his eligibility to work in Canada on a permanent basis. He understood from other international engineering students that if he was truthful about his ineligibility to work in Canada on a permanent basis, he would be screened out of the respondent's hiring process and excluded from any interviews. Based upon the evidence at the liability hearing, the Tribunal found at para. 164 of the Decision on Liability that "the applicant's fear was well-founded", given that the respondent had granted no exceptions to this requirement for entry-level Project Engineer positions up to December 2014.

[24] As a result, and as described at para. 163 of the Tribunal's Decision on Liability, the applicant believed 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 respondent on the basis of his true qualifications, abilities and experience, and then later educate the respondent about his route to permanent resident status.

[25] The applicant also testified at the liability hearing that he regarded the question being asked of him by the respondent to be discriminatory and believed that he was not required to give a truthful answer to a discriminatory question.

[26] In its final submissions at the remedial hearing, the respondent submitted that the applicant had a variety of other options available to him to raise the issue as to whether the permanent eligibility requirement was discriminatory. It was submitted that he could have chosen to answer the question truthfully and, if he was screened out of the hiring process and not offered an interview, he could have filed an Application with this Tribunal to raise the issue of discrimination on that basis. Or he could simply have not answered the question on the candidate information form, as the respondent contends was done by another job applicant. Or he could have responded to the question directly by advising the respondent that he regarded the question as discriminatory.

[27] It is correct to observe that other options were available to the applicant. However, while choosing any of these other options would have avoided being untruthful, the evidence before me does not support that they would have changed the result for the applicant. Indeed, the evidence supports that choosing any of these other options could very well have resulted in the applicant being screened out of the hiring process at an early stage, and before he could establish (as he has done in the instant case) that he was the top-ranked candidate in the competition. Where a job candidate is screened out of a hiring process at an early stage, it is exceedingly difficult for the candidate to prove that they would have been hired but for the consideration of a discriminatory factor.

[28] The respondent points to two examples of other candidates who made a different choice than the applicant. Neither of these examples assists the respondent. The first example is S., who was a candidate in the same job competition as the applicant. The evidence at the hearing does not indicate whether S. truthfully answered the question about his eligibility to work in Canada permanently on his candidate information form or at his on-campus interview. The evidence indicates that at least at an on-site interview, S. advised the respondent that he had a post-graduate work permit. After the offer to the applicant was rescinded, there is evidence that the respondent considered extending a conditional offer to S. However, it was confirmed by the respondent at the remedial hearing that no such conditional offer was ever extended to S.

[29] The second example cited by the respondent is K.P. In his candidate information form submitted in October 2010, the respondent contends that no answer is recorded beside the question, are you eligible to work in Canada on a permanent basis? The evidence indicates that a job offer was made to K.P. on May 26, 2011 for an electrical engineer position, with the same requirement as imposed on the applicant to provide proof of his eligibility to work in Canada on a permanent basis. K.P. replied on June 2, 2011 to say that he was a recent international graduate with a valid work permit that expired in April 2014 and that he had a SIN card that could be renewed until the expiry date of his work permit. He also indicated that he was eligible to apply for the Ontario nominee program upon receiving an offer of permanent and full-time employment from an Ontario employer (which is the same program referenced by the applicant in his communication with the respondent on December 10, 2014). The evidence indicates that a conditional offer of employment was extended to K.P. on August 12, 2011, subject to K.P. obtaining eligibility to work in Canada on a permanent basis by the time his post-graduate work permit expired.

[30] I have a number of reservations about the K.P. example. First, the evidence before me does not in fact indicate that K.P. left the answer to the permanent eligibility question blank. Rather, it indicates that, just like the applicant, K.P. answered yes to this question. Under the heading “Work Authorization”, there are two questions: one for student or term positions, and one for permanent positions. The question asked for student or term positions is whether the candidate is eligible to work in Canada for the duration of the term of the position. K.P.’s answer was that this question was not applicable, as he was applying for a permanent position. There is then a sub-heading “For permanent positions:”, which is not a question. This is followed by the question about whether the candidate is eligible to work in Canada on a permanent basis. While K.P.’s “yes” answer lines up with the sub-heading rather than the question, I note that the same applies to his response to the previous question. In my view, it is clear that, just like the applicant, K.P. responded on his candidate information form that he was eligible to work in Canada on a permanent basis, which was not correct. There is no

evidence before me as to whether K.P. knew at the time that his answer to this question was not true.

[31] Like the applicant and unlike candidate S., it appears that K.P. did not reveal his actual eligibility to work to the respondent until after he had received the initial job offer. If he had, the respondent would have made him a conditional offer at that time, rather than extending a conditional offer only after receiving K.P.'s response to the initial offer. Again, there is no evidence before me as to whether K.P. was actually asked at his on-campus or on-site interviews as to whether he was eligible to work in Canada on a permanent basis, or what answers he gave if he was asked. All the evidence indicates is that it was the respondent's general practice to ask this question at the on-campus interview and at each on-site interview, and it appears that the respondent was not aware of K.P.'s true eligibility status until after it made the initial offer of employment.

[32] Further, it is significant that K.P. had applied for a position as an electrical engineer, and not for a position as an entry-level project engineer. K.P.'s situation is expressly discussed in the Decision on Liability at paras. 72 - 77. The Tribunal refers at para. 72 of the Decision to the agreed statement of facts stating that K.P.'s particular skill set was "something that is rare in the oil industry." The Tribunal goes on to find at para. 76 - 77 of the Decision that while the respondent at times waived its "permanence requirement" for experienced and inexperienced job candidates alike and for engineering and non-engineering positions and that granting such a waiver was not truly "exceptional", the undisputed evidence of the respondent's Human Resources Manager was that no exceptions to this requirement had ever been made for new engineering graduates who are recruited on campus for entry-level project engineer positions, as such candidates were deemed "ineligible" as soon as they disclosed their post-graduate work permit status.

[33] As a result, K.P.'s situation does not in fact provide an example to support the proposition that the applicant could have chosen not to answer the question about his permanent eligibility to work in Canada, gone through the hiring process and received an offer of employment, then disclose his actual work eligibility and be granted a

conditional offer. Rather, the evidence of the respondent's Human Resources Manager is that the applicant would have been deemed "ineligible" for an entry-level project engineer position as soon as he disclosed his post-graduate work permit status, as he correctly feared.

