The Gloves Come Off: Sky High Damages in Human Rights Cases

By: Ryan Conlin and Frank Portman

Human Rights Tribunals across the country have been issuing damage awards which have raised the eyebrows of the employer community. In a number of recent cases, employees have been awarded record setting damages. In many of these cases, these damages have greatly exceeded what a Court would be prepared to award in a wrongful dismissal cases.

The Traditional View

Human rights tribunals are empowered to award general damages for human rights violations. These damages are intended to compensate the victims of discrimination for the loss of dignity and self-respect, and hurt feelings, caused by discriminatory actions. These damages have historically usually ranged from $500 to $15,000, with an unofficial high range established from $25,000 to $40,000. When taking into account that costs awards following a superior court trial can exceed these amounts, counsel for employees have frequently complained that this range of damages is not sufficient to deter discrimination.

In 2008, significant amendments were made to the Ontario Human Rights Code. In order to assess the effectiveness of these changes, in 2012 the Attorney General commissioned a report from lawyer Andrew Pinto on the state of the human rights litigation system in Ontario.

Pinto made a number of findings in his report. Of particular importance, Pinto decried the Tribunal’s relatively small awards of general damages. Pinto argued that low damage awards created, in effect, a “licence fee” to discriminate, and trivialized the importance of the Human Rights Code. He advised that these damages should be increased.

Tribunals across the country appear to be following the approach suggested by Mr. Pinto. While high general damages awards, including a record-breaking award by a Tribunal out of British Columbia, signify a shift in the approach of human rights adjudicators, just as significant have been the increase in employment related damages awards intended to compensate claimants for lost wages. These awards in particular have grown substantially, and Tribunals appear to have considered themselves able to award damages for events that, due to limitations periods, would be beyond the reach of the Courts.

**Fair v Hamilton-Wentworth School Board** (Ontario)

This case from the Human Rights Tribunal of Ontario served as the canary in the coalmine that human rights tribunals were reconsidering their approaches to damages. In this case, the employee was an environmental supervisor who developed a generalized anxiety disorder that prevented her from performing her duties. The Tribunal found that the employer had not adequately accommodated the employee, and had other positions in which the employee could have worked.
The Tribunal ordered that the employee be reinstated. This is an uncommon remedy, but not unheard of. The Tribunal found it was appropriate in this case because the defendant was a school board that could easily fit the employee into a new position, and was large enough that the employee did not have to have any contact with any of the individuals who had taken part in the earlier discrimination. The Tribunal then turned its mind to damages.

The Tribunal determined that the employee would have continued to work for the employer, and would still be employed with the employer, had she not suffered the discrimination that resulted in her dismissal. As a result, she was entitled to the wages she would have earned during that time. The employee was awarded $420,000, almost 10 years of back wages. This is the largest award for wage loss in Canadian human rights litigation history.

It is worth pausing at this point to mention that in wrongful dismissal cases, the unofficial cap on awards is 24 months’ pay, although courts occasionally but rarely have awarded greater amounts. Such a high notice period is generally awarded in the case of employees with very long service (likely in excess of 20 years). As there is no right of reinstatement, Courts do not award “backpay” regardless of the length of time it takes to get to trial.

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THE RISING TIDE OF HUMAN RIGHTS DAMAGES
(Complimentary Webinar, June 25, 2014, 12 p.m. to 1 p.m. ET)

In a number of recent decisions, human rights tribunals have shattered records for damages awarded to employees. These Tribunals have taken new approaches to well-established legal doctrines that have resulted in awards that might well be impossible in front of a court, and could result in a dramatic increase in liability for employers.

The Webinar will cover:

- A review of the leading cases from across the country
- The startling increase in the size of lost wage awards for former employees
- The new approach of human rights tribunals towards general damages awards for hurt feelings and loss of dignity and self-respect
- The possible use of damages normally reserved for personal injury cases in human rights proceedings
- The impacts of these awards in wrongful dismissal actions

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In this case, the Tribunal awarded 8 ½ years of backpay, roughly equivalent to 104 months. Along with back pay, it ordered the employer to equalize the employee's pension and CPP payments, along with repayment for all out of pocket medical and dental expenses that would otherwise have been covered by the employee's benefits.

