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HR Risk:
HUMAN RIGHTS DAMAGES ON THE RISE

Canadian employers have historically avoided large damage claims for breaches of human rights legislation, but that state of affairs is changing, cautions **Lorenzo Lisi**. And any misstep can now cost big money

Human resource professionals are a sophisticated lot. They understand the law, assess risk, and make decisions relative to employee accommodation and business realities. There is always risk of a claim or complaint, but generally (in the past), damage awards where there was a violation of human rights legislation were relatively low.

Recently, however, Canadian courts and tribunals have shown a willingness to increase damage awards for a breach of human rights legislation, resulting in significant damage awards. Some would say we are moving towards the U.S. model of damages for human rights for claims of discrimination and harassment.

FAIR AND HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD

The recent ruling by the Human Rights Tribunal of Ontario in *Fair v. Hamilton-Wentworth District School Board* serves as a strong reminder to employers that a failure to accommodate an ill or injured employee can be costly. In this case, it cost the school board $450,000.

Here, briefly, are the facts. Ms. Fair was formerly employed by the Hamilton-Wentworth School Board as a supervisor of regulated substances. In 2001, she developed a generalized anxiety disorder resulting from a fear that she would make a mistake and face personal liability for a breach of the *Ontario Occupational Health and Safety Act*.

In 2001, and until 2004, Ms. Fair went off work on long-term disability. In 2004, the school board's insurer determined that Ms. Fair was capable of returning to employment and, consequently, suspended her benefits. However, rather than returning her to work, the school board said that it did not have a suitable position to which she could return, and relied on evidence from an expert that it was unlikely Ms. Fair could return to a position that involved a similar level of liability. In July 2004, the school board terminated Ms. Fair's employment.

After a lengthy hearing, the tribunal held that the school board failed to accommodate Ms. Fair's employment to the point of undue hardship. In determining the appropriate remedy for this breach, the tribunal considered those payments, or damages, she would have been entitled to receive if she had continued to be employed.

The tribunal ordered damages of more than

$450,000 for lost wages, retroactive pension adjustments, and out-of-pocket medical/dental expenses, as well as compensation for injury to dignity, feelings and self-respect. A staggering result!

This "make whole" approach to remedy, while not new at law, was surprising, not only because of its application to a complaint under the *Ontario Human Rights Code* but also because of the lengthy passage of time between the discriminatory termination and the conclusion of the hearing. What makes it even more surprising is that the tribunal acknowledged that much of the delay was as a result of its own process.

This decision signals real change in the willingness of a tribunal to view its remedial authority as an opportunity not only to award damages but to make the individual "whole" where there is a proven case of discrimination.

Given that a complaint alleging a failure to accommodate can take a very long time to get before a tribunal, or a court, employers need to be aware, be cautious and, most of all, assess the possibility of settlement early in the game, before legal costs and possible liability start to climb.

CITY OF CALGARY AND CUPE LOCAL 38

The importance of a proper investigation was highlighted in the 2013 decision in *City of Calgary and Canadian Union of Public Employees, Local 38*, in which an arbitration panel (the "Panel") awarded a unionized employee more than $800,000 in damages for a breach of the applicable collective agreement.

The employee, a unionized clerk for the City of Calgary, was sexually assaulted repeatedly by a senior foreman who fondled her while she was at her desk. She reported the assault to her manager, who arranged for an extension to her desk to make it more difficult for the employee to be approached from behind. The manager subsequently left on a one-week vacation and placed the foreman (the same foreman who had assaulted the employee) in charge.

The assault continued. The employee installed a spy camera at her desk, and surveillance footage showed a further assault on her. When the employee showed the images caught on camera to her manager's director, he emailed corporate security to launch an investigation.

The city's director, however, described the photos as "inconclusive." In addition, the employee (despite continued complaints of assault and other conduct) was treated with indifference and, it was found, inappropriately. For example:

- After reporting the assault, the employee discovered what she thought to be rat poison on her keyboard. An investigation was commenced, but never concluded. The employee was moved to a different facility and was later rebuked by management and even "counselled" by the city.
- The city required the employee to attend a mandatory meeting with a psychiatrist and indicated it would receive a copy of the psychiatrist's report. The employee refused. Upon her return from a scheduled vacation, the city required her to provide a "fitness to return to work" certificate from her family doctor.
- Upon her return to work, the employee's manager advised her that "any type of disrespectful workplace behavior will be dealt with in a disciplinary manner." At the same time, her manager asked her to return certain door keys, which had been in the employee's possession as part of her job.

The panel concluded that steps taken by the city to deal with the situation were not in line with the city's complaint process and that they actually worsened the situation.

The foreman who assaulted the employee eventually pleaded guilty to a charge of assault and was incarcerated.

At issue at the arbitration hearing was not whether the assault had occurred, but the scope of the damages to be awarded against the city. Instead of a mere award of damages for lost income, the Panel awarded the following: general damages, damages for lost and future income, damages for lost pension entitlements, and special damages for the cost of future counselling, totalling almost $870,000!

The conduct of certain city management in this case was certainly egregious and beyond the pale. However, the award is extremely significant. It demonstrates that an arbitrator (in this case a panel) will not hesitate to award additional and "non-traditional" damages where the evidence supports such damages.

It also highlights the importance of a proper and appropriate investigation, and the obligation to address any complaint of harassment seriously. HRD

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