

The high cost of human rights complaints

Date : January 1, 2001

It may not be immediately clear that substantial monetary damages are among the potential consequences for an employer named as a respondent in a successful human rights complaint. Under paragraph 41(1)(b) of the Ontario *Human Rights Code*, the provision respecting monetary damages, boards of inquiry are empowered to make orders that "direct the party to make restitution, including monetary compensation, for loss arising out of the infringement [of a right under the Code], and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish".

However, under this provision, boards of inquiry have awarded "special damages" for specific losses, such as lost earnings, and "general damages" for losses that are not as easy to quantify, such as the right to be free from discrimination. When the discriminatory conduct has affected the psychological well-being of a complainant, and was either wilful or reckless, a board may also award damages of up to \$10,000 for mental anguish.

A recent decision of a board of inquiry has dealt extensively with the principles behind damage awards in human rights decisions. It illustrates the significant exposure an employer can face in terms of monetary damages if care is not taken.

In *Moffatt v. Kinark Child and Family Services* (November 2, 1999), Moffatt was a gay man who had been a supervisory employee of Kinark. Moffatt complained that he was the victim of discriminatory workplace gossip that created a poisoned work environment. Further, he alleged that his manager, Oswin, had failed to investigate the rumours being spread about him. Lastly, Moffatt claimed he had been dismissed for discriminatory reasons and that an inaccurate report had been submitted to the Children's Aid Services as a reprisal for his efforts to enforce his rights under the Code.

The Board of Inquiry upheld his allegations of discrimination and reprisal, but found that, although Moffatt's termination had been unfair, it had not been motivated by discriminatory factors. The Board then addressed the issue of damages.

NO "DOUBLE RECOVERY"

The Human Rights Commission sought damages both for Kinark's having tolerated a poisoned work environment, and for its failure to investigate Moffatt's complaint. Terming this "double recovery", the Board declined this request, holding that "[w]here there is a finding that a complainant has been subjected to discriminatory work conditions which are not investigated by management, the resulting infringement of the complainant's right to be free from discrimination

constitutes one basis of compensation under s. 41(1)(b) ..., not two." ... The fact that there was more than one factor creating the discriminatory work environment may be relevant to the quantum of the compensation, but does not create a second head of damages."

GENERAL DAMAGES SUBJECT TO \$10,000 LIMIT

The Commission also argued that, despite the \$10,000 ceiling on awards for mental anguish, there was no such limit on awards of general damages for humiliation and loss of dignity due to discrimination. The Board rejected this argument as well, holding that a limitation was implicit in the Code: "Given that s. 41(1)(b) provides that complainants can request an award of up to \$10,000, if and only if they have suffered mental anguish, and if and only if the infringement was wilful or reckless, it would be inconsistent if the section also allowed unlimited awards for the emotional impact of the discrimination that did not cause mental anguish and was not engaged in wilfully or recklessly."

DAMAGES AGAINST MORE THAN ONE RESPONDENT

The Board held that, where more than one party is found to have infringed a right, each party can be ordered to pay damages arising from its own discriminatory conduct, including general damages for the experience of discrimination, and damages for mental anguish. However, where one party is a corporation that is held to be liable for the conduct of an employee, this vicarious liability does not provide a basis for a separate award assessed directly against the corporation in respect of the same infringement.

Based on this approach, the Board held that, in this case, the maximum compensation available would be \$40,000: for each infringement of Moffatt's rights - the right to be free from discrimination based on sexual orientation and the right to claim the protection of the Code without reprisal - Oswin and Kinark could be held jointly and severally liable for general damages to a maximum of \$10,000 and damages for mental anguish to a maximum of \$10,000.

In the result, the Board ordered damages of \$36,000 for general and mental anguish damages (or \$4,000 less than the maximum), as well as special damages of \$13,800 for Moffatt's loss of income from the time of his dismissal until the commencement of his new employment nine months later.

In Our View

Readers may note that income replacement damages were awarded despite the fact that the Board did not find that Moffatt had been dismissed for discriminatory reasons. However, it held that, under human rights legislation, Kinark had "some continuing responsibility" to investigate Moffatt's allegations even after his termination. Had Kinark conducted a proper investigation and

openly addressed the discriminatory rumours circulating around Moffatt, the Board stated, this would have assisted Moffatt's emotional recovery and stemmed the flow of damaging rumours outside the organization that hindered his attempts to obtain new employment. In making this award of damages, the Board cited the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.* (reported in "[Fairly, reasonably and decently](#)": [Employers obliged to deal in good faith with dismissed employees, Supreme Court rules](#)" on our Publications page) to the effect that the law should encourage conduct that minimizes the dislocation to employees caused by dismissal.

For further information, please contact [Andrew Tremayne](#) at (613) 563-7660, Extension 236.