General Remedial Principles

[34] In approaching the issue of the applicant's dishonesty in the context of the remedial hearing, it is important to start with the basic remedial principles that this Tribunal is directed to apply when considering the matter of monetary compensation. As confirmed by the Ontario Court of Appeal in *Airport Taxicab (Malton) Assn. v. Piazza*, (1989) 69 O.R.(2d) 281 at para. 9 (Ont. C.A.), the purpose of compensation under the *Code* "is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred."

[35] In applying this well-established and fundamental remedial principle, it is important to consider what discriminatory act or acts were found by the Tribunal. In the instant case, the Tribunal at para. 166 of the Decision on Liability not only found that the respondent's "permanence requirement" was a factor in its decision not to hire the applicant, which constitutes discrimination in employment because of citizenship contrary to s. 5(1) of the *Code*, but the Tribunal further found at paras. 149 - 152 and 169(a) of the Decision on Liability that the respondent's policy of requiring a job applicant to disclose in writing and verbally that she or he is a citizen or permanent resident of Canada is prohibited conduct in violation of s. 5(1) and ss. 23(1) and (2) of the *Code*.

[36] As a result, I am required to consider what position the applicant would have been in had these discriminatory acts not occurred. Had these discriminatory acts not occurred, the applicant would not have been confronted with the "Catch 22" choice of responding to what was found to be a discriminatory question about his eligibility to work in Canada on a permanent basis, either on the candidate information form or at his on-campus interview or at his on-site interviews or immediately prior to the respondent

making its offer of employment. Either no such question would have been asked, or any question about work eligibility would have been restricted to asking only whether the candidate was eligible to work in Canada, to which the applicant could truthfully have answered yes. As a consequence, if I am to put the applicant in the position he would have been in had the discriminatory questions not been asked, there would have been no dishonesty about his work eligibility and no alternate explanation for the respondent's decision not to hire the applicant. Therefore, but for the discriminatory act of considering his permanent eligibility to work in Canada as a factor in its decision not to hire him, I find that 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.

The *Kolev* Decision

[37] The respondent relies upon the decision of the Board of Inquiry in *Kolev v. McDonnell Douglas Canada Ltd.*, (1992) 18 C.H.R.R. D/213 (Ont.) to argue that, when determining the appropriate remedy to award, it does not make a difference whether or not a finding of a violation of s. 23 of the *Code* is made. Section 23(2) of the *Code* provides that:

> 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.

[38] In *Kolev*, above, the complainant was hired by McDonnell Douglas as a senior progress chaser. Prior to commencing his employment, he was required to complete a medical questionnaire, which asked whether he had or had ever had any of 90 listed medical problems, including "allergies", "shortness of breath" or "asthma." While the evidence was unclear as to whether the complainant had been formally diagnosed with asthma or had experienced shortness of breath at the time he filled out the questionnaire, he certainly had allergies.

[39] The complainant began experiencing difficulties at work when he was required to walk through a particular area of the facility. On one occasion, he experienced difficulty

breathing and felt very faint. He did not report this to the employer. About a year later, there were work changes that raised the possibility of the complainant being transferred to this particular area, which left the applicant feeling very stressed and he began to experience tightness in his chest, shortness of breath, pain, wheezing and vertigo. He consulted his doctor and was diagnosed with asthmatic bronchitis. He did not report this condition to his employer.

[40] The following spring, the complainant was informed that he was being transferred to work in the area of the facility where he was experiencing difficulty. In an attempt to avoid the transfer, he disclosed that he had been diagnosed with asthmatic bronchitis, and later provided medical letters from his doctors. This caused the employer's labour relations representative to accuse the complainant of having lied on the medical questionnaire about not having "allergies" or "asthma." This led to the complainant being offered the choice of being fired or resigning. The complainant resigned.

[41] The Board of Inquiry found that the employer's sole basis for its termination of the complainant's employment was premised on its longstanding practice of termination for falsification in answering either the employment application or medical questionnaire. The Board did not find that this was a pretext for disability discrimination, on the basis of the employer's established practice of accommodating employees who disclosed disabilities at the time of hire.

[42] It was argued before the Board of Inquiry that the questions asked of the complainant on the medical questionnaire constituted a violation of s. 22 (now s. 23) of the *Code*. The Board determined that it was not necessary to decide whether the questions asked on the medical questionnaire violated then s. 22 of the *Code*, on the basis of the Board's finding that the sole reason for the termination of the complainant's employment was the employer's longstanding policy with respect to falsification. As a result, the Board found no violation of the *Code* by the employer and dismissed the complaint, and so did not need to address the question of remedies.

[43] In my view, the *Kolev,* above, decision is distinguishable on a number of bases. First, as no violation of the *Code* was found, either in relation to the decision to terminate the complainant's employment or as a result of the questions asked on the medical questionnaire, the Board of Inquiry in *Kolev,* above, was not required to apply the remedial principles articulated by the Ontario Court of Appeal in *Piazza,* above. As a consequence, unlike in this case, the Board was not called upon to put the complainant in the position he would have been in but for the discriminatory act(s), as no finding of any discriminatory act was made.

[44] Second, it was clear from the evidence before the Board of Inquiry in *Kolev,* above, at paras. 33, 39 and 69, that a significant factor in the employer's decision to terminate due to dishonesty on the medical questionnaire was the employer's view that the medical condition not disclosed by the complainant was relevant to his work. Indeed, at the hearing, an Ontario Human Rights Commission manager had testified on cross-examination that, given the job description for the complainant's position, it would be reasonable for the employer to ask about allergies in order to facilitate any required accommodation. In contrast, in this case, it already has been found by the Tribunal that the applicant's ability to work in Canada on a permanent basis was not relevant to his ability to perform the essential duties of the project engineer position, was not a *bona fide* occupational requirement, and did not require accommodation.

[45] Third, the Board of Inquiry in *Kolev,* above, placed heavy reliance on the evidence tendered by the employer at the hearing to support its longstanding practice of terminating employees who had falsified answers either on their employment application or the medical questionnaire. Indeed, this longstanding practice is repeatedly relied upon by the Board of Inquiry to support its finding that the complainant's dishonesty in responding to the medical questionnaire was the sole reason for the termination decision.

