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**INDIVIDUAL HUMAN RIGHTS REMEDIES**

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**1. INTRODUCTION**

Human rights legislation in Canada is quasi-constitutional and is both preventative and remedial. Remedies for breaches of human rights legislation can be sought in a variety of contexts. Tribunals have broad powers and wide discretion to prevent and redress discrimination. They are granted the power, pursuant to human rights legislation, to require that any proper party to a proceeding take any steps which, in their opinion, the party should take to promote compliance, including addressing future practices.

Labour arbitrators and Labour Boards have exclusive jurisdiction over human rights complaints in the unionized context. As of June 30, 2008, amendments to the Ontario *Human Rights Code* (the “Code”) allow litigants within the jurisdiction of the *Code* to pursue remedies for breaches of the *Code* in the civil courts as well. There is some debate as to whether litigants under the jurisdiction of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “CHRA”) have the same ability to do so.

This paper will explore individual human rights remedies in the context of the Ontario and Canadian Human Rights Tribunals, the labour arbitration context and the civil context. Each section will separately consider the types of remedies awarded in successful cases, the reasoning behind those awards and trends that are emerging in each legal context. It will conclude by discussing themes that supersede the boundaries of forum and demonstrate the cross-pollination of ideas between contexts.

The pronouncements as to the remedial powers under human rights legislation permit human rights Tribunals to make wide ranging and sometimes creative awards – much broader than traditional employment related remedies.

It is therefore incumbent upon anyone representing a party to a human rights proceeding to give serious consideration to:

- (i) the relief to be sought, if acting for an applicant;
- (ii) in what forum that relief should be sought:
  - arbitrator/arbitration panel in a unionized context as per *Tranchemontagne v. Ontario (Director, Disability Support Program)*<sup>1</sup>;
  - human rights tribunal; or
  - court;
- (iii) the relief which could be awarded, if acting for a respondent; and
- (iv) how the above factors might impact upon the appropriateness of settlement prior to a hearing.

The purpose of human rights legislation is not punishment but deterrence. The Supreme Court of Canada in *Ont. Human Rights Commission v. Simpsons-Sears*<sup>2</sup> said, in relation to the *Code*, that the purpose of the remedial provisions of human rights legislation is:

- to provide restitution to the victim of discrimination; and
- to act as a deterrent against future breaches so as to remove discrimination.

In *CN v. Canada (Human Rights Commission)*,<sup>3</sup> the Supreme Court of Canada stated that the purpose of the *Canadian Human Rights Act* (“CHRA”) was:

- to promote the goal of equal opportunity for each individual; and
- to prevent discriminatory practices.

The human rights regime recognizes that the “the equal worth and dignity of all individuals is foundational to the development and maintenance of a just and equitable society”.<sup>4</sup>

## **2. LEGISLATIVE FRAMEWORK**

### **Ontario Human Rights Code**

Section 34: Under section 34 of the *Code*, any person who believes that any of his/her rights under Part I of the *Code* have been infringed, may apply to the Tribunal for an Order under section 45.2 within the timeline specified in the *Code* (within 1 year after the incident or within 1 year after the last incident in a series of incidents).

Section 34(11): Concurrent civil and Tribunal applications are barred by section 34(ii) of the *Code*. A person may not apply to the Tribunal if a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement, if a court has finally determined the issue of whether the alleged infringement has occurred or the matter has been settled.

Section 45.1: Under section 45 of the *Code*, the Tribunal has the jurisdiction to defer an application as well as the power, under section 45.1, to dismiss an application, in whole or in part, where it is of the opinion that another proceeding has appropriately dealt with the substance of the application. These provisions have been used to defer to civil actions, complaints pursuant to the *Employment Standards Act, 2000* (the “ESA”), to other tribunals or to dismiss the *Code* application altogether.

Section 45.2: Under section 45.2, the Tribunal may make one or more of the following Orders:

- (i) an Order directing the wrongdoer to pay monetary compensation for the “loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect”;
- (ii) an Order directing the wrongdoer to make restitution other than through money compensation, for “loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect”; and

- (iii) even when no such Order is requested, an Order directing any party to do anything that, in the opinion of the Tribunal, the party ought to do to “promote compliance with this *Act*”; including an Order in respect of future practices.

Section 46.1: This section created a new substantive jurisdiction for Ontario Courts to award monetary compensation and other remedies for a breach of the *Code*. Under section 46.1, if a court finds that someone has infringed the rights of a person under Part I of the *Code*, the court can make an order directing the party who has infringed the right to pay monetary compensation arising out of the infringement, including compensation for injury to dignity, feelings and self-respect or to make restitution other than through monetary compensation. In considering section 46.1, the courts have determined that it should be read prospectively only. Cases with human rights allegations pre-dating June 30, 2008 are barred.<sup>5</sup>

Section 46.1(1) of the *Code* provides for a court to award monetary compensation for loss arising out of the infringement and “restitution”, other than monetary compensation, including restitution for injury to dignity, feelings and self-respect. It is unclear however whether “restitution” includes the jurisdiction to reinstate as reinstatement is not a common law remedy. There has still been no court decision directly addressing whether a civil court has the jurisdiction to reinstate as a *Code* remedy as opposed to awarding compensation in lieu thereof.

Section 46.2: Pursuant to section 46.1(2), in order to commence a civil action seeking compensation for discrimination, a human rights claim must be accompanied by a civil cause of action.

## **Canadian Human Rights Act**

Section 53(2): Section 53(2) of the *CHRA* sets out the remedies available for breach of the *CHRA* if a complaint is substantiated. The Orders which can be made are:

- (i) that the person cease the discriminatory practices and take measures to redress *the* practice or prevent the practice or similar practices from occurring in future, including:
  - a) the adoption of a special program, plan or arrangement pursuant to section 16(1) of the *CHRA* designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those advantages would be based upon on or relate to the prohibited grounds of discrimination; or
  - b) making an application to the Canadian Human Rights Commission (“CHRC”) for approval and implementing a plan under section 17 of the *CHRA* to adapt services, facilities, premises, equipment or operations to meet the needs of persons arising from disability;

- (ii) make available to the victim on the first reasonable occasion, the rights, opportunities or privileges that were or are being denied;
- (iii) compensate the victim for any or all of the wages the victim was deprived of and for any expenses incurred as a result of the discriminatory practice;
- (iv) compensate the victim for any additional costs of obtaining alternate goods, services, facilities, or accommodation and for any expenses incurred as a result of the discriminatory practice;
- (v) compensate the victim, by an amount not exceeding \$20,000, for any pain and suffering that the victim experienced as a result of the discriminatory practice;
- (vi) in addition, order a further amount, up to \$20,000, if the Tribunal determines that the discrimination was engaged in wilfully or recklessly; and
- (vii) order interest on any award at a rate and for a period which the Tribunal deems appropriate.

Section 54: Under section 54, no order that is made under section 53(2) may contain a term requiring:

- (i) the removal of an individual from a position if that individual accepted employment in that position in good faith; or
- (ii) the expulsion of an occupant from any premises or accommodation, if that occupant obtained the premises or accommodation in good faith.

Section 54.1(2): Note that section 54.1(2) prevents the Tribunal from making an Order requiring an employer to adopt a special program, plan or arrangement containing:

- (i) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the workplace; or
- (ii) goals and timetables for achieving that increased representation.

Accordingly, the Tribunal cannot effect employment equity within the workplace but can otherwise make an order requiring the employer to cease or correct the practice.

### **3. INDIVIDUAL REMEDIES IN THE TRIBUNAL CONTEXT**

There are a number of individual remedies available under the *Code* and the *CHRA*. Obviously monetary compensation is one, but other remedies beyond monetary compensation are also available. Public interest and systemic remedies are beyond the scope of this paper. This section will review the types of individual remedies offered in the Tribunal context, dealing with both the Ontario Human Rights Tribunal (OHRT) and the Canadian Human Rights Tribunal (CHRT).

## **Monetary Remedies:**

### **(a) Lost wages and Benefits**

A Tribunal's award for lost wages is not restricted by common law notice and there is no legislative limit. The Tribunal will however take mitigation into account.

The Ontario Court of Appeal in *Impact Interiors Inc. v. Ontario (Human Rights Commission)*<sup>6</sup>, in upholding an award of an Ontario Board of Inquiry for lost wages, found that there need not be congruence between the compensation awarded for lost wages and the duration and quality of the claimant's employment.

Moreover, the Tribunal is not limited to the terms of the contract of employment in determining the period for which lost wages may be awarded. *Systemgroup Consulting Inc. v. McConaghie*<sup>7</sup> was a judicial review of an OHRT decision which found employment discrimination on the basis of sex when the applicant was excluded from a customer appreciation event called "Men's Day 2012" because she was a woman. She complained to management who did not see this event, which involved "massage" and "Hooters girls" as inappropriate. Several weeks later the employee was terminated, allegedly for poor performance. The Tribunal awarded, among other things, lost wages for a six month period of unemployment despite a limitation in the employment contract to two weeks' pay per year of service, to a maximum of twelve months. This award was upheld on reconsideration and on judicial review, where the Superior Court held that the power of the Tribunal to order compensation under the *Code* was not subject to the limits on compensation imposed by the common law with respect to claims for wrongful dismissal. As the Tribunal found that the applicant's employment would likely have continued but for the violations of the *Code* and that she made reasonable efforts to mitigate, it reasonably awarded compensation for lost wages for the period up to the time that she obtained new employment.

Awards under this heading can be significant, as was seen in *McKee v. Hayes-Dana Inc.*, also decided by an Ontario Board of Inquiry.<sup>8</sup>

In *McKee* as a result of the company downsizing, a number of staff, including the Complainant, were offered two options. The first was a lay-off with full salary and benefits for six months, followed by separation pay. The second option was early retirement with adjusted pension so there would be no reduction in pension benefits. The Complainant accepted the second option. When deciding who to keep and who to lay-off, the vice-president prepared a note stating that the company "hoped to keep people with career potential". In the past, this decision was based on seniority with the company. The Complainant worked for over 32 years with the company. At age 57 her career with the employer came to an end. She was a production operator for 15 years and a foreman for 17 years in the forge shop. When her employment was terminated, the employer decided to retain two younger foremen.

Although the employer argued that the selection was based on "the time spent on the floor and how well [you] know your job", the Board of Inquiry concluded that age was part of the reason for the selection of the Complainant. The Board of Inquiry rejected the Respondent's argument that the termination was due to inadequate job performance. The evidence demonstrated that the Complainant was one of the best employees and most qualified. Age was found to be a

motivating factor and a *prima facie* case for discrimination was established. At the time of the hearing the Complainant was 64 years of age.

