
Case Law Update: Minimizing Your Risk of Increasingly High Damage Awards

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Overview

Five areas:

- Infliction of mental suffering
- Child care obligations
- Investigation of sick leave claims
- Enforcement of harassment policies
- Failure to accommodate - HRTO

Damages for Mental Suffering

Key cases:

- *Honda v. Keays*
- *Piresferreira v. Ayotte*

Damages for Mental Suffering

Timing is everything

- Manner of dismissal → “*Keays*” damages
- Misconduct during the employment relationship → tort of intentional infliction of mental suffering

“Keays” Damages

- Manner of dismissal must have caused mental distress
- Dollar value accurately compensating for the plaintiff’s actual loss
- Normal distress and hurt feelings will not attract *Keays* damages

Post-*Honda v. Keays*

- *Piresferreira v. Ayotte*
 - Ontario Court of Appeal
 - \$45,000 for mental suffering
- *Altman's v. Steve's Music Store Inc.*
 - Ontario Superior Court of Justice
 - \$35,000 – moral damages based on *Keays*
 - \$20,000 – punitive damages

Tort of Intentional Infliction

Elements

1. Flagrant and outrageous conduct;
2. Calculated to produce harm;
3. Resulting in a visible and provable illness.

Tort of Negligent Infliction

Court of Appeal in *Piresferreira v. Ayotte*:

- Breach of contractual duty cannot be the basis for the recognition of a common law tort

Question:

- Will employers' Bill 168 obligations form the required duty of care?

Summary – Mental Suffering

- During the employment relationship
 - Compensation through the tort of intentional infliction of mental suffering
- At the time of dismissal
 - *Keays* damages

Best Practices

- Treat employees with respect and dignity in the dismissal process
- Consider individual circumstances and timing
- Train employees and managers
- Treat complainants fairly, effectively, in timely manner

Childcare Obligations

- Location, location, location

Childcare Obligations

- B.C. – where a change results in serious interference with a substantial parental/family obligation
- Federal and Ontario HRT – where policy has a differential impact on employee due to his/her family status
- Ontario arbitrators – amalgam approach

CHRT – Range of Damages

- No cap - wages that the victim was deprived of and expenses incurred by the victim as a result of the discriminatory practice
- Up to \$20,000 - pain and suffering
- Up to \$20,000 - special compensation for wilful and reckless conduct

Federal - Damages

- *Johnstone v. Canada Border Services*
 - Lost wages and benefits
 - \$15,000 - pain and suffering
 - \$20,000 - wilful and reckless conduct

Federal - Damages, cont

- *CN Rail* Trilogy
 - Reinstatement
 - Lost wages
 - \$15,000 – pain and suffering
 - \$20,000 – wilful or reckless discrimination

HRTO – Range of Damages

- No cap - losses flowing from an infringement, including:
 - Past and future loss of income, benefits
 - Pre and post-judgment interest
 - Loss of right to be free from discrimination
- No cap – injury to dignity, feelings and self-respect

HRTO – Damages Award

- *McDonald v. Mid-Huron Roofing*
 - \$3,500 – lost wages
 - \$20,000 – intangible harm for infringement

Best Practices

- Implement an accommodation program
- Foster an open environment
- Consider all requests – investigate, query self-accommodation, determine reasonable needs
- Train managers on human rights obligations

Investigating Sick Leave Claims

- GTAA – Arbitrator Shime
 - \$300,000 less mitigation - Past economic loss
 - Amount to be determined – Future economic loss
 - \$50,000 - Mental distress, pain and suffering
 - \$50,000 – Punitive damages

Investigating Sick Leave Claims

- GTAA – Divisional Court – Judicial Review
 - No punitive damages
 - Mental distress to be quantified separately
 - No pain and suffering
 - Does not include compensation for physical injury
 - Economic loss (past and future)

Best Practices

- Treat employees with respect and dignity
- Consider whether video surveillance is necessary
- Use experts to interpret any surveillance
- Follow the investigation process
- Ensure process is fair

Best Practices, cont.

- Use available investigative tools
- Interview the employee
- Apply the principles of progressive discipline where appropriate

Harassment Policies

- *Disotell v. Kraft*
- Constructive dismissal a result of
 - Inconsistent enforcement of harassment policy
 - Flawed investigation
- ~\$35,000 awarded

Best Practices

- Apply harassment policies consistently
 - Training
 - Enforcement
- Take complaints seriously
- Conduct proper investigations

HRTO – Failure to Accommodate

- Five 2010 decisions
 - Employees requested accommodation
 - 3 cases - employment was terminated
 - 1 case - employee sent home
 - 1 case – employee did not return to work

Damages awarded by HRTO

- Lost wages
- Range of \$10,000 to \$20,000 for the loss of right to be free from discrimination, injury to dignity, feelings, self-respect
- \$15,000 for discriminatory treatment

Best Practices

- Implement a human rights policy
- Determine accommodation case-by-case
- Provide human rights training
- Take complaints seriously

Conclusion

- Damages awards are higher
- The best defence is a good offence
 - Implement and enforce policies
 - Take complaints seriously
 - Investigate accommodation requests
 - Consider individual circumstances