[46] In contrast, in this case, there is no such evidence of a longstanding practice on the part of the respondent. The respondent's evidence did support the importance of trustworthiness and truthfulness by its employees, and especially its engineers. A

respondent witness did testify about two engineers who had been terminated due to dishonesty, both of which related to dishonesty in the performance of the engineers' job duties, one of which resulted in cracks developing in the support structures holding up pieces of the facility. While this witness testified generally that the respondent placed "massive" weight on honesty, integrity and trustworthiness in the recruitment process and that any concerns in those areas would be a "showstopper" in terms of the candidate not being hired or considered for hire, there was no specific evidence of any job candidate apart from the applicant not having been hired due to dishonesty, let alone evidence of any longstanding practice of terminating or not hiring candidates who falsified answers on their employment application.

[47] Fourth, the Board of Inquiry in *Kolev,* above, expresses its attraction to the "thinking" expressed by another adjudicator that, "while it may be that applicants have no duty to disclose their handicaps, surely a prospective employee with an invisible handicap requiring certain accommodation in order for him or her to perform the work in question has some obligation to disclose that handicap if such assistance is reasonably to be expected." This "thinking" now runs directly counter to the finding of the Divisional Court in the subsequent decision of *ADGA Group Consultants Inc. v. Lane*, (2008) 91 O.R.(2d) 649, holding that the applicant in that case was under no obligation to disclose his invisible mental health disability of bi-polar disorder at the time he was hired, despite his need for certain accommodations in the workplace. In my view, this approach to a prospective employee's obligation to disclose an invisible disability requiring accommodation at the time of hire, together with the evidence cited in the Board of Inquiry's Decision about the relevance of the complainant's allergies and asthma to his ability to perform his work duties, played a role in the Board of Inquiry's determination that it did not need to address the issue of whether the questions asked on the medical questionnaire violated then s. 22 of the *Code* in the circumstances of the *Kolev* case.

[48] To the extent that my determination in this case is considered to be inconsistent with the approach taken by the Board of Inquiry in *Kolev*, above, I note that the *Kolev* decision is not binding on me and, as discussed above, expresses views that are

inconsistent with a subsequent decision of the Divisional Court that is binding on me. In my view, the Board of Inquiry in *Kolev,* above, ought to have determined the issue raised before it as to whether the specific questions on the medical questionnaire at issue were in violation of then s. 22 of the *Code*. If not, then there would have been nothing further to address. However, if these questions were found to have been in violation of the *Code*, in my view the Board in *Kolev,* above, ought then to have addressed the appropriate remedy in the circumstances, and applied the well-established remedial principle of putting the complainant in the position he would have been in but for the discriminatory act of asking questions in violation of the *Code*.

[49] My intent in this Decision is 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*. In my view, where an allegation of dishonesty is raised in this specific context, this Tribunal needs to address dishonesty in the context of fashioning an appropriate remedy for the violation of the *Code* that arises from the asking of the prohibited questions, in the context of applying well-established remedial principles under the *Code*. As I will discuss below, the conduct of an applicant who engages in dishonesty in such circumstances is, in my view, most appropriately addressed in the context of the exercise of this Tribunal's discretion in determining whether to award compensation for injury to dignity, feelings and self-respect or in the quantum of any such award.

[50] I agree with the submission made by Commission counsel in *Kolev*, above, that to find otherwise would potentially allow a respondent to do an "end run" around the *Code*. For example, consider a situation where a landlord on a phone call with a prospective tenant asks the person if they are White, and the person says yes. The person then shows up to sign the rental agreement, and the landlord discovers the

person in fact is Black. Could the landlord refuse to rent the apartment to this person not because they are Black but because they lied in response to the question about whether they are White, on the basis that truthfulness and trustworthiness are fundamental to the landlord-tenant relationship? Similarly, could an employer ask a prospective employee whether he is gay or whether she is pregnant, be told no, later find out otherwise, and fire or refuse to hire the person not because of their sexual orientation or because they are pregnant but because they lied about it? In my view, the answer in these situations is clearly no, on the basis that the initial question itself is prohibited by the *Code*.

[51] The reason this case may feel different is that in the scenarios described above, the person asking the question knows or ought to know that the question is in violation of the *Code*, whereas in this case, the respondent takes the position that it believed the question about a candidate's eligibility to work in Canada on a permanent basis was permissible. However, in my view, that distinction goes to the issue of intent, which the Supreme Court of Canada clearly has held is not required in order to find a violation of human rights legislation. See, *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536. One of the reasons the Supreme Court found that intent was not required is because human rights legislation is not intended as punishment for misbehaviour, but is intended to remedy the consequences of conduct found to be in violation of such legislation. Accordingly, just as intent is not required to find a violation of the *Code*, the respondent's intent also is not a proper consideration from the remedial perspective in determining the appropriate remedy to address the consequences of discriminatory conduct.

Other Cases Dealing with Dishonesty

[52] I next will address a couple of additional cases relied upon by the respondent for the purpose of the remedial hearing. The first is the Divisional Court's decision in *Chornyj v. Weyerhauser Co.*, [2007] O.J. No. 640. In that case, a prospective employee was required to submit to a pre-employment drug test in order to be employed in a safety-sensitive position. The drug test came back positive for marijuana. When asked

about the result of the test, the complainant says that he hesitated and then admitted he was an occasional user. The employer, on the other hand, says that the complainant first claimed that he had been exposed to second-hand marijuana smoke, and only conceded being an occasional user when pressed. The employer took a number of positions in a preliminary hearing before the Tribunal, including that the complainant had not been hired due to dishonesty. The Tribunal denied the employer's request for dismissal of the complaint, and allowed the matter to proceed.

[53] The Tribunal's decision was quashed by the Divisional Court on judicial review. However, the Divisional Court did not address the issue of the complainant's alleged dishonesty. Rather, the Court found that, as an occasional marijuana user, the complainant did not have an actual disability. Further, the Court held that there was no tenable basis upon which the complainant could proceed with an allegation of discrimination because of a perceived disability, in the specific circumstances of that case.

