

# Damages Awarded by an Ontario Court for a Human Rights Code Breach

by Michael Stitz

On September 12, 2013, the Ontario Superior Court of Justice released what appears to be the first decision in which a court in Ontario has awarded damages for a *Human Rights Code*, R.S.O. 1990, c. H.19 ("the *Code*"), violation in a wrongful dismissal action.

In *Wilson V. Solis Mexican Foods Inc.* (2013), 233 A.C.W.S. (3d) 388, 2013 ONSC 5799 (Ont. S.C.J.), the Honourable Justice Grace awarded Patricia Wilson three months' pay in lieu of reasonable notice, as well as an additional 520,000 in human rights damages pursuant to s. 46.1 of the *Code*, namely for the right to be free from discrimination and the corresponding injury to her dignity, feelings and self-respect as it related to the unlawful termination of her employment, in breach of the *Code*.

Until 2008, a provincially regulated employee would have to pursue human rights redress through Ontario's specialized human rights regime, not Ontario's court system. After 2008, employees have been permitted to make civil claims for human rights damages pursuant to s. 46.1 of the *Code* where the claim is connected to another cause of action, such as a breach of contract/wrongful dismissal action. However, employees still cannot commence a civil action seeking human rights damages based solely on a breach of the *Code*.

Notably, federally regulated employees governed by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, do not benefit from the same civil remedy provisions in Ontario. Further, it is important to keep in mind that individuals cannot recover their legal fees if they are successful before a human rights tribunal, unlike if the matter is brought before a court.

## Facts

After approximately 16 months of employment, Ms. Wilson was informed by a letter dated May 19, 2011, that she was being dismissed without cause, effective immediately. Ms. Wilson alleged that her employment was terminated, at least in part, because of an ongoing back ailment which was a purported disability, and she claimed damages pursuant to s. 46.1 of the *Code*.

Prior to her dismissal, the plaintiff's attendance and performance were formally assessed, in November 2010. Aside from a time management issue, she achieved a satisfactory rating. Soon after, concerns emerged about the plaintiff's back and the status of her health. By early March 2011, Ms. Wilson stopped coming to work, and provided a note from her family physician that read as follows:

*This certifies that [Ms. Wilson] requires to be off work until further notice due to medical reasons.*

On March 28, 2011, Ms. Wilson's doctor advised that she was "medically fit to start a graduated return to work". It was proposed that she work four hours per day during the week of April 4, six hours per day the following week and eight hours per day starting April 18, 2011. That proposal, along with another that followed, was rejected by the employer. The defendant required that Ms. Wilson be "capable of returning to full-time hours and full duties before making the transition back to the workplace".

A May 19, 2011, letter then advised Ms. Wilson that the defendant's New Orleans Pizza "organization" had been sold. The letter concluded:

As a result of these organizational changes, many of your job functions have become redundant. Regretfully, we must terminate your employment effective May 20, 2011.

## Decision

Justice Grace ultimately found that the decision to dismiss Ms. Wilson was at least in part based on her disability and that she was not accommodated. Justice Grace also took issue with the

defendant's position that the plaintiff's role became redundant or was eliminated as a result of organizational changes, stating [at paras. 75-78]:

*If the divestiture was the real reason for the plaintiffs termination, why did that transaction not feature, at all, in a single communication with Ms. Wilson before May 19, 2011? Did it truly only realize Ms. Wilson was not needed post-closing? Was the author of the letters the Human Resources Manager caught so unprepared? No. The defendant's position is contrary to the evidence and defies common sense. ... the plaintiffs condition enabled the defendant to nudge the problem across the divestiture finishing line and provided the defendant with an excuse to terminate her.*

Justice Grace made his determination with respect to human rights-related damages based on the criteria discussed by Ferrier J. of the Ontario Divisional Court in its judgement in *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425, 2008 C.L.L.C. 230-037 (Ont. Div. CL) [at paras. 153-4]:

*This court has recognized that there is no ceiling on awards of general damages under the Code. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a "licence fee" to discriminate.*

*Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect; dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment. [Authorities omitted.]*

Ultimately, it was determined that Ms. Wilson lost the right to be free from discrimination" and experienced "victimization". Second, the defendant's breach was serious. The defendant orchestrated the dismissal and was disingenuous at various times both before and during termination.