At the time, this was the largest wage loss award in Canadian human rights tribunal history. When factoring in a $30,000 general damages award, this case came close to an award of $500,000. While the general damages award was on the high end of the usual range, it did not break particularly new ground. Nonetheless, the sheer size of the total award made by the Tribunal is noteworthy as a clear expression of the Tribunal’s newfound gusto in awarding large damages.

**Garrie v Janus Joan Inc. (Ontario)**

Another case from Ontario shows a similar disregard for rules that might constrain the award of damages in other circumstances. In *Garrie*, the employee suffered from a developmental disability, and worked for the employer from the late 1990s until 2009, when she was dismissed. She brought a complaint before the tribunal arguing that she had been paid less than minimum wage as a result of her disability.

At first, the Tribunal dismissed the majority of the claim. It held that the employee’s claim that she was paid less than minimum wage was out of time, since she had been aware of the wages she had earned and the potential for a claim in respect of them for over a decade. The Tribunal found that the employee had been dismissed in contravention of the **Code**, and granted a small award for the period immediately following her dismissal.

The claimant asked the Tribunal to reconsider their decision to dismiss the minimum wage claim.

In a fresh decision, the Tribunal found that the failure to pay the employee proper wages was an ongoing act of discrimination that only ended when the employee's employment did.

In the courts, employees may claim only wages unpaid owing within 2 years of the date the claim is filed.

The Tribunal did not feel that it was necessary to account for any similar period. In order to make the plaintiff whole, they awarded the claimant $140,000 in lost wages, compensating her for the underpayments for the entirety of her employment. In addition, they awarded her $25,000 in general damages, and $20,000 in respect of lost earnings following her termination.

While the amount of the award for lost wages is substantial, the general damages award is within historical norms. More interesting is that the Tribunal felt it had jurisdiction to award over 10 years of back pay, well outside of the range permissible in any jurisdiction in Canada. There is no indication, in fact, that the Tribunal perceived itself to be under *any* limit as to how far back it could look to award damages.
Kelly v University of British Columbia (No. 4) (British Columbia)

After several years of litigation and multiple judgments, the British Columbia Human Rights Tribunal finally released its decision on remedy in this case.

Kelly was a student in the UBC medical school residency program. He suffered from ADHD and a non-verbal learning disability. As a result of his treatment by the medical school, the Tribunal found he suffered embarrassment and humiliation, and eventually his participation in the program was terminated. Six years after that termination, he was re-admitted to the program following an earlier tribunal decision that found that UBC’s treatment of him was discriminatory.

This decision was concerned only with remedy.

In determining lost wages, the Tribunal awarded the difference between the earnings Kelly actually received, and what he would have made had he completed the program and moved on to work as a GP at his father’s clinic. Over six years, the Tribunal found that the difference was roughly $385,000. While this is high, and covers a longer period than most limitations statutes would allow, the size of the award is in part large due to the higher wages earned by doctors as compared to the litigants in other human rights cases.

It should be noted that ultimately, Kelly would become a doctor and will in the future, earn wages as any other doctor would. Nonetheless, because his ability to earn those wages had been deferred by six years, the Tribunal awarded damages.

More alarming for employers was the general damages award. Despite the fact that ultimately, the effect of the discrimination was nullified by the re-admission of Kelly into the residency program, the Tribunal found that Kelly was for a time unable to enter into his chosen profession because of the discrimination, and that Kelly had suffered serious social and employment consequences.

The Tribunal awarded a Canadian record $75,000 in general damages for loss of dignity and self-respect, and hurt feelings.

