

RESTITUTIONARY DAMAGES: RECENT DECISIONS AFFIRM BROAD POWERS OF HUMAN RIGHTS TRIBUNAL

Posted on June 22, 2015

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The purpose of Ontario's *Human Rights Code* (the "Code") is remedial, not punitive. Accordingly, the Human Rights Tribunal of Ontario has the jurisdiction to fashion awards – both monetary and non-monetary – which are intended to put the applicant back in the position that he or she would have been in but for the discriminatory conduct, as well as eradicate discrimination and ensure future compliance with the Code. The following recent decisions highlight the Tribunal's broad authority in this regard.

1. Monetary Restitution: Lost Wages

In *Systemgroup Consulting Inc. v McConaghie*,^[1] the Ontario Superior Court of Justice upheld an award by the Tribunal for six months of lost wages following the termination of the applicant's employment, *even though the termination clause in her employment contract only entitled her to four weeks of pay*.

According to the Tribunal, the applicant's employment had been terminated for reasons contrary to the Code. In order to restore the applicant to the position she would have been in but for the employer's discriminatory conduct, the Tribunal disregarded the termination clause and ordered that the employer pay the applicant her lost wages for the period ending on the date that she obtained another job.

On appeal, the employer argued that the Tribunal had erred since restoring the applicant to the position she would have been in prior to the termination of her employment would be to provide her with her rights under her employment contract only (e.g., four weeks of pay). While the Court conceded that the employer's argument might be correct in the context of a common law action for wrongful dismissal, the same reasoning does not apply in cases where the Code has been violated. Because the Tribunal found that the applicant's employment would have likely continued but for the discriminatory conduct, the Court held that the Tribunal's decision to award six months of lost wages was reasonable.

2. Non-Monetary Restitution: Reinstatement

In *MacLeod v Lambton (County)*,^[2] the applicant was hired to manage the employer's Emergency Medical Services ("EMS") department. Following complaints from EMS staff that the applicant was being verbally

abusive, the applicant disclosed that he had been diagnosed with bipolar disorder. When the applicant attempted to return to work after a disability-related leave, the employer unilaterally assigned him to work in a different building on special projects. The employer also notified the applicant that he would not be returned to his managerial position because of concerns about his behaviour and management of the department.

The Tribunal found that the employer had discriminated against the applicant on the basis of his disability by failing to consider whether the applicant's disability could be accommodated in his managerial position. Therefore, the Tribunal ordered that the applicant be reinstated into his managerial position, but with terms and conditions that recognized the harm that his previous disability-related conduct caused, including that:

- the applicant provide medical certificates certifying that he was sufficiently well to resume his managerial duties;
- the employer retain a consultant with expertise in bipolar disorder and discrimination to provide training to staff; and
- the parties draft and sign a protocol for identifying and dealing with bipolar disorder-related behaviour in the workplace.

The Tribunal concluded that reinstatement was the most appropriate way to put the applicant back in the position that he would have been in, but for the employer's discrimination.

3. Non-Monetary Restitution: Positive Letter of Reference

In *Wesley v 2252466 Ontario Inc.*,^[3] the applicant was a gay, deaf man who was hired to perform landscaping work. During the job interview, the parties agreed that the applicant would communicate with his colleagues by writing in a note pad.

The applicant testified that after a few weeks of work, some of his colleagues would swear and complain that they had to communicate with him by writing in a note pad. His colleagues also made obscene sexual gestures and sexual and homophobic comments directed towards the applicant. The employer began scheduling the applicant for fewer shifts and eventually wrote the following in the applicant's note pad: "You are a good worker. I just have no work for you because of contract loss.... I have to lay off 6 people.... You and 5 others..." Following the applicant's lay off, the applicant observed that the employer did not lay off any of any of his former colleagues.

Finding that the respondent had discriminated against the applicant on the basis of his disability, sex, and sexual orientation, the Tribunal ordered the employer to provide the applicant with a positive letter of reference. In the Tribunal's view, given that the employer wrote in the applicant's note pad that he was a "good worker", the positive letter of reference would assist in putting the applicant back in the position that he would

have been in, but for the discrimination. The Tribunal also ordered that the letter of reference (1) set out the applicant's job title, the start and end dates of his job, and his duties and responsibilities; (2) state that the applicant was a good worker; and (3) be signed by the employer.

The Tribunal also awarded compensation for lost wages, damages for injury to dignity, feelings and self-respect, and an order that members of the employer's management complete an online training module on human rights.

Employer Takeaways

These decisions serve as a reminder to employers that the Tribunal has the authority to not only award damages that compensate the applicant for monetary losses suffered as a result of a violation of the Code, but that the Tribunal also has the authority to award monetary and non-monetary restitutionary damages, including lost wages for the actual duration of time the applicant is out of work, reinstatement, and positive letters of reference.

by Stefanie Di Francesco and Paul Boshyk

[1] [2015 ONSC 2213](#).

[2] [2014 HRTO 1330](#).

[3] [2014 HRTO 1591](#).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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