The Board of Inquiry ordered the following relief:

- the Respondent to compensate the Complainant for lost wages and benefits from October 1, 1985, when the Complainant was 57 years of age, to the date of the Complainant's 65<sup>th</sup> birthday, the date to which the Board found the Complainant would have worked but for the discrimination;
- \$1,500 as compensation to be paid to the Complainant as a result of injury to dignity – given the extended time during which the Complainant had been unable to find an equivalent occupation, the humiliation of being rejected in the way he was after so many years of faithful and competent service; and
- the Respondent to conduct a yearly seminar “Planning for Retirement” and it also conduct an appropriate seminar prior to offering an early retirement program.

In this case, the Complainant had been employed for 32 years; thereby likely entitling her, even at the outside, to a common law notice period in the range of 24-26 months; a vast difference from the 7 years of lost wages and additional 1 year of future wages awarded.

This case was decided at a time when the *Code* permitted mandatory retirement at age 65; being presumably the inherent limit of the award based upon her expected retirement date. Had it been decided today however, the Complainant's potential retirement date, and the award for future wage loss, could have exceeded age 65.

In *Garrie v. Janus Joan Inc.*<sup>9</sup>, the Applicant was employed for 10 years and then terminated. The allegation was that she had been paid a lower wage due to a developmental disability and then terminated due to her disability. The Tribunal upheld a finding of discrimination due to disability in respect to both the lower wage and the termination and awarded the Applicant the difference in pay over her 10 years of employment and related payments for taxes and CPP contributions, among other relief.

The Tribunal also recently again ordered lost wages in a situation where the hearing took place long after the infringement under the *Code*.

In *Fair v. Hamilton-Wentworth District School Board*,<sup>10</sup> the Applicant was employed by the School Board from 1988 to 2004 and was responsible for asbestos removal. As a result of the highly stressful nature of her job, and her fear that, in making a mistake about asbestos removal, she could be held personally liable, she developed a generalized anxiety disorder. Due to the disorder she was off work and receiving disability payments from 2001 until she was terminated by the School Board in 2004. In 2003, the Applicant notified the School Board that she was prepared to return to work and amended her Application to seek reinstatement but in another supervisory position. However, the School Board refused to allow her to do so. The only option provided was for her to return to the position she had held which had caused her the anxiety and stress disorders. The Applicant filed a complaint alleging discrimination due to disability.

At the initial hearing the HRTO found that the School Board had failed to accommodate the Applicant by placing her into another available position, and had discriminated against her on the basis of her disabilities. The parties were unable to agree on the acceptable remedy and as a result were forced to appear before the HRTO in 2013.

At the remedy hearing, the HRTO found that the School Board's refusal to give the Applicant another position in 2003 constituted discrimination. The HRTO did not accept the School Board's argument that it was unfair to "permit the Applicant to lie in the weeds over the years and then seek the remedy of reinstatement, precluding the Respondent from mitigating its losses."

The HRTO ordered the following relief:

- the School Board was to reinstate the Applicant (with appropriate adjustment to her length of seniority, banked sick days and other employment entitlements, if any) to a suitable position (one which is at or equivalent to the PASS level 6, which is the level the Applicant was at when last employed with the School Board);
- a calculation of the Applicant's loss of wages from 2003 until the date of reinstatement;
- reinstatement of the Applicant's years of service with OMERS and payment by the employer of pension contributions and additional costs associated with the buy-back of service;
- remittance of retroactive payment to CPP or compensation to the Applicant for any losses arising from the lost years of CPP pension contributions;
- payment to the Applicant for out of pocket medical and dental expenses which would have been covered by the applicable benefit plans;
- calculation of the additional tax consequences flowing from the money owing as a result of the decision; and
- payment to the Applicant of \$30,000 as compensation for the injury to her dignity, feelings and self-respect.

In 2014 the Tribunal decision was upheld on judicial review by the School Board to the Divisional Court, and subsequently upheld on appeal to the Court of Appeal. The School Board took the position that the remedies awarded by the Tribunal were "unreasonable" given their uniqueness and their imposition so long after the events giving rise to the application.<sup>11</sup> Both the Divisional Court and Court of Appeal held that the remedies ordered by the Tribunal were reasonable.

In *Maciel v. Fashion Coiffures*,<sup>12</sup> an award was made which included compensation for the loss of maternity and parental leave benefits where the Applicant was terminated due to her pregnancy.

The Applicant was hired to work as a receptionist in two related salons operated by the Respondent. At the time she was just over four months pregnant. She alleged that on the first day of her job she told the manager of the salons that she was pregnant. The Applicant was terminated from her employment shortly thereafter. The HRTO reviewed the evidence and disagreed with the Respondent that the Applicant being pregnant had nothing to do with the termination. The HRTO noted the vulnerability of the Applicant at the time she began her

employment with the Respondent stating that “she was young, just out of school, and coping with an unplanned pregnancy.” The HRTTO held that the Applicant had made out a *prima facie* case of discrimination on the basis of sex (pregnancy) and that the Respondent had failed to prove a non-discriminatory explanation for the termination. On a balance of probabilities, the HRTTO found that the Applicant’s pregnancy “was a factor, likely the only factor, in the Respondent’s decision to terminate her employment.”

The HRTTO ordered the following relief:

- \$15,000 as compensation for the loss of the right to be free from discrimination;
- \$9,060 to the Applicant for lost wages;
- \$11,659 as compensation for her loss of maternity leave and parental leave benefits; and
- An order that the employer implement a policy regarding accommodation of pregnant employees.

**(b) Out of Pocket Expenses**

The Tribunal has jurisdiction to order out of pocket expenses – such as job search costs, relocation expenses, medical expenses, any expenses incurred as a consequence of the infringement.

**(c) Legal Costs**

The Supreme Court of Canada determined in *Canada (Canadian Human Rights Commission) v. Canada (A-G)*<sup>13</sup> that legal expenses cannot be awarded by a human rights Tribunal unless the statute clearly provides for it.

The *Code* states that a Tribunal can make rules in respect to costs but to date no such rules have been enacted. Despite the lack of costs rules set by the Tribunal itself, applicants who are successful at the Tribunal may still be exposed to costs awards if the Divisional Court is persuaded that the Tribunal's ruling was unreasonable on judicial review.<sup>14</sup> For example, in *Saadi v. Audmax*, the applicant was successful at the Tribunal and received a general damages award of \$15,000. Her employer sought judicial review. The Divisional Court overturned the Tribunal’s findings of liability and ordered Ms. Saadi to pay \$10,000 in legal costs.<sup>15</sup>

**(d) Interest**

Tribunals have the jurisdiction to award prejudgment interest from date of infringement and postjudgment interest from the date of the decision.

**(e) General Damages**

**Ontario Human Rights Tribunal Cases**

General damages under the *Code* are awarded for injury to dignity, feelings and self-respect. General Damages can constitute a significant remedial award, as they are not income and thereby not taxable (as long as they are reasonable).

Since a revision to the *Code* specifically removed the \$10,000 cap, there is no cap on any of the remedies provided for in the *Code*. As a result, there has been a perceptible increase in awards for general damages from their historical nominal amounts; arguably due to an attempt to reflect true restitution and true compensation in accordance with the legislative framework.

The relevant factors considered in determining the extent of damages for injury to dignity, feelings and self-respect are set out in *Sandford v. Koop*<sup>16</sup> and include: the humiliation experienced by the applicant; the extent of hurt feelings experienced by the applicant; the applicant's loss of self-respect; the experience of victimization; and the seriousness, frequency, and the duration of the offensive treatment. In addition, as stated in *Arunachalam*,<sup>17</sup> the HRTO will "make a general evaluation of the circumstances of the *Code* violation and its effects to determine the appropriate monetary compensation for injury to dignity, feelings and self-respect."

The Divisional Court in *ADGA Group Consultants Inc. v. Lane*<sup>18</sup> recognized the Tribunal's power to award compensation for the intrinsic value of the infringement of rights under the *Code* as compensation for the loss of the right to be free from discrimination and the experience of victimization.

In *ADGA*, Ferrier J. of the Divisional Court outlined the factors to be considered in determining the quantum of awards under the *Code* as follows:

This court has recognized that there is no ceiling on awards of general damages under the Code. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a 'license fee' to discriminate.

Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.<sup>19</sup>

However, a recent empirical analysis by Audra Ranalli and Bruce Ryder has found that no single trend can account for the pattern of awards for general damages over the last fifteen years.<sup>20</sup> Based on a tabulation of all final decisions in which a finding of discrimination was made between 2000 and 2015, they concluded that the average size of general damages awards trended upward from 2000 to 2006, then dropped sharply from 2007 to 2009 (the period of transition to the open access model of adjudication implemented by the 2008 *Code* amendments). The average size of general damages awards held steady at the new low level from 2010 to 2012, before returning to an upward trend from 2013 to 2015. In 2000, the median award was \$6,500 while in 2015 it was \$8,000.<sup>21</sup> When the data is adjusted for inflation, in real terms the range and size of awards has remained relatively unchanged from 2000 to 2015.

The cases reflect a wide range of awards. In *Kohli v. International Clothiers*,<sup>22</sup> an Applicant terminated due to her gender and subjected to reprisal by the employer, was awarded \$12,000 in general damages for the loss of the right to be free from discrimination in addition to lost wages.

In *Li v. Lazar Yitzchok/Lazar Gourmet*,<sup>23</sup> the discriminatory conduct did not occur in the context of an employer-employee relationship but rather during the Applicant's application for employment. The Applicant identified as having cerebral palsy, affecting his speech and motor control in his hands, and bilateral hearing loss, making it difficult to hear in certain circumstances.

The Applicant submitted a resume and cover letter to the Respondent in response to an advertisement the Respondent placed in the newspaper about an accounting clerk position. He received a call from a representative of the Respondent, who indicated he was calling about the position, and to arrange an in-person interview. Records showed the conversation lasted three minutes. In the early part of the conversation, the employer's representative did most of the speaking. The Applicant testified that his speech and hearing impairments became manifest in the later part of the conversation, where it became necessary for him to speak. The Applicant had to ask the representative to repeat himself several times, either because he could not hear, or because of his slowness in writing down some of the information he was providing. According to the Applicant, after he asked the representative a question about bus accessibility to the Respondent's premises, he said something to the effect of "this is ridiculous" and hung up. After about twenty minutes, the Applicant called back and asked to speak to the person responsible for the accounting clerk position. The receptionist put the Applicant through the person he had been speaking to previously. When the Applicant identified himself, the representative told him he would have to wait, and the phone was again disconnected. The Applicant called again about one month later to inquire about the position. The receptionist told him the position was filled and terminated the call.

