Damages for Human Rights Breaches in Court Cases and Comparison to Human Rights Tribunal Decisions

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Human rights tribunals across Canada generally have the authority to award damages for injury to dignity, feelings and self-respect. In Ontario, awards of damages for injury to dignity, feelings and self-respect are not limited to the Ontario Human Rights Tribunal (the "HRTO") however. In 2006, the Ontario *Human Rights Code* (the "Code") was changed and Ontario Courts were granted authority under s. 46.1 (1) of the Code to award damages for the infringement of Code rights. There is now a trend of Ontario Courts awarding damages for human rights breaches. However, are the amounts awarded by Ontario Courts comparable to those awarded by the HRTO? Are Ontario Court cases and HRTO decisions consistent?

Types of Damages Awards

The focus of this article is on damages awarded for compensation for injury to dignity, feelings and self-respect. However, it is helpful to generally understand the different types of damages that can be awarded by the HRTO and Ontario Courts.

The HRTO can award the following types of damages/compensation:

1. General damages for breach of the Code, including damages for injury to dignity, feelings and self-respect.
2. Special damages, which are meant to restore the complainant to the same financial position as if the human rights violation had not occurred.
3. Interest, but not costs.

Generally, in employment matters, Ontario Courts can award the following types of damages/compensation:

1. General damages, which are intended to compensate for pain and suffering, including damages for injury to dignity, feelings and self-respect.
2. Compensatory/special damages, which are designed to return the plaintiff to the same financial position s/he was in prior to the alleged injury.

3. Aggravated damages, which are compensatory and available as additional compensation if the plaintiff can establish that a breach of contract caused mental distress.
4. Punitive damages, which are awarded to punish the defendant.
5. Interest, costs and disbursements.

Guiding Principles: Damages for Compensation for Injury to Dignity, Feelings and Self-Respect

The guiding principles with respect to damages awarded for compensation for injury to dignity, feelings and self-respect are the same whether before the HRTO or Ontario Courts.

The analysis focuses on:

- the objective seriousness of the conduct; and

- the effect of the discrimination on the particular applicant or plaintiff.

Relevant considerations to assess an applicant's or a plaintiff's particular experience in response to the discrimination include the following: humiliation, hurt feelings, loss of self-respect, loss of dignity, loss of self-esteem and confidence, the experience of victimization, the applicant's or plaintiff's vulnerability, and the seriousness, frequency and duration of the offensive treatment. Damages will generally be at the higher end of the relevant range when the applicant or the plaintiff has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.

Two Similar Cases

Let's turn to two cases for comparison purposes. The two cases are similar in nature and involve serious allegations of sexual harassment and assault.

In *Silvera v Olympia Jewellery Corp.,* 2015 ONSC 3760 ("*Silvera*"), an Ontario Superior Court case, the plaintiff was an administrative employee who, throughout the course of her employment, was subjected to frequent inappropriate and derogatory racial comments from her boss and inappropriate touching by her boss. Her boss also engaged in sexual coercion by requiring her to wear particular items of jewellery, forcing her to accept rides, gifts and food. Instead of complying with her requests that the conduct cease, her boss escalated his assaults. The Court found that the employee had been subjected to sexual and racial harassment and sexual assault by her boss. The Court awarded damages against the plaintiff's employer and her boss jointly and severally liable in the following amounts: $90,000 for general and aggravated damages; and $10,000 for punitive damages. The Court also ordered the employer to pay $15,000 in aggravated damages and $10,000 in punitive damages. With respect to the Code infringement, the Court awarded the plaintiff $30,000 in damages for compensation for injury to dignity, feelings and self-respect. This award was based on the Court's conclusion that the plaintiff had suffered the full-list of consequences to be considered in the analysis of the effect of the discrimination on the plaintiff.

In *O.P.T. v Presteve Foods Ltd.*, 2015 HRTO 675 ("*Presteve*"), a HRTO decision, the applicants were two sisters who were hired to work as temporary foreign workers. They were subjected to unwanted sexual solicitations and advances, sexual harassment, sexual assaults and touching at the hands of their employer. The HRTO awarded one sister, O.P.T, $150,000 and the other sister, M.P.T, $50,000 as compensation for injury to dignity, feelings and self-respect to two employees against their former employer. With respect to O.P.T, the employer invited and took her out to dinner on several occasions when she did not want to go, told her he loved her, forcibly hugged and kissed her on several occasions, and forced her to perform fellatio and sexual intercourse on multiple occasions. The HRTO concluded that both O.P.T and M.P.T had suffered the full-list of consequences to be considered in the analysis of the effect of the discrimination on the applicant. However, the HRTO reasoned that the difference in both awards was justified by O.P.T's greater vulnerability, the greater seriousness of the employer's conduct with respect to her and the impact the conduct had on her.

Comparing the Awards: Courts vs HRTO

In both *Silvera* and *Presteve*, the employer's conduct and the impact on the complainant were very serious. As seen above, in *Silvera*, the Court awarded $30,000 for the Code infringement and in *Presteve*, the Court awarded $150,000 to O.P.T and $50,000 to M.P.T. The HRTO's award for M.P.T is only slightly higher than the Court award in *Silvera*. On the other hand, the HRTO's award for O.P.T is much higher than the Court award in *Silvera*... or is it?

As previously noted, in addition to damages for Code infringements, Courts can award various types of damages, including aggravated and punitive damages. Courts will not shy away from awarding amounts under those headings of damages if the facts warrant it. Therefore, setting aside the damages for wrongful termination and future lost income, the total damages award in *Silvera*, inclusive of general damages, aggravated damages, punitive damages and damages for the Code infringement, actually amounts to $155,000.

The HRTO does not have jurisdiction to award damages that are punitive in nature. Given the HRTO's inability to award damages that are punitive in nature, does the HRTO compensate for this by awarding higher damages awards for compensation for injury to dignity, feelings and self-respect? Time will tell. However, it is important to remember that a comparison between the cases will largely depend on the significance of the facts and the nature of the rights infringed. Court decisions may sometimes appear to be higher given the different types of damages a Court can award, as well as costs! But generally, Ontario Court cases and HRTO decisions appear to be somewhat consistent and comparable with respect to the amounts awarded for Code infringements. And we do know that Ontario Courts refer to HRTO decisions in determining the seriousness of the breaches and the amount to be awarded for compensation for injury to dignity, feelings and self-respect.

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