[54] The respondent also relies upon the decision of the Superior Court in *Aboagye v. Atomic Energy of Canada Limited*, 2016 ONSC 8165, aff'd at 2017 ONCA 598. That decision deals with an employer's entitlement to dismiss an employee for just cause when the employee lied on a security clearance questionnaire that he was required to complete in order to work in the nuclear industry. No issue arose in that case that the questions asked in the security questionnaire were in violation of the *Code*. Indeed, it is apparent that the questions at issue in that case had nothing to do with any *Code*-protected ground, but were simply questions asking the employee to provide his employment history for the past five years. The employee deliberately concealed a job he was currently working in at the time he completed the questionnaire. He later lied about his whereabouts during the hiring process, saying that he was attending his father's funeral in Africa when he was actually working at this other job. The employee's dishonesty was only revealed in the context of an investigation being conducted by the employer into allegations of sexual harassment and misconduct against the employee.

In these circumstances, it is no surprise that the Court found that the employer was entitled to dismiss this employee for just cause.

[55] I also will address two other cases that were raised before me where issues of alleged dishonesty were addressed. The first is *Davis v. Toronto (City)*, 2011 HRTO 806. In *Davis*, above, the complainant applied to be a firefighter. He received a conditional offer of employment, subject to completion of a medical history data form and a medical examination. On the form and in the examination, the complainant did not disclose a knee injury, or a diagnosis of osteoarthritis in his knee that he had received, or that he had arthroscopic surgery on his knee. On the basis of the totality of the medical evidence at the hearing, the Tribunal found a violation of the *Code* on the basis that the applicant's knee injury was a factor in the respondent's decision to rescind its offer of employment, and that his knee injury would not have adversely impacted the complainant's ability to perform the essential duties of the position. However, the Tribunal also considered the complainant's dishonesty in the hiring process, and found that the complainant would not have been offered the position in any event due to the respondent's view that he had knowingly failed to disclose his medical history, which was found to be genuine and not a pretext for discrimination.

[56] In *Davis*, above, no issue was raised as to whether the questions asked of the complainant on the medical history data form or in his medical examination were in violation of s. 23 of the *Code*, and as a consequence, no such finding was made. In this regard, I note that the Ontario Human Rights Commission's Policy on employment-related medical information states: "Any medical assessment to verify or determine an individual's ability to perform the essential duties of a job, should only take place after a conditional offer of employment is made, preferably in writing." That requirement appears to have been satisfied by the respondent in *Davis*, above, such that no issue of compliance with s. 23 of the *Code* arose.

[57] As a result, in my view, *Davis,* above, is a good example of a situation where the Tribunal applied well-established remedial principles in the context of a person's dishonesty in the hiring process that was not in response to a respondent's conduct

found to be in violation of the *Code*, and therefore was not found to be a discriminatory act. While the finding that the disability was a factor in the respondent's decision not to hire him was sufficient to find a violation of the *Code*, the Tribunal declined to award compensation for lost income on the basis that but for the discriminatory act of considering his disability as a factor, the complainant still would not have been hired due to his dishonesty in the hiring process that was not in response to a discriminatory act and therefore was non-discriminatory. In my view, that is the correct approach, and is not in any way inconsistent with my determination in this Decision.

[58] The last case dealing with dishonesty that I will address is the decision in *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 aff'd on judicial review at *ADGA Group Consultants Inc. v. Lane*, (2009) 91 O.R.(2d) 649 (Div. Ct.). In that case, the complainant suffered from bi-polar disorder which required certain workplace accommodations. The complainant did not disclose his bi-polar disorder to the employer at the time he was hired. In addition, on an employment application form that he signed prior to being employed, he stated that he had been on sick leave for only 5 days in the previous 12 months. This was not true. In fact, in his previous employment, the complainant had been off work for about 3 weeks due to a pre-manic episode related to his disability.

[59] As with the applicant in this case, the complainant in *Lane,* above, testified at the hearing that he did not disclose his bi-polar disorder and misrepresented the number of sick days he had taken for fear that he would not secure the position if he were forthcoming with the company. He also believed that it was not permissible to ask a prospective employee questions about days of sick leave. See 2007 HRTO 34 at para. 41.

[60] The Tribunal rejected the position taken by the employer that it had the right to dismiss the complainant once it discovered that he had lied about his bi-polar disorder in the course of the hiring process, or at the very least, had failed to reveal a factor that was critical to any determination that he was qualified to perform the job for which he was being considered. The Tribunal relied upon the expert evidence from the hearing

that persons with bi-polar disorder are extremely reluctant to reveal their disorder to prospective employers, which would trigger in most employers a stereotypical reaction to someone with a mental illness leading to a decision not to hire. As a result, the Tribunal held that the employer could not rely on the complainant's lying as an independent basis for dismissal, and therefore avoid having to account for its treatment of him as someone exhibiting the symptoms of bi-polar disorder in the workplace. See 2007 HRTO 34 at para. 137.

[61] The Divisional Court expressly addressed the position taken by the employer at paras. 99 to 102 of its Decision as follows:

> ADGA's position is that Lane misrepresented his ability to do the job for which he was hired. The Tribunal held that he did not do so. The Tribunal found that out of fear of a stereotypical reaction to someone with a mental illness leading to a decision not to hire, Lane did not reveal his illness to his prospective employer and misrepresented the number of his sick days in the preceding year.
>
> The expert testimony of Upshall supported Lane's perception that he would not get the job if he revealed his disability because of a stereotypical reaction which would be triggered in most employers.
>
> In these circumstances, the Tribunal held that ADGA could not rely on "Lane's lying" as "an independent basis for dismissal and thereby avoid having to account for its treatment of him as someone exhibiting the symptoms of bipolar disorder in the workplace".
>
> In this the Tribunal was correct. Lane was under no obligation to disclose his disability -- nor indeed his record of sick days. The Tribunal held as a fact that he did not misrepresent his ability to perform the tasks required of him. The Tribunal held as a fact that he was terminated because of his disability.

[62] In my view, the approach taken by the Tribunal and the Divisional Court in *Lane*, above, is entirely consistent with the approach I have taken in this Decision. While there was no specific finding of a violation of s. 23 of the *Code* in relation to the question on the employment application form about sick days, the Divisional Court clearly held that the complainant was under no obligation to disclose his record of sick days or his disability. Accordingly, any reliance by the employer on the complainant's alleged

dishonesty in failing to reveal his bi-polar disorder during the hiring process or misrepresenting his sick days was impermissible, as questions about those matters would be discriminatory acts.