The Tribunal accepted the Applicant's evidence. The Tribunal drew the inference that the representative had recognized the Applicant had a speech impediment, and hung up on him because he was frustrated or irritated with the length of time it was taking the Applicant to understand and write down the information given to him. It was not necessary, according to the Tribunal, to demonstrate that the representative knew the speech impediment was caused by cerebral palsy, because disability is defined in the *Code* to include any degree of speech and hearing impediment. The Tribunal also made the inference that the second call was terminated upon recognizing the Applicant's voice. The Tribunal concluded that the abrupt termination of the calls, and the rescinding of the interview offer which the Respondent intended to offer the Applicant, amounted to adverse treatment, in which the Applicant's disability was a factor.

The Tribunal ordered the following remedial relief:

- \$8,000 in compensation for injury to dignity, feelings and self-respect, plus post-judgment interest; and
- The representative and the Respondent's President to complete the Human Rights 101 course offered by the Ontario Human Rights Commission.

In setting the quantum of damages, the Tribunal noted the Applicant's testimony about the impact the incident had on him. The Applicant testified he felt devastated, depressed, hopeless, and afraid to apply for jobs. The Tribunal noted that damages in the range of \$4,000 to \$5,000 had been awarded in cases of discrimination in the interview phase or, in one case, on the second day of training for a job, after an offer had been made. The Tribunal pointed to two factors in

support of its larger award of \$8,000: first, because the act of hanging up on the Applicant mid-conversation was objectively more demeaning; second, in light of the Applicant's lifetime experience of being treated differently on account of his disability, the impact of the incidents on the Applicant was magnified.

In *Fair*, referred to above, the Applicant was awarded \$30,000 as compensation for injury to dignity, in addition to reinstatement and 8 years of lost wages in excess of \$400,000.

Where an applicant suffered discrimination on multiple grounds, the Tribunal made separate awards for the different types of discrimination suffered. In *Wesley v. 2252466 Ontario Inc. o/a The Grounds Guys*,<sup>24</sup> the Applicant was a homosexual Aboriginal man who was also deaf. The Applicant brought an interpreter to his interview. He was hired as a landscaper after an agreement between the parties that he would communicate in the workplace by way of writing on a note pad. The Applicant attended the first day of training with the interpreter but the interpreter was sent home by the Respondent as being unnecessary. After a short time, the Applicant's supervisor and fellow employees became impatient and frustrated with the need to use notes to communicate with the Applicant and would often swear or complain before providing him with written instructions. Furthermore, on a specific date, the owner/operator of the employer made sexual gestures toward the Applicant and sexual and homophobic comments to him in front of other employees, who laughed. The Applicant's hours of work and number of shifts were reduced until he was ultimately terminated due to "contract loss" and lack of work.

The Tribunal ordered \$25,500 financial compensation for breach of dignity, feelings and self-respect comprised of \$18,000 for the disability related lay-off and \$7,500 for the poisoned work environment due to the remarks concerning the employee's sexual orientation.

In recent cases, the Tribunal has awarded between \$20,000 and \$25,000 in general damages to Applicants suffering sexual harassment and sexual solicitation in the workplace.

*Granes v. 2389193 Ontario Inc.*<sup>25</sup> involved incidents occurring in February 2014 at a restaurant owned by the institutional Respondent. The Applicant was a full-time server who was sexually harassed and sexually assaulted by the personal Respondent, a co-owner of the restaurant. The Tribunal found that the personal Respondent made inappropriate comments, touched and groped the Applicant's breast, stomach, and thigh in an inappropriate sexual manner, and acted inappropriately with at least one other employee. Further, the Tribunal found that the Applicant's employer, the institutional Respondent, did not take the situation seriously and asked the Applicant to forget what happened. The Applicant was distraught after the incidents, and required medical attention.

In deciding the appropriate remedy, the Tribunal gave a useful and comprehensive overview of case law in the area, including *Sandford v. Koop* and *ADGA Group Consultants v. Lane*. The Tribunal noted that sexual harassment cases involving explicit sexual touching tend to garner higher monetary compensation awards, and awarded the \$20,000 in monetary compensation for injury to the Applicant's dignity, feelings and self-respect based primarily on the following factors:

- a) Even though the incidents occurred in one night, they were relatively serious in nature;

- b) The conduct involved touching of her breast, shoulder, stomach, hips and an attempt to kiss her and an assault to obtain the personal respondent's keys violating the safety of her own personal space;
- c) The failure to investigate and properly respond to her complaint, the expectation that she would have to work with the personal respondent, and the termination of the general manager that she trusted, forced her to resign from her employment;
- d) The emotional impact she suffered making use of a free counselling service and medications;
- e) The humiliation in having to borrow money from her father and to rely on credit;
- f) Not being able to afford to attend school;
- g) Her emotional impact, the serious loss of self-confidence, the damage to her dignity and hurt feelings.

The Tribunal found that the Applicant would have stayed at the restaurant had she not been sexually harassed, and therefore awarded the Applicant lost wages, including her base salary and tips, for 8 months. The Tribunal found the Applicant mitigated her losses, and found work 8 months after her resignation from the restaurant.

*Granes* gives a useful overview of remedies in sexual harassment cases, and demonstrates that the damages awards trend higher when the case involves sexual touching.

In *Crete v. Aqua-Drain Sewer Services Inc.*,<sup>26</sup> the Applicant worked at a plumbing and sewer company in a dispatcher role for approximately one year. About six months after she started at the company, her manager began to ask the Applicant inappropriate questions about her spouse and personal life. The behaviour escalated to the manager hugging and kissing the Applicant, which she reported to the owner of the company. The Applicant also experienced sexual harassment and solicitation from other co-workers. After reporting incidents to management, the Applicant was terminated. The Tribunal found that the employer knew about the harassment the Applicant was experiencing, and created a poisoned work environment by ignoring the behaviour. Further, the Tribunal found the Respondent reprimed against the Applicant when they terminated her. The Tribunal awarded the Applicant \$20,000 in damages for the violation of her right to be free from discrimination and harassment, the respondent's failure to reasonably investigate, and for the discriminatory termination.

*Perry v. The Centre for Advanced Medicine* and *Kerceli v. Massiv Automated Systems*<sup>27</sup> are other recent Tribunal decisions with similar facts involving workplace sexual harassment and reprisal. Both Applicants were awarded damages in the range of \$20,000 to \$25,000. These cases demonstrate some stability of damages in this particular area.

Although considered an outlier by some, the recent 2015 decision of *OPT v. Presteve Foods Ltd.*<sup>28</sup> set a new high-watermark for damages awarded at the Tribunal.

The applicants were sisters who were in Ontario on temporary foreign worker permits from Mexico, brought in to work for the respondent, a fish processing plant. The applicants were subjected to unwanted sexual solicitations and advances by the principal of their former employer. As well as, in the case of the first applicant, sexual assault (including both rape and various incidents of touching), a poisoned work environment, discrimination in respect of

employment because of sex and reprisals for turning down sexual advances. The applicants were threatened that if they did not comply with the principal's advances they would be sent back to Mexico. The second applicant had been more successful in her attempts to rebuff the advances of the respondent and had escaped the same level of assault.

The Tribunal stated that owing to the seriousness of the conduct found to have occurred, which had not been seen in the prior case law, an unprecedented damage award was justified. The Tribunal especially considered the fact of the particular vulnerability of the migrant workers, the threats of repatriating them to their home country, thereby causing significant loss of economic and financial advantage, the observed impact on the applicants, and the repeated and serious nature of the sexual assaults.

An award of \$150,000 in general damages was made to the first applicant. The second applicant received \$50,000. In making this determination, the Tribunal reviewed the principles applied in previous Tribunal jurisprudence as well as the quantum of previous high awards for similarly outrageous conduct. In the Tribunal's view, given that awards in the range of \$40,000-\$50,000 had been awarded for less heinous acts, \$150,000 in general damages was justified in the circumstances.

As a somewhat comparable case, the Tribunal referred to *J.D. v. The Ultimate Cut Unisex*<sup>29</sup>, in which the Tribunal awarded each of two applicants the amount of \$40,000 as compensation for injury to dignity, feelings and self-respect. For one of the applicants, this was based upon the respondent's sexual comments and advances, touching her shoulders, back and leg and slapping her buttocks, asking her to sleep with a friend of his, and offering her lotion as a gift and saying that he wanted to spread it on her body. For the other applicant, this was based on the respondent rubbing her upper thigh close to her vagina, asking about how her boyfriend touched her, offering her gifts, and ultimately hugging her and pulling her onto his lap.

It seems that the Tribunal is tending to award increasing general damages compensation for serious incidents of sexual discrimination and harassment.

### **Canadian Human Rights Tribunal Cases**

Note that under section 53(2)(e) of the *CHRA*, there is a cap of \$20,000 on an award for pain and suffering experienced as a result of the discriminatory practice and as well, under section 53(2)(f) of the *CHRA*, a \$20,000 cap on an award for special compensation for wilful or reckless discrimination.

This two-pronged approach has tended to be greater in combination than single awards for general damages issues by the HRTO. According to Ranalli & Ryder, "the two-pronged approach may encourage the Tribunal to focus not just on compensation, but also in a more sustained way on the need to fashion awards with sufficient deterrent impact (especially for reckless or repeat violators of the *Code*) to create a culture of human rights compliance."<sup>30</sup>

In the CHRT's three rulings that made findings of discrimination issued in 2015, the Tribunal issued the following general damages awards:

- \$30,000 in *Turner v. Canada Border Services Agency*<sup>31</sup>, of which \$15,000 was for pain and suffering and \$15,000 as special compensation. However, the Federal Court found the findings of fact made by the Tribunal to be unreasonable, and remitted the matter to the Tribunal for reconsideration. The Federal Court of Appeal upheld the Federal Court's decision, and leave to appeal has been filed with the Supreme Court;<sup>32</sup>
- \$20,000 in *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada*<sup>33</sup>, of which \$10,000 was for pain and suffering and \$10,000 as special compensation); and
- \$40,000 in *Tanner v. Gambler First Nation*<sup>34</sup>, of which \$15,000 was for pain and suffering and \$25,000 as special compensation for two discriminatory incidents.