While Kelly was obviously embarrassed and upset by the events leading to this decision, he nonetheless will have a career as a physician, albeit one delayed. The Tribunal did not offer any detailed explanation as to why this case merited a larger award than had ever been previously awarded.

It is unclear as to whether the Tribunal saw this award as establishing a new upper limit on general damages awards. It may well be that in the view of the Tribunal more egregious cases of discrimination may warrant even larger awards.

The City of Calgary v CUPE, Local 38 (Alberta)

This case can only be called tragic in every way. The grievor was sexually assaulted by her supervisor, who was a well-thought of and high ranking member of the union, an assault for which the supervisor was convicted criminally. Following the grievor’s complaint, she was subjected to harassment by her coworkers, including having her keyboard sabotaged with rat
poison. The harassment continued, and the grievor was ordered to attend at a psychiatrist’s office. The employer demanded that the grievor provide a fitness to work certificate from her doctor, despite the grievor not requesting any time off.

This case dealt primarily with the question of damages, as there was little conflict about the facts and the employer’s liability.

Labour arbitration cases have long dealt with relatively large awards for lost wage claims. When an employee is reinstated by an arbitrator, they are usually reinstated with backpay to the day of the award. In this case, the arbitrator awarded $135,000 in such loss of previous income.

Additionally, the arbitrator determined that the employee would not be able to work again for another 4 ½ years, would retire shortly thereafter and, while working, would make a lesser salary than she would have at her old employment. In total, she awarded $512,000 for future income loss.

The arbitrator referred to the normal practice of human rights tribunals to award general damages. However, rather than citing other human rights cases, the arbitrator took a different tact. In determining the proper amount for general damages, the arbitrator cited two court cases which dealt with tort claims, one in the context of sexual harassment, the other in the case of an illegal invasive strip-search. Both of those cases left the individuals with mental trauma.

Referring to these cases, the arbitrator determined that an appropriate award was $125,000.

This is an extremely large award for general damages, no doubt awarded on the basis of the egregious facts of this case, and the suffering of the grievor. It should be noted that there was very little discussion about the differences in awarding damages between a court case dealing with psychological injury and a human rights case.

If this award is an indication that arbitrators are willing to take into account general damages awards from cases decided by other adjudicative bodies, we could see even higher awards. As of March, 2014, the cap on general damages in Canada is roughly $350,000.

What employers should know

The amounts of money involved in these cases is significantly higher than what we have seen in previous decisions coming out of the human rights tribunals, in terms of both lost wages and general damages.

Human rights tribunals offer a number of advantages for plaintiff’s lawyers. In particular, there are no cost consequences for an unsuccessful application and the costs of bringing a proceeding are significantly lower. There is also the potential benefit for employees of not being subject to statutory limitation periods which bind the Courts in civil cases.

It should be noted that the consequences of the decisions dealing with general damages is not limited to human rights tribunal cases. The Ontario Human Rights Code allows judges to award damages for human rights violations, even if those complaints have not been brought before the Tribunal.
This provision has been in the Human Rights Code since 2006, but was not invoked before the recent decision of the Ontario Superior Court in *Wilson v Solis Mexican Foods*. The case involved the termination of a disabled employee. The judge found that not only was the employee dismissed without proper notice, but the termination had been in part the result of the employer’s reaction to the employee’s disability.

As a result, the judge awarded general human rights damages. In fact, the human rights damages were equivalent to the notice period award, and effectively doubled the cost for the employer. Rising general damages awards could increase the liabilities to which employers are subject across employment litigation, if employee’s claims involve a human rights aspect.

Employers must take note of the quickly rising awards being meted out by human rights tribunals. Given the ease with which employees can access the human rights system, it is imperative, more than ever, to ensure that disciplinary and dismissal decisions are made in such a way so as to avoid any hint that they might be influenced by impermissible discriminatory concerns. Even for employers operating in good faith, not taking into account the potential for an outside observer to see an action as discriminatory could render employers liable to significant awards.

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