[63] In the same way, in this case, I find that reliance by the respondent on answers given by the applicant to questions that have been found by this Tribunal to have been in violation of s. 23 of the *Code* as an "independent basis" for not hiring the applicant is similarly impermissible. I further note that, while unlike the complainant in *Lane,* above, there may not be any particular "stereotypical assumptions" made by a prospective employer as a result of a disclosure of ineligibility to work in Canada on a permanent basis, the effect or consequences are the same. The evidence at the liability hearing in this matter was clear that, if the applicant had disclosed such ineligibility, he would have been excluded from the hiring process.

Other Allegations of Dishonesty

[64] Before leaving the issue of dishonesty, I will address an argument advanced by the respondent in its written submissions filed in advance of the remedial hearing. I will address the argument only briefly, as the respondent did not pursue this argument as part of its final submissions at the remedial hearing.

[65] In its written submissions, the respondent took the position that the applicant was dishonest on his resume, when he stated that he had worked for Shell Canada from January to August 2013. In fact, the applicant had worked for Shell Canada from January until sometime prior to the summer of 2013, and had worked for Canadian Natural Resources in the summer of 2013. The applicant testified that he had stated this on his resume because, when he asked Shell Canada for an employment letter, Shell Canada had mistakenly issued a letter stating that he had worked there until August 2013. The applicant testified that, at the time, he was in the midst of taking his courses at McGill and applying for jobs, and it would have been an additional piece of work for him to get this corrected. So instead he chose to state the term of working for Shell

Canada as reflected in the employment letter, and leave off any reference to having worked for Canadian Natural Resources.

[66] There was no evidence provided that the respondent was aware of this error on the applicant's resume at the time it decided not to hire him, or that this error played any role whatsoever in the respondent's decision. Further, and unlike in *Aboagye,* above, there is no reasonable basis in the evidence to believe that this error would later have come to light if the applicant had been hired, or whether any disclosure of such an error would have had any negative employment repercussions for the applicant. As a result, I find that the error on the applicant's resume is irrelevant to the remedial issues before me.

Conclusion on the Dishonesty Issue

[67] Accordingly, in relation to the respondent's position on the applicant's dishonesty in his responses to its questions about his eligibility to work in Canada on a permanent basis, I base my findings in the context of the remedial hearing on the discriminatory acts as found by the Tribunal in its Decision on Liability and in the application of the well-established remedial principle that applies to the award of remedies under the *Code*. I find that but for the discriminatory act of asking the questions about his eligibility to work in Canada on a permanent basis, there would have been no dishonesty by the applicant. As a result, I find 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. I further find that, but for the consideration of the applicant's citizenship in its decision not to hire him, the applicant more likely than not would have been hired by the respondent as an entry-level project engineer.

Award for Lost Income

[68] The applicant claims monetary compensation for lost income to be calculated on the basis of the difference between the income that he would have received had he been hired by the respondent as an entry-level project engineer, and the income that he

in fact received from other employment, during the period from March 2, 2015 when he first became eligible to work upon receipt of his post-graduate work permit and SIN, and May 3, 2019, when he left his other employment to pursue different career opportunities.

The Applicant's Evidence

[69] The applicant testified before me at the remedial hearing that during his last term in the engineering program at McGill, he was looking to pursue a career path as an engineer, specifically in the energy sector in Canada. He testified that he wanted to work with a "super-major" company in the energy sector in Canada, which included the respondent. He also wanted to obtain his professional engineering designation.

[70] He testified that he applied for hundreds of positions in his final year at McGill, with upwards of 80% of those positions being engineering positions. In the end, he received three job offers. The first offer he received was on October 23, 2014, for a position in Business & Systems Integration in Calgary at a company called Accenture. This was not an engineering position. He accepted this offer on October 31, 2014, with a start date to be mutually agreed. Before commencing work in this position, the applicant would have needed to complete his studies at McGill and obtain his post-graduate work permit and SIN.

[71] The second offer the applicant received was from the respondent on December 2, 2014, which was subsequently rescinded in early January 2015.

[72] The third offer he received was for a position as a Business Technology Analyst for Deloitte in St. John's, Newfoundland. This was not an engineering position. There actually were three different offers made by Deloitte, with the position originally to be in St. John's, and then shifted to Saint John, New Brunswick, and then re-shifted back to St. John's. The offer the applicant ultimately accepted was made on January 23, 2015 and accepted by him on January 30, 2015. The start date in the offer letter was stated to be on February 9, 2015, but in fact Deloitte wanted to negotiate the applicant's start

date once he had received his post-graduate work permit and SIN. In the end, the applicant commenced working for Deloitte on March 30, 2015.

[73] In terms of his personal ranking of these three offers, the applicant testified at the remedial hearing that he ranked the respondent as his first choice, Accenture as his second choice, and Deloitte as his third choice. The applicant testified that the criteria he applied were: that he wanted to work as engineer; that he wanted a job that would allow him to obtain his professional engineering designation; that he wanted to work in the oil and gas sector; that he wanted to work for a company with international opportunities and long-term career prospects; and that he wanted to earn a good salary. He testified that the position at the respondent met all the criteria. He testified that he ranked the Accenture position second because it was not an engineering position but paid substantially higher than Deloitte, and because the position was based in Calgary, which is the headquarters for oil and gas companies and these would have been the clients for service companies like Accenture. Then by default, Deloitte was his third choice.

[74] He testified that, while he accepted the offer of employment from Accenture, he was unable to proceed with this employment. He testified that oil prices dropped in late 2014 and early 2015, coinciding with the time of his graduation from McGill, which resulted in a downturn in Accenture's business out of its Calgary office. He testified that he was asked by Accenture if he could travel to the United States to work for Accenture's U.S. clients, which would require a Canadian passport or citizenship that the applicant did not have and could not get. He testified that he tried to suggest some alternatives, but these were not accepted by Accenture, so the position with that company did not work out.