In *Seeley v. Canadian National Railway*<sup>35</sup>, the Applicant worked for the Canadian National Railway ("CN") as a conductor from 1991 to 1997. As with many other employees of CN she was laid off from 1997 to 2005. However, her employment relationship with CN was maintained throughout the layoff period. The Collective Agreement provided that an employee on lay off would continue to accumulate seniority. During the layoff period the Applicant did some emergency work for CN and had two children almost 5 years apart. In 2005 (after having her second child), she was called back to work and was required to report 1,000 km away from her home. Because her husband worked long hours, the family needed to determine how they were going to find child care given the new circumstances. The Applicant eventually asked to be excused from the assignment because she could not find reasonable childcare. CN refused her request, and when the Applicant did not report to work, she was fired.

The Applicant filed a Complaint with the Canada Human Rights Commission on June 26, 2006, alleging discrimination on the basis of family status. The matter went before the Tribunal in 2009 and the Tribunal released its decision on September 29, 2010, allowing the Applicant's complaint. The Tribunal decided that family status included parental child care obligations and rejected CN's submission for a more onerous test for *prima facie* discrimination of "a serious interference". The Tribunal concluded that the Applicant had established a *prima facie* case since CN's ordering the Applicant in to cover the Vancouver shortage made it impossible for her to arrange for appropriate childcare. Due to CN's rules and practices and the Applicant's parental duties and obligations, the Applicant was unable to participate equally and fully in employment. The onus shifted to CN to demonstrate that the requirement to report to cover the Vancouver shortage was a *bona fide* occupational requirement ("BFOR"), which CN failed to do.

The Tribunal concluded that CN did not produce evidence to prove that accommodating the Applicant would have constituted undue hardship. In addition, CN did not provide reasonable accommodation to the Applicant when it failed to respond to the Applicant's request for accommodation.

The Tribunal awarded the Applicant \$15,000 for pain and suffering and \$20,000 for additional compensation for wilful/reckless conduct, as well as an order for reinstatement, compensation for lost wages and benefits and other non-monetary relief.

An application for judicial review of the Tribunal's decision was dismissed.<sup>36</sup> The Federal Court upheld the Tribunal's finding that parental childcare obligations come within the term "family

status” in the *CHRA* was reasonable. Further, the Federal Court concluded that the Tribunal reasonably found that there was *prima facie* discrimination, that CN had not met its duty to accommodate and that the compensation ordered was reasonable. Costs were awarded to the Applicant.

In *Hicks v. Human Resources and Skills Development Canada*,<sup>37</sup> the Applicant made an expense claim for Temporary Dual Residence Assistance (“TDRA”) under the Respondent’s relocation directive. The directive stated that financial assistance would be available to offset the costs associated with maintaining a second residence during the initial stages of relocation. To qualify, one of the two residences must be occupied by a “dependent”. The Applicant’s claim was denied as the Applicant’s mother in law did not live in either of the two residences, but rather a nursing home and because the Applicant’s mother in law was not temporarily ill but suffering from a chronic condition.

The CHRT found that the Applicant had established a *prima facie* case of discrimination. The rules created a distinction between persons who were permanently residing with the employee prior to the relocation and those who were not. It also distinguished between family members suffering from temporary illnesses and those suffering from permanent conditions. These distinctions excluded the Applicant from the assistance benefit based on these family characteristics. The Tribunal found that no “legitimate work-related objective or affirmative evidence to the point of undue hardship” was advanced by the Respondent which would justify the *prima facie* discrimination.

The Tribunal found in favour of the Applicant and held that the Respondent had discriminated against the Applicant on the basis of family status contrary to the provisions of the *Act*. The Tribunal stated that “the Respondent showed disregard and indifference for the Complainant’s family status and for the consequences that its decision to deny the TDRA would have in this regard.”

The Tribunal ordered the following relief:

- compensation in the amount of \$15,000 for pain and suffering, and \$20,000 (the maximum allowable under the *CHRA*) for engaging wilfully and recklessly in a discriminatory practice (e.g. by relying on the Relocation Directive’s strict eligibility rules); and
- the Tribunal left it to the parties to determine the quantum of the allowable TDRA claim.

In *Johnstone v. Canada (Border Services Agency)*,<sup>38</sup> the Applicant, a border services officer, alleged she was discriminated against on the basis of family status. The Applicant, who normally worked rotating, irregular and unpredictable shifts, requested a schedule that would afford her fixed day shifts in order to allow her to arrange childcare for her young children. The Applicant’s requests were denied on the basis of an unwritten policy of the CBSA not to provide full-time hours to employees requesting accommodation on the basis of child-rearing responsibilities. The existence of this policy was not disputed by the CBSA.

In 2010, the Tribunal had found that the Applicant had proven a *prima facie* case of discrimination on the basis of family status and furthermore, that the CBSA failed to prove that

accommodating Johnstone's request would create undue hardship. The Attorney General of Canada applied unsuccessfully to the Federal Court of Canada for judicial review of the Tribunal decision on several grounds, including whether the remedial orders of the Tribunal were appropriate.

The Tribunal made three remedial orders that were challenged on the judicial review:

- \$20,000 in special damages under s. 53(3) of the *CHRA* for “wilfully or recklessly” engaging in a discriminatory practice;
- establishment of a written policy satisfactory to the CHRC; and
- an award of lost wages.

The Tribunal's award of special damages was based on its conclusion that the CBSA had failed to follow *Brown v. Canada (Department of National Revenue)*,<sup>39</sup> a case in which the Tribunal ordered the Respondent to prevent incidents of discrimination based on sex (pregnancy) and family status from recurring, “through recognition and policies that would acknowledge family status to be interpreted as involving ‘a parent’s rights and duty to strike a balance [between work obligations and child rearing] coupled with a clear duty on the part of any employer to facilitate and accommodate that balance.”

The Attorney General's appeal to the Federal Court of Appeal was also unsuccessful. The Court upheld the orders after applying the standard of review of reasonableness, with two slight modifications to the order concerning the establishment of a written policy. The Court noted that the Tribunal crafted the order with specific reference to paragraph 53(2)(b) of the *CHRA*, which empowers the Tribunal to order that measures be taken “*in consultation* with the Commission” (emphasis added). The Court found no statutory basis requiring that an order to establish policies must be “*satisfactory*” to the Commission. As a result, the Court varied the order so as to require the CBSA to develop the policies *in consultation* with the Commission.

With respect to the special damages, the CBSA submitted that the Tribunal had no reasonable basis to conclude that the CBSA had engaged in the discriminatory practice wilfully or recklessly. The Court responded at para. 125 by stating:

“I disagree with the appellant on this point. The Tribunal's conclusion of wilful or reckless practice was largely founded on the CBSA's disregard for the prior decision of the Tribunal in *Brown*. The Tribunal concluded that in *Brown* it had ordered the organization to which the CBSA succeeded to prevent similar events from recurring through recognition and policies that would acknowledge family status. This was a reasonable interpretation of *Brown* by the Tribunal and a reasonable finding as to the CBSA's failure to follow that prior decision. As a result, the Tribunal acted reasonably in concluding that wilful and reckless conduct had occurred in this case.”

Note that a Tribunal has the jurisdiction to award compensation in respect of each right breached as in *Ketola v. Value Propane Inc.*<sup>40</sup>, where \$10,000 was ordered for mental anguish for a finding of discrimination due to disability as well as \$10,000 in general damages and \$10,000 for mental anguish based upon a finding of reprisal.

*Mills v. Bell Mobility Inc.*<sup>41</sup> involved a non-employment claim. The Applicant was a chemotherapy patient, and was unable to leave her house due to her compromised immune system. Bell Mobility refused to provide her with same day activation service for a new cell phone unless she appeared personally at a store. The Tribunal found that the Applicant was disabled and her disability prevented her from appearing at a store in-person without risking her health and safety. The Tribunal further found that the option to purchase a phone from Bell on a postpaid basis with same-day activation was the very nature of the service offered by Bell to the general public. This service was denied to customers who were incapable of attending at a retail store to be visually identified, and the Applicant was therefore adversely impacted by Bell's actions.

The Tribunal made the following orders:

- the modification of Bell's Retail Activation Standards to redress the discriminatory practice;
- \$20,000 in damages for pain and suffering.

The Tribunal did not award special compensation for wilful or reckless discrimination, finding that Bell "is an iconic and excellent company that is well managed and usually cares about its customers, including disabled Canadians." Further, the Tribunal found that Bell likely did not contemplate the problem presented in the Application.

### **Non-Monetary Remedies:**

#### **(a) Reinstatement**

Reinstatement can be a key remedy and leverage for settlement, especially as it has never been awarded by the courts at common law even though courts appear to have that jurisdiction under s. 46.1(1) of the *Code*.

Based upon the decision in *Fair*, discussed above, there is no legislative limit on the maximum time that can elapse before a Tribunal reinstatement award can be made.

However, a review of the jurisprudence illustrates that where the relationship between the employer and employee is toxic; where the employee is already re-employed by the time of the hearing; or where a long time has elapsed from the date of the events giving rise to the discrimination (but see *Fair*), the Tribunal may find reinstatement to be inappropriate.

However, given the expedited "direct access" process under the *Code*, the timelines for hearing are being shortened and we may see Tribunals using reinstatement more readily.

#### **(b) Promotion of Applicant and Others**

An Order to place an applicant into an available position is a remedy available under human rights legislation.

One of the most notable cases involving this remedy is *Michael McKinnon v. Ontario*<sup>42</sup>, an Ontario Board of Inquiry decision.

The Complainant worked as a correctional officer in Toronto for the Ministry of Corrections for over 11 years. He filed a human rights complaint against the Ministry of Corrections and against four individual Respondents, each of whom was a manager at the Centre, alleging that he worked in an extremely poisoned work environment in which racist slurs were the norm. The Complainant argued at the hearing that he had been subject to harassment and discriminatory treatment on the basis of race. He alleged that he was constantly being called by a series of racist “nicknames” and treated adversely because of his race.

Two years after filing the initial human rights complaint, the Complainant filed a second Complaint alleging that he had been subjected to severe reprisals for having filed the first complaint, including some actions affecting his wife, who also worked at the Centre as a corrections officer. For example, the Complainant and his spouse were denied a promotion to entry level management positions.