What compounded matters was the disingenuous manner in which the defendant handled the situation, Justice Grace remarked [at para. 90]:

*As Aston J. wrote in Dwyer, supra, at para. 50:*

*When dismissing employees, employers are under a duty to act fairly. They are required to be candid, reasonable, honest and forthright.*

*Telling an employee they are valued while making them overcome various obstacles so that they do not return temporarily and then terminating them permanently when the time is ripe, does not meet that standard.*

## Thoughts and Conclusions

1. Some plaintiffs counsel will undoubtedly take issue with this award as it may very well have a chilling effect on the call for increased damage awards when human rights breaches are found. The Human Rights Tribunal ("the Tribunal") has often been regarded as awarding too little when breaches are found, generally awarding \$5,000-\$10,000 unless egregious circumstances exist. Many stakeholders have been waiting for a court to take the lead on this matter and increase the quantum when presented with the opportunity. Curiously, despite the court regarding Ms. Wilson's situation as a serious breach, the award is simply in line with moderate to high awards made by the Tribunal since 2008, and what many advocates regard as far too low. On November 8, 2012, the Ontario government released the report of the Ontario Human Rights Review 2012 (the "Pinto Report"), which reviews the changes made to the *Code* in 2008. Among the recommendation made in the report was the following:

### *Recommendation 10*

*The Tribunal should reconsider its current approach to general damages awards in cases where discrimination is proven. The monetary range of these awards **should** be significantly increased.*

*I received feedback from several stakeholder groups and individuals that Tribunal awards, particularly the general damages awards, are routinely too low.*

*... in keeping with the Tribunal's purpose, higher compensatory awards will encourage applicants to pursue their human rights claims before the Tribunal, as it will be efficient and economically worthwhile to do so.*

If there is now relative parity between awards of the Tribunal and awards of the courts as it

relates to general damages for a breach of the *Code*, more employees will utilize the courts over specialized tribunals because, unlike at the Tribunal, employees can recover a portion of their legal costs in court.

2. In *Piazza v. Airport Taxicab (Malton) Assn.* (1989), 60 D.L.R. (4th) 759, 26 C.C.E.L. 191 (Ont. C.A.), the Ontario Court of Appeal analyzed the meaning of compensation under the old provisions of the *Code*. The Honourable Justice Zuber, as he then was, provided:

*The purpose of compensation 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. I find nothing in the language of the foregoing section which would import into it the limit on compensation which is imposed by the common law with respect to claims for wrongful dismissal.*

In Ms. Wilson's case, however, the award of wrongful dismissal damages (pay in lieu of reasonable notice) for breach of contract was not made with reference to s. 46.1 of the *Code*, but rather the traditional common law analysis discussed in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, [1960] O.W.N. 253 (Ont. H.C.).

Plaintiffs counsel will undoubtedly argue that Justice Grace should have taken a more restitution/tort-based approach to analyzing lost compensation rather than simply employing the traditional common law wrongful dismissal analysis. Perhaps this decision is a result of Ms. Wilson's counsel not advocating until the date of trial for remedies such as damages for lost wages or other related "make whole" relief. Nevertheless, there have been decisions of tribunals and courts in Ontario over the last several decades which call for damages in a scenario such as Ms. Wilson's not to be determined through the typical wrongful dismissal lens. It appears that was done on only part of the judgment.

3. Finally, this case reinforces that the accommodation process cannot be taken lightly when a disability rears its head and is supported by medical documentation. All parties must act reasonably and an employer will generally be expected to accommodate an employee to the point of undue hardship when a reasonable return to work plan is presented. The decision to require a complete recovery when an employee may require only minor accommodation to return to their position will be heavily scrutinized.

It remains to be seen if this decision will stifle the efforts of the stakeholders calling for increased damage awards or if it will create increased redundancy as it relates to the functions of the courts and specialized human rights tribunals. These questions will undoubtedly be answered as more cases like Ms. Wilson's begin to play out in the public forum.