[75] In response to the question of whether he had considered not accepting the Deloitte position in order to look for an engineering job or a higher paying job, the applicant testified that he had not done so for several reasons. First, he needed to apply for his Canadian permanent residence and needed a full year of experience working for an employer to be eligible, so the sooner he started working, the sooner he could meet

that criterion. Second, when he graduated, he had a whole lot of student debts and he wanted to pay this money back as soon as he could. Third, he had built up an employment portfolio in the oil and gas sector through his internships, but unfortunately oil prices had “tanked.” So he did not believe that it would be a good idea for him to wait and hope for oil prices to improve at a time when a lot of companies had hiring freezes. Fourth, the applicant testified that in his final year at McGill, he was looking for work almost full-time and had literally applied for hundreds of jobs. He felt that he had applied sufficiently to see what the job market had for him, so for him to hold off and wait for a better opportunity was not an option. He understood that most companies only come to McGill once per year in the fall, so he would have needed to wait until the fall of 2015 for these companies to post additional opportunities. As a result, he would have been waiting almost a full year just to start working when he already had a job with Deloitte. He testified that, in the circumstances, he had to proceed with what he had.

[76] As stated above, the applicant commenced working for Deloitte on March 30, 2015 at a starting salary of $50,000 per year. He received annual increases to his salary in June or July of each year. In March 2017, he was promoted to a position as a Consultant and received a salary increase at that time, as well as a further salary increase in June or July of that year.

[77] The applicant received his permanent residence status in Canada on June 17, 2017. He subsequently took a 10-month unpaid leave of absence from Deloitte from October 9, 2017 to June 29, 2018 to spend time with his family in Pakistan. The applicant properly has not claimed any lost income for the period of this unpaid leave of absence, on the basis that he would have taken the same leave had he been hired by the respondent.

[78] Upon his return from this leave of absence, the applicant moved to a position with Deloitte in Kitchener, with a substantially increased salary of $67,000. He remained in this position with Deloitte until he resigned on May 3, 2019. The applicant is not seeking any award of lost income beyond the time of his resignation from Deloitte.

[79] In the fall of 2018, the applicant began looking for other employment opportunities, including engineering jobs. He did not do so prior to receiving his permanent resident status because he was concerned that changing employers during that time could negatively affect his application for permanent residency. The applicant testified that he applied for a large number of positions and received some initial job interviews, including one or two for engineering positions, but did not receive any job offers during the relevant period.

Mitigation Issues

[80] The respondent advanced a number of arguments in relation to the applicant's mitigation of his losses.

[81] First, the respondent submits that the applicant had a legally enforceable employment contract with Accenture for a rate of pay that was substantially higher than what he earned at Deloitte. In cross-examination, the respondent questioned the applicant as to why he did not pursue legal remedies against Accenture for breach of the employment contract, or file a human rights application against Accenture on the basis of any requirement it imposed for him to have a Canadian passport or Canadian citizenship to travel to the United States.

[82] The duty on an applicant to mitigate his losses is a duty to take such steps as a reasonable person in the applicant's position would take in his own interests, and not a duty to take such steps as will reduce a claim against the defaulting employer. See, *Forshaw v. Aluminex Extrusions Limited*, (1989) 39 B.C.L.R. (2d) 140 (C.A.). In my view, it is not reasonable to expect the applicant to have pursued litigation against Accenture in order to reduce his claim against the respondent. The respondent was unable to provide me with any authority to support the proposition that a reasonable person in the applicant's circumstances is required to pursue litigation in mitigation of his losses.

[83] The respondent next submits that the applicant made a choice to pursue employment in a lower paying, non-engineering field, and in Eastern Canada where wage rates are lower. In my view, this proposition is not supported by the evidence. The applicant made an extensive job search during his final year at McGill. In the end, he received three job offers, which he testified was more than some other students. The job offer from Accenture did not work out for reasons that I find the applicant has reasonably explained. The job offer from the respondent was rescinded. That left the non-engineering position at Deloitte in Eastern Canada as the applicant's only remaining option. That cannot fairly be said to have been the applicant's "choice." Rather, it was his only remaining option having already conducted an extensive job search while at McGill.

[84] I also accept the applicant's evidence that it would have been unreasonable for him to have turned down the Deloitte position in the hope that something better might turn up. He gave a number of entirely reasonable explanations not to do so, including his need to be employed in order to apply for his permanent resident status, the already extensive job search he had conducted, the economic situation in the oil and gas sector at the time, and his need to starting earning money to repay his debts. In my view, these are entirely reasonable explanations for his decision to accept employment with Deloitte.

[85] I also find that it was reasonable for the applicant to continue working at Deloitte for the period he did. He expressed a reasonable concern in his interests about staying in the job while he pursued his permanent resident status, and about not jeopardizing his ability to obtain this status. Shortly after obtaining his permanent resident status, he took a 10-month unpaid leave of absence, for which he is not claiming any lost income from the respondent. He returned from his leave of absence to a substantially higher paying position with Deloitte, but nonetheless starting in the fall of 2018 made reasonable efforts to search for other employment, including engineering positions. While he got a number of job interviews, he did not get any offers. And he is not

asserting any claim for lost income beyond the time when he resigned from Deloitte on May 3, 2019.

[86] I find the applicant made reasonable efforts to mitigate his losses throughout the period relevant to his claim.

[87] Before leaving this section, I will briefly address an error in the transcript of evidence from the liability hearing. At the liability hearing, the applicant was asked on cross-examination whether he had ever received an offer from Canadian National Resources for employment following the completion of his studies at McGill. The transcript records the applicant as having responded by saying "yeah". The applicant clarified during his testimony at the remedial hearing that he had not received any such offer, and that he does not believe that he responded affirmatively to this question at the liability hearing. I accept the applicant's explanation without reservation.

The Period for Which Lost Income is Claimed

[88] The applicant is claiming lost income for a period of over four years, from March 2, 2015 to May 30, 2019, although he makes no claim for the 10-month period of his unpaid leave of absence during this time.

[89] As stated above, it is well-established that in human rights cases, an award for lost income is not limited to the period of reasonable notice, as in a wrongful dismissal claim, but 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. See, *Airport Taxicab (Malton) Association v. Piazza*, above.