The Board of Inquiry did not take issue with the fact that the complainant continued to work in the poisoned work environment for almost 11 years before filing the first human rights complaint. It was held that it was reasonable for the Complainant to endure being called racist names before taking any action. Therefore, the Complainant was not estopped from bringing a complaint to keep the harassment from continuing.

The Board of Inquiry concluded that the Ministry was liable for the discriminatory acts and omissions of its employees. With respect to the job promotion, the Board of Inquiry reviewed the evidence and concluded that the Complainant and his spouse were discriminated against in the competition for the entry level management positions. It also found that management’s lack of action in respect to the harassment constituted an infringement of the Complainant’s right to equal treatment and that other employees faced similar racist behavior and name calling.

The Board of Inquiry ordered the following relief:

- that the individual Respondents and the Ministry pay the complainant \$20,000 as compensation for the violations of his rights;
- compensation for loss of wages the Complainant suffered because he took sick leave as a result of work-related stress;
- that the Complainant and his spouse be promoted to the rank of OM16 within 30 days and to receive compensation for the loss of wages they had incurred because they were not promoted on a non-discriminatory basis following the job competition;
- relocate two of the four individual Respondents to ensure that they do not work in the same facility as the complainant at any future time;
- the Ministry to make the Order known to all employees of the Metro East Toronto Detention Centre; and
- conduct a human rights training program, approved by the Human Rights Commission within six months.

The *McKinnon* decision subsequently went before a number of other Boards of Inquiry ([2002] O.H.R.B.I.D. No. 22, November 29, 2002) and appeals in respect to the enforcement of the decision before all outstanding matters were settled on March 24, 2011 and all proceedings terminated.

**(c) Removal of Harasser**

In *McKinnon*, the original Board of Inquiry ordered that two of the four individual Respondent managers be permanently relocated to work in another facility to be separated from the Complainant. Further, the Complainant and his spouse were granted paid leaves of absence until the orders were complied with.

In *Tenaquip Ltd. and Teamsters Canada, Loc. 419*<sup>43</sup>, an arbitrator ordered the removal of the harasser, a member of management, who had verbally abused and assaulted the grievor. The award was made not as a punishment but to remediate an unsafe workplace irrespective of the fact that it may have had a disciplinary impact.

**(d) Offer of Employment**

Where an employer has refused to employ an applicant due to discrimination, Tribunals have ordered the employer to make an offer of employment to the aggrieved applicant.

In *Cameron v. Nel-Gor Castle Nursing Home*<sup>44</sup>, a decision of the Ontario Board of Inquiry (leave to appeal to Div Ct refused), the Complainant had been discriminated against when applying as a nurse's aide due to the deformity of one of her hands. The Respondent was ordered to offer employment to her when a position in the company became available.

**(e) Apologies**

An apology is a very common remedy requested by applicants in human rights proceedings however it is rarely ordered. It was done in *Styres v. Paiken*<sup>45</sup>, an Ontario Board of Inquiry decision, where the conduct of the Respondent was found to be insensitive. Generally however, tribunals recognize that such orders are coercive and insincere and therefore serve no useful purpose.

In the Federal Court decision of *Stevenson v. Canada (Canadian Security Intelligence Service)*<sup>46</sup>, the Court found that the CHRT is a creature of statute and that consequently, the authority to order a letter of apology to be provided must be expressly provided for in the *CHRA* or derived by necessary implication. It concluded that the Tribunal had no such jurisdiction.

**(f) Letter of Assurance**

A letter of assurance, where the respondent states that it will commit no further breaches of the legislation, is a more likely remedy than an apology and is designed to bring home the importance of the obligations under the legislation.

**(g) Letters of Reference**

Letters of reference have been ordered by tribunals in some cases such as *Moffatt v. Kinark Child and Family Services*,<sup>47</sup> an Ontario Board of Inquiry decision.

### **Interim Relief:**

Tribunals have the jurisdiction to order interim relief. Pursuant to section 23.2 of *Code*, interim relief can be granted where:

- (i) the application appears to have merit;
- (ii) the balance of harm/convenience favours granting interim relief; and
- (iii) it is just and appropriate to do so.

Interim relief orders have been made in numerous cases, including:

#### *Bird v. Transcontinental Printing*<sup>48</sup>

The Applicant self-identified as having a mental health related disability. He commenced work as a janitor in August 2008. Until 2010 he used his MP3 player to listen to talking files to reduce his symptoms, thus enabling him to work. In 2010 the Respondent introduced a new policy banning the use of such devices; reportedly for safety reasons due to high-speed equipment in the plant. The Applicant did not work around such equipment.

The Applicant sought an interim remedy pending the hearing; being to use his MP3 player in areas other than the shop floor. The Tribunal ordered the interim remedy to, among other things, preserve the *status quo*, noting that the harm to the Applicant in not being granted the interim remedy would be significantly greater than the harm to the Respondent if it was granted.

#### *Devoe v. Haran*<sup>49</sup>

The Applicant, identified as a disabled senior, single and childless, was in receipt of public assistance. She had serious mobility issues due to her disabilities. She resided on the second floor of an apartment building managed by the Respondent, which was only accessible by stairway. After finding out that the first floor apartment was vacant, the Applicant requested that the Respondent allow her to transfer to the first floor to accommodate her disability-related needs. The Respondent refused the Applicant's request.

The Applicant stated that if she wasn't transferred immediately, the Respondent would rent out the apartment to someone else. The Applicant filed an Application alleging that the Respondent discriminated against her with respect to housing because of her disability, family status, marital status, age and receipt of public assistance. She further alleged that she was subjected to reprisal by the Respondent.

The Tribunal was satisfied that the situation was of an urgent nature and required the resolution of the dispute in a rapid manner.

The Tribunal ordered the following interim relief:

- that the Respondent not rent the first floor apartment to anyone until receiving further orders and directions from the Tribunal; and

- that the parties attend an expedited hearing of the merits of the Application.

Ultimately, a final award was made at the hearing<sup>50</sup> that the Respondent was required to rent the apartment to the Applicant at a rent that was determined by the Tribunal.

*TB v. Halton District School Board*<sup>51</sup>

The Applicant, a mother of two children who attended elementary school in the Halton District School Board, filed an Application alleging that the refusal to pick up her children closer to her home constituted discrimination with respect to services because of her disability. The Applicant had a permanent spinal cord injury that caused extensive pain and affected her mobility. The School Board emphasized that pursuant to its policy it would only modify its bus services because of a child's disability, not that of a parent.

As a result of the School Board's refusal to accommodate her disability, the Applicant stated that she could not consistently drop off and pick up her children from their bus stop, and that her daughter, who was in junior kindergarten, had not attended school that year. In her request for an interim remedy, the Applicant asked the School Board to add a temporary bus stop to the existing route, either at a nearby intersection she identified or in front of the Applicant's complex. In support of this remedy, the Applicant provided evidence that her physician had confirmed that she could not walk the required distances to meet the bus at the regular stop.

The Tribunal held that the harm to the children of missing school outweighed the speculative harm to the School Board of temporarily modifying the bus route. As such, the Applicant had met the heavy onus of justifying an interim remedy.

The Tribunal ordered the following relief:

- that the School Board ensure that the bus stop in front of the Applicants' residential complex or at the nearby intersection identified by the Applicant to transport her children to school;
- that the School Board ensure that the Applicant's daughter was re-registered in the same school to which she was admitted in September and granted a courtesy seat on the bus from the home school; and
- that the order remain in effect until a final Decision on the matter or until the Applicant obtained a scooter so that she could accompany her children to their bus stop.

**Enforcement:**

**(a) Enforcement of Orders**

Pursuant to section 19 of the *Statutory Powers Procedures Act*, the Superior Court of Justice has jurisdiction to enforce the orders of a Tribunal.

Further, the Divisional Court holds jurisdiction to make an order for contempt for failure to comply with an Order. This avenue was used in *McKinnon* and as well, the Tribunal remained seized of the decision because of the nature and breadth of the systemic relief ordered and the difficulties encountered in enforcing the Tribunal Orders made.

**(b) Enforcement of Settlements**

*Medeiros v. Cambridge Canvass Centre*<sup>52</sup>, involved the issue of the failure of the Respondent to abide by Minutes of Settlement which required the Respondent to pay \$5,000 within 60 days of signing the Minutes and to undertake human rights training within 90 days of signing the Minutes. The Applicant brought an application seeking to enforce the terms of the Minutes and further relief in the amount of \$5,000 as monetary damages arising out of the breach.

Due to the Respondent's failure to abide by the Minutes of Settlement, the Tribunal ordered:

- (i) that the Respondent pay the amount ordered and an additional \$1,500 for contravention of the Minutes; and
- (ii) that the Respondent provide confirmation to the Applicant of the completion of training.

Under the s. 48(3) of the CHRA, a settlement can be enforced by an order of the Federal Court in the federal human rights context.

**4. INDIVIDUAL REMEDIES IN THE LABOUR ARBITRATION CONTEXT**

In this section, labour arbitration decisions, with a focus on Ontario, will be reviewed and compared with cases from the tribunal context. Damages for injury to dignity, feelings and self-respect are applicable in the arbitral context as they are in the Tribunal context. However, arbitrators have taken a variety of different approaches to awarding human rights damages, relying to a greater or lesser extent on the guidance of the OHRT.

**Reliance on HRTO Jurisprudence**

In recent arbitral jurisprudence, some labour arbitrators have explicitly adopted the principles for determining the quantum of awards set out by the HRTO in *Sandford v. Koop* and *Arunachalam*, previously discussed. This likely reflects the thinking that there should be some degree of consistency across arbitral decisions in terms of damage awards.<sup>53</sup>

In *Re Hyland*<sup>54</sup>, the Ontario Grievance Settlement Board very recently awarded \$18,000 in general damages and \$12,000 for mental anguish when the employer failed to accommodate an employee with a severe smoking allergy. The Ontario Grievance Board found that the employer had failed to enforce a non-smoking policy that had been in effect for some time and failed to engage in a thorough search for desirable accommodated positions. The Board cited the factors set out in *Sandford v. Koop* as being relevant to determining the quantum of general damages, as well as for the assessment of damages for mental anguish. It concluded that the grievor had experienced humiliation, hurt feelings, a loss of dignity, and victimization. It also concluded that the employer's conduct had caused the grievor a significant amount of stress and anxiety. Based on these conclusions, the Ontario Grievance Board awarded damages for general damages and mental anguish, but did not provide any specific explanation as to how it arrived at each amount.

In *City of Hamilton v. Amalgamated Transit Union, Local 107*,<sup>55</sup> Arbitrator Waddingham adopted the HRTO's principles regarding damages for injury to dignity, feeling and self-respect,

as set out in *Arunachalam*. The Arbitrator considered both the objective seriousness of the conduct as well as the grievor's own subjective experience. The grievor was the only female transit inspector employed by the City, and was sexually harassed by her supervisor over the course of a number of years. The Arbitrator found that the supervisor's conduct, which included touching, was very serious. She also found that the City exacerbated the situation by failing to respond adequately, resulting in a poisoned work environment. The Arbitrator considered the significant impact the harassment had on the grievor's mental health and concluded that the injuries to the grievor's dignity, feelings and self-respect were substantial. An award of \$25,000 in general damages was ordered.

Not all labour arbitrators draw on HRTO jurisprudence in determining when to award damages. In some cases, there is very little insight available into what factors arbitrators take into consideration.

For example, in *Bonnell*,<sup>56</sup> the grievor, a teacher, suffered from numerous medical conditions that were accommodated for a long period of time, and for which new medical information was not provided. When a new principal arrived, a new medical certificate was requested. After the grievor did not provide the required documentation immediately the grievor was placed attendance management, the grievor's medical certificate was subsequently rejected and the grievor was placed on home duty on the basis of unverified complaints. The Arbitrator found these incidents to constitute harassment on the basis of disability and awarded \$20,000 as general damages for pain and suffering pursuant to the *Code*. The Arbitrator concluded that the grievor experienced considerable pain and mental stress as a result of the school board's actions and that the amount was reasonable.

In *Dominion Forming Inc. v. Universal Workers Union (LIUNA, Local 183)*<sup>57</sup>, the Ontario Labour Relations Board ("OLRB") specifically declined to follow *Bonnell* as the rationale for the quantum of the award was not clearly enunciated. Instead, the OLRB specifically referred to the HRTO's reasoning in *Arunachalam* in holding that uniform principles must be applied to determine which types of cases are more or less serious so that the range of damages based on given facts is predictable.

## **Quantum of awards**

Notwithstanding *Sandford v. Koop* and *Aranachalam*, the quantum of arbitral awards appears to vary widely, with some cases being generally in line with quantum seen in the HRTO context and some lower. However, a few notable cases exceed the awards usually given by the HRTO.

For instance, recently, in addition to awarding \$244,242 for lost wages, the Ontario Grievance Settlement Board awarded a total of \$98,000 in general damages to a grievor who was the victim of extensive harassment and discrimination on the basis of sexual orientation. In *Ontario Public Service Employees Union (Ranger) v. Ontario (Community Safety and Correctional Services)*,<sup>58</sup> the Board recognized that the amount awarded was unprecedented in arbitral jurisprudence, but it was in keeping with compensation awarded by the HRTO. The grievor worked as a correctional officer and was subjected to ongoing bullying and harassment on the basis of his sexual orientation. Although the grievor's managers were aware of the ongoing harassment, nothing was done to address the situation. As a result, the grievor fell ill, and took a medical leave of

absence that lasted for three years. Eventually, he was able to return to work on the condition that he be put in a different position. Although the employer identified possible positions, it was unwilling to modify them to accommodate the grievor. The grievor was eventually offered a customer service position within a different department, but he was unable to do the job effectively. This led to an exacerbation of his depression and anxiety, and further medical absences.

Vice-Chair Leighton concluded that the grievor was subjected to harassment and a poisoned work environment on the basis of his sexual orientation. Vice-Chair Leighton also found that the employer failed to accommodate the employee when he was able to return to work, and failed to make diligent efforts to accommodate him when the customer service position was not working. With respect to the grievor's claim for damages, Vice-Chair Leighton emphasized that the compensation was aimed at making the grievor whole, but that the damages must be foreseeable and not too remote. Vice-Chair Leighton awarded \$45,000 in damages as compensation for the harassment, discrimination and poisoned work environment. In so doing, she noted that, in accordance with decisions from the HRTO, she must consider the nature of the breach and the extent of the harm to the grievor. She concluded that the grievor had suffered greatly, including well-documented issues of anxiety and depression.

Vice-Chair Leighton went on to award a further \$35,000 for the failure to accommodate the employee when he was able to return to work. She held that such a failure was an egregious breach of the collective agreement and of the *Code* and therefore, it merited significant compensatory damages. She also accepted the medical evidence showing that the grievor's condition was exacerbated as a result of the employer's treatment of him during that period, and that he had suffered greatly as a result of the employer's unwillingness to accommodate him. Finally, a further \$18,000 was awarded to compensate the grievor for the second failure to accommodate him, which was another significant breach causing the grievor to suffer harm.

Another notable general damage award was made to a grievor who was repeatedly sexually assaulted by her supervisor at the City of Calgary.<sup>59</sup> In that case, the grievor's misery was exacerbated by the inept and often malicious handling of her case by City of Calgary managerial staff. As a result of the assaults and the mishandling of her case, the grievor's mental health was severely damaged and her prospects of ever working again all but ruined. In awarding \$125,000 in general damages, the Arbitration Board compared the facts of the case to two civil cases and to the *Greater Toronto Airports Authority* case decided by Arbitrator Shime.<sup>60</sup>

The above cases suggest that arbitrators may be beginning to exceed the damages awarded in the HRTO context.

### **Remedies for Failure to Investigate**

As will be seen in the civil context below, there is a trend towards awards to compensate a person where there has been a failure to properly investigate a human rights complaint which has been raised with an employer. The HRTO has also awarded damages for the failure to investigate allegations of discrimination, independent of the actual findings on the allegations themselves.<sup>61</sup>

In *Re Renfrew County and District Health Unit and OPSEU Local 487*<sup>62</sup> Arbitrator Parmar found that the grievor had been subjected to discriminatory comments based on his sexual orientation and ordered systemic remedies, in addition to a payment of general damages of \$9,000 to the grievor. The arbitrator awarded damages for a failure to investigate. Arbitrator Parmar based her damage award in part on the “[e]mployer’s inadequate investigation and response”, which she found extended the impact of the discriminatory incident.<sup>63</sup>

Even where a complainant's discrimination claim fails, there are cases where a 'free standing' award of damages for a failure to investigate human rights complaints is granted. A recent arbitral decision has held that employers also have an obligation to promptly communicate the outcome of employee complaints following an investigation. In *Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Williams), Re*, Arbitrator Albertyn (Vice-Chair) awarded the grievor \$3,500 in damages due to the employer’s failure to consult with the grievor during a fifteen-month period following the employer’s acceptance of an investigation report into her racial discrimination complaint, leaving her in “limbo” and causing her “some injury to her dignity and to her feelings of self-respect.”<sup>64</sup>

## **Reinstatement**

The HRTO and labour arbitrators alike have the power to order reinstatement as part of their extensive remedial powers. However, reinstatement is more frequently awarded in the arbitral context.

Recently, in *Kinsey v. Deputy Head (Correctional Service of Canada)*,<sup>65</sup> the Canada Public Service Labour Relations and Employment Board held that the grievor had been subject to discrimination contrary to the *Canadian Human Rights Act* when the employer’s aggressive approach in disciplining the grievor was “unacceptable.” The adjudicator held that the grievor’s sleep apnea, obesity and other physical disabilities biased the employer against the employee and highly contributed to the employer’s decision to terminate the employee. The Board accordingly ordered the grievor to be reinstated to a position “consistent with his needs for accommodation [...] without loss of seniority or other benefit.”<sup>66</sup> In the Board’s words, when an employer fails to accommodate and instead disciplines an employee due to his or her disability, the employer “trivializes the disciplinary process and creates a lack of credibility for the person imposing that discipline.”<sup>67</sup>

In *TRW Canada Ltd and TPEA (Lockhart), Re*,<sup>68</sup> the Arbitrator ordered the reinstatement of the grievor after finding that the employer dismissed the employee due to his absenteeism and failure to follow the reporting process of his absences to his employer. The arbitrator found that the reasons for the grievor’s termination upon which the employer relied were brought upon by severe diagnosed depression. In addition to granting the reinstatement, the Arbitrator ordered the grievor to comply with medical advice instructing him to attend 20 therapy group sessions, and imposed a “last chance” agreement allowing the employer to suspend the grievor for a first absence without leave, and to terminate the grievor for a second unreported absence. Thus even when an arbitrator orders reinstatement, he or she may impose terms and conditions which the employee must be strictly follow, failing which the employee may be dismissed.

In *Global Communications Ltd v. CEP, Local 722-M*,<sup>69</sup> the employer denied the grievor's request for leave after the grievor informed her superior that she had requested the time off because her faith required her to complete a pilgrimage in Japan. Notwithstanding the denial of her request, the grievor went to Japan, completed her pilgrimage and consequently failed to report for work, which led to her dismissal. The employer stated that the employee failed to stress the nature of her trip to Japan, and did not attend meetings between the union and the employer regarding her duties at work. However, the Arbitrator found that the employer failed to accommodate the grievor's religious beliefs to allow her to partake in the pilgrimage, failed to meet the threshold of undue hardship, and ordered the grievor's reinstatement.

As illustrated above, it is not uncommon for arbitrators to order the employee's reinstatement as part of the remedy when an employer is found to have violated a prohibited ground of discrimination in dismissing an employee. Such a remedy has also been seen in the HRTO context, but not yet in the civil context, despite its apparent availability.

## **Conclusion**

As can be seen, there is a substantial and established body of human rights jurisprudence in the labour arbitration context. The case law draws heavily, if unevenly, on existing HRTO decisions. Some types of remedies that appear to be well-used in the arbitral context are less established elsewhere, including reinstatement and damages in the arbitration context for failure to investigate. Moreover, awards of general damages appear to be rising. Unionized workers can rest assured that the remedies being awarded by arbitrators go some distance towards making them whole.

## **5. INDIVIDUAL REMEDIES IN THE CIVIL LITIGATION CONTEXT**

In Ontario, since June 30, 2008, the *Code* now specifically provides jurisdiction to courts to award monetary and non-monetary relief to aggrieved parties in certain circumstances.

However, despite the great promise of human rights damages in the civil context, the predicted floodgates have not opened; there have been very few successful cases brought under section 46.1. This section reviews each of the successful cases, considers the barriers to successful claims and explores the likely future of section 46.1.

Before launching into a substantive analysis of the jurisprudence, it is helpful to first set out a brief history of the development of human rights remedies in the civil context.