[90] In *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440 upheld by 2016 ONCA 421, the Tribunal stated at para. 31: "There are numerous human rights cases awarding full compensation for the entire period of unemployment or underemployment resulting from a discriminatory termination." Reference was made to the decision in *McKee v. Hayes-Dana Inc*., (1992) 12 CHRR D/79 (Ont. Bd. Inq.) in

which the Board ordered the respondent to compensate the complainant for lost wages and benefits for a period of 8 years. Similarly, in *Fair,* above, the applicant was awarded lost income for the entire period from the time her employment was terminated until she was reinstated, which at the time the decision was released was for almost 10 years.

[91] In determining the appropriate length of time to award compensation for lost income, once again one must start from the well-established remedial principle of putting the applicant in the position he would have been in but for the discrimination. This calls upon the Tribunal to consider, to the best of its ability, what more likely than not would have happened if an applicant's employment had not been terminated for a discriminatory reason or, as in this case, if the applicant's job offer had not been rescinded for a discriminatory reason or on the basis of his answers to discriminatory questions.

[92] In my view, there are two aspects to this assessment. The first aspect is from the applicant's perspective, and the question is whether from his perspective he more likely than not would have remained employed by the respondent during the entire period for which lost income is claimed. On the basis of the evidence before me, I find that he would have. He described the position with the respondent as his "dream job." It met all the criteria he was looking for. It was an engineering position, it would enable him to pursue his professional engineering designation, it was in the oil and gas sector, it was with a "super-major" company, it offered the possibility of international opportunities, and it was well-paying. I also have regard to the longevity of the applicant's employment with Deloitte as further supporting the finding that he would have continued in the same job for the entire period claimed.

[93] The second aspect to this assessment is from the employer's perspective, and the question is whether the employer more likely than not would have continued to employ the applicant for this entire period. Once again, I find that this conclusion is supported by the evidence. The position taken by the respondent at the liability hearing, and confirmed through the evidence of its Human Resources Manager who testified at the liability hearing, was that the respondent wants to hire engineers who will stay

employed with the respondent in different positions for their entire career. Specifically, with respect to the entry-level project engineer position, the respondent stated that it expects that the engineers that it hires will be repeatedly promoted and transferred to more senior positions. It was stated that the respondent's employee relations strategy is focused on doing everything possible to attract and retain engineers who are hired out of university. See, Decision on Liability at para. 26.

[94] The conclusion that, from the respondent's perspective, the applicant more likely than not would have remained employed for the entirety of the relevant period is further supported by the actual experience of the other three engineers who were hired out of the competition for the position to which the applicant had applied. While one of these three engineers left employment with the respondent after two years, the other two engineers continued to be employed by the respondent throughout the entire period.

[95] As a result, I find that the applicant is entitled to claim lost income for the entirety of the period from when he would have commenced employment with the respondent until May 3, 2019, less the 10-month period when he was on an unpaid leave of absence.

Calculation of Lost Income

[96] In support of his calculation of lost income, the applicant prepared a number of tables. Based on disclosure of pay information for the three engineers who were hired by the respondent out of the same competition, he calculated the average annual salary increase for these employees. Then, based on the starting salary of $86,700 that was offered to him by the respondent, the applicant applied these average annual salary increases to calculate how much he would have earned at the respondent on an annual basis. Then finally, from the annual amounts he would have been paid by the respondent, he deducted the annual amounts he actually was paid by Deloitte. In my view, this is an entirely appropriate method to calculate his lost income over the relevant period, and I accept the applicant's calculations subject to the following three points.

[97] First, the applicant assumes in his calculations that he would have commenced his employment with the respondent on March 2, 2015, which is the date by which he had received his post-graduate work permit and SIN. I do not accept that he would have started working for the respondent immediately on that date. Rather, as occurred with Deloitte, my expectation is that the respondent would have negotiated an appropriate start date with the applicant once he had received his work permit and SIN. In my view, based on his experience with Deloitte, the most appropriate assumption is that the applicant would have commenced work with the respondent on March 30, 2015, which is when he started with Deloitte. This results in a deduction of $6,888.37 to the applicant's lost income calculation.

[98] Second, as noted by respondent counsel, the applicant based his calculation of what he would have earned from the respondent in February 2016 on 29 calendar days, which is correct given the leap year. However, when calculating the daily wage rate based on his projected annual earnings, he had divided his projected annual earnings by 365 days rather than by 366 days, which inflated the daily rate. This results in a deduction of a further $245.81 from the lost income calculation.

[99] Third, the applicant based his calculation of his salary at the respondent on the average annual salary increases given to his cohort. The problem with this, in my view, is that he failed to take into account the fact that he would have been absent from the respondent's workplace for a 10-month period from early October 2017 to late June 2018, and so is unlikely to have received any annual salary increase attributable to that period. In my view, the impact of this 10-month leave of absence would have been two-fold. First, in my view, it is unlikely that the applicant would have received any salary increase for 2018, given that he would have been on his leave at the end of 2017 and ultimately absent from work for almost a year. Second, the salary increase that the applicant reasonably could have expected for 2019 would be more in line with what the two other members of his cohort received for the previous year in 2018, rather than the much more substantial salary increase they received in 2019.

[100] Based on these assumptions, I have re-calculated the applicant's projected lost income from the respondent for July to December 2018 (as he would have been on an unpaid leave from January to June 2018) to total $45,885.08 (as opposed to the $48,053.88 calculated by the applicant) and for January to May 3, 2019 to be $32,122.96 (as opposed to $38,815.13 as calculated by the applicant). This results in a further deduction of $8,860.97.

[101] Incorporating these three deductions, the applicant's total lost income from March 30, 2015 to May 3, 2019 amounts to $101,363.16.

[102] Accordingly, I find that the applicant is entitled to monetary compensation for lost income in the total amount of $101,363.16.

Compensation for Injury to Dignity, Feelings and Self-Respect

[103] The applicant further claims the amount of $25,000 as compensation for injury to his dignity, feelings and self-respect.

[104] In terms of the impact on him of the respondent's decision to rescind its offer of employment, the applicant testified at the remedial hearing that there were two aspects of this. First, he testified that he had demonstrated genuine interest in working as an engineer in the oil and gas sector and had carefully crafted a portfolio through his internships to pursue work in this sector with one of the "super-major" companies. He testified that to have all that taken away from him was very disturbing, given that he had a decent GPA, had a good resume, had graduated from one of the toughest engineering schools, and had been selected as the top candidate in the competition. He testified that this was a loss for him and also for society.