### **Tracing the judicial interpretation of human rights in the civil context**

Until the 2008 amendment to the *Code*, human rights claims in civil courts were effectively barred by the jurisprudence. In *Bhadauria v. Seneca College of Applied Arts & Technology*<sup>70</sup> ("*Bhadauria*"), the Supreme Court of Canada rejected the recognition of an independent tort of discrimination and established that a civil cause of action could not be grounded only in an allegation of a breach of human rights legislation or the public policy expressed therein. In rejecting a tort of discrimination, the Court recognized that the enforcement scheme of the *Code* was intended to be comprehensive.

In 2008, in *Honda Canada Inc. v. Keays*, the Supreme Court of Canada concluded that a breach of the *Code* is neither an actionable tort, nor an "independently actionable wrong" for the purposes of awarding punitive damages.<sup>71</sup> The Court did recognize, however, that a plaintiff could advance a breach of the *Code* as a cause of action in connection with another actionable wrong under the newly enacted section 46.1.

With the enactment of section 46.1, the barrier to prosecuting human rights violations in the civil context slowly began to lift. According to a 2012 report on the changes to the Ontario human rights regime, section 46.1 was intended to provide a kind of alternative relief valve for human rights cases outside of the Tribunal context.<sup>72</sup> This provides an interesting contrast to the approach taken by the Court in *Bhadauria*, which cautiously avoided deconcentrating the comprehensive administrative human rights regime.

Despite this legislative indication that a shift was desired, courts were slow to catch on. For at least three years following the introduction of section 46.1, courts struggled with questions as to its applicability.

In *Andrachuk v. Bell Globe Media Publishing Inc.*, the defendant brought a Rule 21 motion to strike the plaintiffs wrongful dismissal action as statute barred.<sup>73</sup> The defendant also moved to strike certain paragraphs of the plaintiff's statement of claim, arguing that there was no independently actionable wrong of discrimination recognized in law. In *Andrachuk*, a senior level employee was notified that her position had been dissolved pursuant to a "re-organization" just eleven days after she informed her employer that she was pregnant and intended to take maternity leave. A younger male manager was hired a few months later to fill the plaintiff's former position.

The Court rejected the defendant's submission that, pursuant to *Bhadauria* and *Keays*, a civil cause of action cannot be grounded in a breach of human rights legislation. The plaintiff had not pleaded an independent tort of discrimination. She had pleaded discrimination for the purpose of claiming monetary compensation under section 46.1 for discrimination on the basis of sex; in support of her claim of wrongful dismissal as reprisal for the intention to take maternity leave and as descriptive of the defendant's conduct in dismissing the plaintiff. The Court refused to strike the claim.

Aside from this basic recognition of the utility of section 46.1, the Ontario Court of Appeal's decision in *Jaffer v. York University* set the stage for a narrow interpretation of human rights claims in the civil context.<sup>74</sup> In this motion to strike the plaintiff's claim under Rule 21, a student with Downs Syndrome claimed that the university had breached its contract and its duty of care to him by failing to accommodate his disability. Although the Statement of Claim did not plead discrimination under the *Code*, the University argued that his claim fell solely within the jurisdiction of the Tribunal.

The Court found that the failure to accommodate provided no basis for a claim in negligence, and in the absence of a specific contractual claim, the duty to accommodate arose under the *Code* and not in breach of contract.<sup>75</sup> In rejecting the claims, Karakatsanis J.A. held:

To recognize a common law duty of care that required the university to provide reasonable accommodations would, in my view, undermine the comprehensive dispute

resolution mechanisms established by the *Code* in precisely the ways that the Supreme Court has cautioned against in cases such as *Bhadauria* and *Keays*.<sup>76</sup>

There was some confusion in the early days with respect to the extent to which the human rights claim needed to be related to the separate cause of action. The Superior Court in *Anderson v. Tasco Distributors* clarified that the non-human rights cause of action need not be directly related to the *Code* claim in order to properly ground a claim.<sup>77</sup> In that case, however, the claim of wrongful dismissal and failure to accommodate the plaintiff's disability did share a factual matrix. The defendant's motion to strike paragraphs of the plaintiff's pleading was denied.

Similarly, in *Stokes v. St. Clair College of Applied Arts & Technology*, the Superior Court affirmed, in a Rule 21 motion, that a claim for human rights damages need not be relevant to a wrongful dismissal claim advanced in the same action.<sup>78</sup>

### **Successful cases under section 46.1**

It seems that wrongful dismissal claims often dovetail with human rights breaches. Thus far, all of the successful claims brought under section 46.1 have been in the employment context.<sup>79</sup>

Although section 46.1 was raised in more than a dozen cases between 2008 and 2012, Ontario's Small Claims Court was the first to grant a remedy under section 46.1 in 2013.<sup>80</sup> In *Berkhout v. 2138316*,<sup>81</sup> the plaintiff brought a claim against her former employer for constructive dismissal, failure to pay vacation pay, breach of her human rights and failure to investigate the breach of her human rights. The plaintiff was employed as a salesperson at the defendant's furniture store for four months. She alleged that her supervisor sexually harassed her both verbally and physically. Although few facts about the harassment are included in the decision, the Court accepted that the employer would often make phone calls to her after work hours telling her that he expected to come home with her.

The defendant's claim of financial difficulties was not accepted by the Court as the reason for her dismissal; the Court found that plaintiff was in fact terminated because she complained of sexual harassment. Given the human rights violation, she was not obliged to accept the defendant's offer to reinstate the plaintiff.

Although the defendant argued that the Court did not have jurisdiction to deal with the human rights claim, the Court applied section 46.1 to find discrimination on the basis of sex and sexual harassment. As the individual defendant was acting in the course of employment, and the employer failed to act after the plaintiff complained of harassment, the defendant corporation was found jointly and severally liable with the individual defendant. The plaintiff was awarded \$15,000 in damages under the *Code* in addition to \$2,500 pay in lieu of notice.

Of note, the plaintiff had initially sought relief by filing a complaint with the Ontario Human Rights Commission but was advised by the Commission to proceed through the courts.

Human rights damages were first awarded by the Ontario Superior Court in 2013 in *Wilson v. Solis Mexican Foods Inc.*<sup>82</sup>

The plaintiff in this case was a Certified General Accountant employed by the defendant for sixteen months. She received a grade of satisfactory or better on a performance review approximately one year into her employment. Shortly thereafter, she suffered a back ailment which eventually led her to take a medical leave.

When she commenced her leave and submitted a doctor's note, her employer required that she provide more detailed medical evidence. She submitted a note from her doctor indicating that she would be able to make a graduated return to work over the following three weeks. This proposal was rejected by her employer; it stated that she should not return to work until she was capable of full-time hours and full duties. She was then asked to submit a further form from her doctor. Her physician indicated that with accommodation – including a combination of sitting, standing and walking – she would be able to return to work on a full-time basis. The employer again found this accommodation plan unacceptable and reiterated the requirement of a return to full duties.

One month following the last accommodation proposal, following further communications, the plaintiff received a letter of termination. The purported reason for the termination was restructuring which included a sale of part of the business.

The plaintiff brought a claim for wrongful dismissal and further alleged that her termination was discriminatory. Given her relatively short employment with the defendant, an award of three months' notice was found to be reasonable. The Court went on to find that the plaintiff's disability had been a significant factor leading to the decision to terminate her employment. The employer had been disingenuous in its claim that restructuring was the reason for dismissal. The Court found that the employer intended to make unfair demands for a full return to work until it had an excuse to terminate her under the guise of organizational changes. In determining the quantum of \$20,000 for human rights damages, the Court held:

First in this case, the plaintiff lost “the right to be free from discrimination” and experienced “victimization”. Second, the defendant’s breach of the statute is serious. The defendant orchestrated the dismissal and was disingenuous at various times both before and during termination.<sup>83</sup>

*Solis* opened the door for a trickle of successful Superior Court cases under section 46.1. The plaintiff in *Partridge v. Botony Dental Corp.*<sup>84</sup> worked for the employer for seven years as a dental hygienist working irregular hours, before being promoted to office manager and working a regular 9 to 5 schedule. Rather than being returned to her office manager position upon her return from maternity leave, the plaintiff was unilaterally returned to her former position as a dental hygienist. The plaintiff's schedule was also changed, reducing her hours and making them more uncertain. The new schedule conflicted with the plaintiff's daycare arrangements. When the plaintiff asserted her right under the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the "ESA") to be reinstated in her previous position and working conditions, she was subjected to reprisals, including further scheduling changes and a cold, intimidating attitude from a manager, culminating in termination. The Court rejected the employer's claim that the termination was for cause and dismissed the employer's counterclaim seeking damages in the amount of \$400,000 as nothing more than an attempt to intimidate the plaintiff.

The Court awarded the plaintiff \$42,517.44 for damages arising from wrongful dismissal, and a further \$20,000 in damages for breach of statutory obligations: namely, the plaintiff's right to be reinstated to her prior position after pregnancy and maternity leave under section 53(1) of the *ESA*; the plaintiff's right not to suffer reprisal for attempting to exercise a right under the *ESA*; and the plaintiff's right not to be discriminated against on the basis of family status, pursuant to section 5 of the *Code*.

The Court stated at para. 98:

The discrimination experienced by Partridge clearly did injury to her dignity, feelings and self-respect, as her testimony made clear that she took great pride in her job and the efforts that she had made on the defendant's behalf. At the time of her testimony in this trial, she remained visibly emotionally affected by the ordeal. As in *Johnstone*, I found that the discrimination arose out of Jauhal's wilful and reckless disregard for her legal obligations as an employer. Accordingly, I found that the sum of \$20,000 for breach of the *Human Rights Code* was a just and proper sum to signify the seriousness of breaches of this nature. Particularly where the discrimination has ultimately taken the form of dismissal, this particular breach affects a group of individuals who typically require childcare arrangements out of economic motivation. The discrimination not only has the effect of causing injury to dignity, feelings and self-respect, but may have an economic impact on individuals who can often least afford it. The Court's censure is warranted by way of an award that will act as a deterrent to employers who are unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so.

The recent case of *Bray v. Canadian College of Massage and Hydrotherapy*<sup>85</sup> also dealt with a woman who experienced changes to her terms of employment following a maternity leave. The plaintiff worked as a massage therapy instructor and a supervisor of clinics and outreach programs. While preparing to return to work after maternity leave, the plaintiff learned she would be assigned to the position of teaching assistant rather than her pre-leave position as a lead instructor. The plaintiff advised the employer that she understood the labour laws to mean that she was supposed to be reinstated to the position she held prior to going on maternity leave.