[105] Second, he testified that the experience of having the offer rescinded definitely "hit a nerve" for him. He testified that pursuing his human rights application was not about him, but was about changing the respondent's practice. However, as a result of pursuing his human rights application, he testified that he was required to put his

reputation on the line, to be called a liar in the media, to be in trouble with Deloitte (which restricted the clients he could do work for as a result of the application), and to use his weekends and evenings to be involved in the case and to still be involved four years later.

[106] In terms of the professional impact on him, the applicant testified that he has not been able to work as an engineer or do engineering work in the oil and gas sector as he had wanted, and has not been able to apply for his professional engineering designation.

[107] In terms of the financial impact, he testified that he was required to take a job paying $50,000 per year when he believes he had the potential to earn much more. He testified that he has friends who have paid off mortgages on their houses by this point in their careers, while he does not even own a car. He also testified that while his student debts have been paid off, he has required some assistance from his family.

[108] 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. See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880.

[109] In terms of the objective seriousness of the conduct found to be discriminatory, I appreciate that in many ways the issue determined in this case was novel and that the respondent did not believe that it was acting in violation of the *Code*. At the same time, I find that the decision to deny the applicant employment in an entry-level engineering position at the very start of his career was objectively serious.

[110] In terms of the subjective effect on the applicant, this is not a case where the applicant has submitted medical evidence to support a significant health impact from the discriminatory conduct. But that is not required in order to obtain an award of compensation. It also is not required that an applicant be an eloquent witness who is able to effectively articulate the impact of the discrimination. In this case, 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.

[111] Another factor that this Tribunal takes into account in awarding compensation is to make awards that are consistent with awards made in other similar cases. In the employment context, where the discriminatory conduct at issue has resulted in an applicant losing a job or job opportunity, awards of general damages typically have been made in the amount of at least $15,000 and higher.

[112] In relation to the applicant's dishonesty, I note that where an applicant's conduct has contributed to the context or circumstances in which discrimination was found, the Tribunal will reduce the award of compensation to take account of such conduct. See *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230; *Pilkey v. Guild Automotive Restorations Inc*., 2012 HRTO 1522 aff'd on judicial review at 2013 ONSC 3129 (Div. Ct.).

[113] In the instant case, I find that the applicant's dishonesty was in response to conduct that was found to be discriminatory, rather than contributing to the conduct. I further note that in the *Davis* case, above, the applicant was awarded $10,000 in compensation notwithstanding that he deliberately concealed and lied about his knee injury. Further, in that case, the quantum of compensation was reduced on the basis of the Tribunal's finding that the applicant did not lose the job because of the discrimination but due to his own misrepresentation.

[114] In *Lane*, above, the Tribunal awarded $35,000 as damages for the violation of the complainant's inherent right to be free from discrimination, and a further $10,000 for reckless infliction of mental anguish. In this regard, I note that the impact of the discrimination on the complainant's health in the *Lane* case was quite severe, as was the recklessness of the respondent's conduct. I note that the complainant's misrepresentation of his sick days on his employment application form was not considered as a factor to reduce the award of compensation.

[115] In the specific circumstances of this case, I find that an award of $15,000 for compensation for injury to dignity, feelings and self-respect is appropriate. In reaching this conclusion, I note that the award should be higher than what was awarded in the *Davis* case, given my finding that the discriminatory acts found by the Tribunal resulted in the loss of the engineering position. However, while I have found that the applicant's dishonesty in the hiring process would not have occurred but for the respondent's discriminatory questions, it is my view that 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.

Pre-Judgment Interest

[116] The applicant also has claimed pre-judgment interest. As the Application was filed in the first quarter of 2015, I find that the appropriate pre-judgment interest rate is 1.3% per annum.

[117] I have calculated pre-judgment interest on the entire amount of lost income awarded from the mid-point of the period to which the award applies, which is April 16, 2017 or for a period of 2.35 years to August 23, 2019. As a result, pre-judgment interest on lost income is awarded in the amount of $3,096.64.

[118] I also am making an award of pre-judgment interest on the compensation for injury to dignity, feelings and self-respect at the same annual rate from the time the

applicant was informed on January 8, 2015 that the offer of employment had been rescinded to August 23, 2019, or a period of 4.62 years. As a result, pre-judgment interest is awarded on compensation for injury to dignity, feelings and self-respect in the amount of $900.90.

Public Interest Remedies

[119] Following the release of the Tribunal's Decision on Liability, the respondent took significant steps to change its policies and practices in order to conform to the Decision.

[120] The Decision on Liability was released on July 20, 2018. The respondent quickly took action to revise its policies and procedures by early September 2018, and before the next round of recruiting took place at universities that fall.

[121] The main change to the respondent's practice was that it no longer requires candidates to provide proof of eligibility to work in Canada on a permanent basis, but instead only requires proof of eligibility to work in Canada, including a Canadian open work permit or receipt by Immigration Canada of an application for a post-graduate work permit. A job candidate who receives an offer of employment from the respondent is now required only to submit this proof at least 6 weeks prior to the start date as shown in the offer letter. These changes have been incorporated into the respondent's careers website, job postings, candidate application questionnaire, interview guides, offer letters and pre-employment communications.

[122] On the basis of the evidence led by the respondent at the remedial hearing, the applicant largely withdrew his requests for public interest remedies. However, the applicant maintained his request for an order requiring the respondent to conduct training on its changed policies and procedures. In my view, such an order is not necessary. The respondent witness who testified at the remedial hearing was not able to definitively testify to the training provided in relation to the changes to its policies and practices, because this was not her area of responsibility. However, given the nature of the documentation in evidence before me to support the changes made, including

changes to the materials for the campus representative training for university and college campus events and to the mock interview form used for training purposes, I am confident that such training already has occurred.

[123] Accordingly, I decline to order any public interest remedy in this matter.

ORDER

[124] For all of the foregoing reasons, I hereby make the following order:

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.

Dated at Toronto, this 23rd day of August, 2019.

"Signed by"

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Mark Hart
Vice-chair