The employer responded by email, saying,

"Let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment."

The plaintiff filed a complaint with the Ministry of Labour, but never communicated with her employer about it. The Court inferred that the Ministry notified the employer of the complaint shortly before or shortly after the plaintiff's return to work.

Upon her return, the plaintiff found her schedule had been reduced to 19 hours per week from 25. Coupled with her change in position, this reduced the plaintiff's weekly pay by one third. The Court accepted the plaintiff's evidence that the atmosphere in the workplace had become "strange" and "odd", and that co-workers and managers did not talk to the plaintiff as much as before. When, at the end of the term, the plaintiff asked what her schedule would be for the following term, she was notified that her services were not required for the upcoming term.

The Court held that the plaintiff was constructively dismissed and awarded \$17,700 in damages in lieu of reasonable notice. The Court also found that the plaintiff's change in position, reduction in hours, decrease in income, and eventual termination amounted to discrimination on the basis of sex and family status, as evidenced by the employer's email, which specifically referenced the connection between the plaintiff's status as a new mother and the new working conditions the employer decided to impose on her. The Court awarded \$20,000 in compensatory damages for injury to feelings, dignity and self-respect.

The Court declined to award aggravated damages but awarded \$5,000 in punitive damages because of the employer's bad faith conduct. The plaintiff was therefore entitled to a sum of \$42,700, but because she had limited her claim to the Small Claim Court's monetary jurisdiction of \$25,000, the latter is the amount she received, plus interest.

In *Silvera v. Olympia Jewellery Corp.*,<sup>86</sup> the sexual harassment faced by the plaintiff and its effects on her were particularly severe. The plaintiff brought an action for damages arising out of her wrongful dismissal, a series of sexual assaults and battery, sexual harassment and racial harassment. Her daughter brought a claim for damages under the *Family Law Act* for loss of guidance, care and companionship. The defendants did not appear at trial and their defence was struck. Consequently, the plaintiff's evidence was uncontested.

The plaintiff was employed as a receptionist and assistant administrator at the defendant's jewellery store. The individual defendant, Bazik, was the plaintiff's superior. There was no other person in authority present to address Bazik's conduct. Bazik's harassment began with inappropriate racial comments and racist jokes, to which the plaintiff, as a woman of colour, took offence. Bazik would often assign the plaintiff work at the end of the day to ensure she had to stay late alone with him. He touched her breasts and buttocks without her consent and on one occasion attempted to put his hands down her shirt while giving an unwanted massage. He insisted on driving her home and bought her unwanted gifts. Bazik engaged in this conduct despite knowing that the plaintiff had experienced sexual abuse as a child. The plaintiff felt trapped in the job as a single mother with no other source of income.

The plaintiff was terminated while away from work after emergency dental surgery, for which she provided medical evidence to her employer. The termination had a severe effect on the plaintiff; she drank alcohol to cope and could not interact with older men. She was unable to look for work due to her psychological condition arising from Bazik's conduct and her termination.

Justice Glustein found the defendants liable for battery and liable under the *Code* for sexual harassment, racial harassment and discrimination on the basis of sex and race. As the plaintiff "suffered the full list of consequences" to be considered in determining the quantum, the Court awarded human rights damages of \$30,000.<sup>87</sup> This was in addition to nearly \$270,000 in general, aggravated, and punitive damages, lost income, damages in lieu of notice, and damages under the *Family Law Act*.<sup>88</sup>

Another recent successful case, with a decision released in August 2015, is *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*<sup>89</sup> Default judgment was granted to a plaintiff who was terminated after over fifteen years in her position when she became deaf. The plaintiff was employed as a recruiter for focus groups.

After the plaintiff became deaf due to an infection, the Court described her employer's attitude towards her as "unconscionable"; she was "constantly belittled, humiliated and isolated". The employer repeatedly refused myriad reasonable suggestions for accommodation, with low or no-cost associated.

The plaintiff was awarded 24 months' pay in lieu of notice for wrongful dismissal in the amount of \$50,000, \$18,000 in damages for mental distress, \$15,000 in punitive damages and \$20,000 in human rights damages. The Court declined to award aggravated damages as they would amount to double-recovery, considering the human rights and mental distress damages.

However, despite the reluctance of the Court of Appeal to risk double recovery in *Strudwick*, the Court recently awarded both human rights and moral damages. In *Doyle v. Zochem Inc.*,<sup>90</sup> the most recent successful civil case under s. 46.1, the employee was awarded \$25,000 in damages under the *Code*, as well as an additional \$60,000 in moral damages stemming from the manner of her dismissal.

The employee in *Doyle* worked in a plant manufacturing zinc oxide for nine years, first as a plant supervisor and subsequently as Health and Safety Coordinator. She supervised an all-male group of employees. Doyle experienced ongoing sexual harassment by the Maintenance Supervisor at the plant, and was terminated after making complaints about the harassment and other safety issues in the workplace. The Court found that Zochem was liable for their actions in how they dealt with the workplace environment. In particular, the Court found Zochem did not take reasonable steps to investigate the employee's harassment complaint, and that a prudent investigator would have found Doyle's complaints to be credible. The Court of Appeal upheld the trial decision.

In *Williams Estate v. Vogel of Canada Ltd.*,<sup>91</sup> the Plaintiff was employed by the Defendant company for 32 years as a furniture upholsterer. During the last five years of his employment, he had an agreement with this employer that he would take a leave each January until March or April, to spend time with his family in Jamaica. In 2012, the Plaintiff attempted to return to work, but was informed there was no work because the company was in the middle of a move. Later, when the Plaintiff attended the new location to see whether there was work, a new, younger employee was doing his prior work. Williams was subsequently terminated, though his employer argued that he resigned.

The Court found that Williams was wrongfully dismissed. The Court further found that the Defendant's decision to terminate the Plaintiff was based in whole or part on his age and disability, and therefore his rights under the *Code* were breached. The Court awarded Williams \$5,000 in damages under the *Code*.

The employee in *Nason v. Thunder Bay Orthopaedic Inc.* worked as a registered orthotic technician for the employer for nineteen years.<sup>92</sup> His work involved handling power tools to prepare custom orthotic braces. As a result of his work, he began to have problems with his hands, wrists and elbows that developed into carpal and cubital tunnel syndrome. Some modifications were made to his work tasks. At a certain point, he was performing at 50% capacity and other employees were required to make up the difference.

After several months of this, the employer advised the employee that he could "no longer be accommodated" and advised him that he should initiate WSIB benefits, for which he had already been approved. He did so and was off work for two and a half years, receiving WSIB and later long term disability benefits.

The employee made claims under the *Code* for lost wages in the amount of \$112,387.20 and damages in the amount of \$35,000 for the period when the employer failed to accommodate his disability as well as a claim for damages for breach of his human rights related to his termination in the amount of \$35,000. The Court ultimately found that the employer had fulfilled its duty to accommodate to the point of undue hardship both at the time they put him on unpaid leave and during the leave. The denial of this claim was due in part to the employee's failure to facilitate accommodation by providing the necessary information to his employer about his abilities and limitations. However, the Court went on to award \$10,000 in human rights damages because the employee's physical disability was a factor in the employer's decision to terminate him at the end of his unpaid leave. The amount was reduced from \$35,000 because the employer attempted to ameliorate the situation by offering the employee alternate employment following termination. The employee was also awarded fifteen months pay in lieu of notice. In each of the cases discussed above, there was ample evidence of a breach of the *Code*. Moreover, the facts track neatly onto typical wrongful dismissal or constructive dismissal case law. The decision to award human rights damages in each of these cases does not appear to have been a difficult one.

### **Assessment of human rights damages**

Given the small sample size, it is not yet possible to determine trends in the quantum of damages being awarded by the courts. It seems that so far, the promise of higher damage awards in the civil context has not yet materialized.<sup>93</sup>

However, it does appear that damages under section 46.1 have been assessed by judges in accordance with the principles set out in the Divisional Court's judicial review of the Tribunal's decision in *ADGA Group Consultants Inc. v. Lane*, as outlined above in the Tribunal context.<sup>94</sup>

Thus, the quantum of awards in the civil context appears to be based on a combination of previous Tribunal decisions and the few existing human rights decisions in the civil context.<sup>95</sup> It remains to be seen, however, as a body of jurisprudence develops in the civil context, whether courts will begin to rely more heavily on civil tort case law for guidance.

### **Unsuccessful cases under section 46.1**

Given the relatively large number of unsuccessful claims for human rights damages in the civil context, it is helpful to explore the themes that emerge from these cases. As with any other category of civil cases, some human rights civil claims are found to be unmeritorious. Unlike other civil claims, however, statutory restrictions within the *Code* also work to limit the success of human rights claims in the civil context.

There are two main statutory restrictions on the application of section 46.1. As noted in the discussion of the legislative framework, section 46.1(2) prevents a person from bringing a civil claim based solely on the *Code*. Under section 34(11), a human rights application to the Tribunal is barred where a civil proceeding has already been commenced.

Pursuant to section 46.1(2), the jurisprudence to this point suggests that where a civil cause of action is struck down prior to trial, the accompanying human rights claim cannot survive on its own. In *Mackie v. Toronto (City)*<sup>96</sup>, Toronto Community Housing Corporation (TCHC) tenants brought an action alleging that the TCHC had failed to carry out repairs in their units as a result of discrimination based on mental disability. In a motion to strike, the Superior Court found that the repair claims were within the exclusive jurisdiction of the Landlord and Tenant Board and could not proceed. The Court explained that “if all that remains of the Plaintiffs' claims in the Superior Court is the Plaintiffs' discrimination claim, then the exclusive jurisdiction to address that claim rests with the Ontario Human Rights Commission and not the Superior Court.”<sup>97</sup>

However, it appears that when the claims are dealt with concurrently at trial, the failure of the accompanying civil claim does not automatically defeat the human rights claim. In *Cavic*<sup>98</sup>, the Court rejected the defendant's argument that the discrimination claim need not be determined if the wrongful dismissal claim failed, and dealt with the *Code* claim separately.

It is clear that a *Code* claim cannot proceed if it is the only cause of action in a claim from the start. *John v. Peel Regional Police* considered allegations of police racial profiling in a traffic stop incident. The Court recognized the applicability of s. 46.1 where the discrimination arises in the context of a separate, actionable wrong. However, in that case, the discrimination was at "the heart of the pleading" and there was no accompanying civil claim. Therefore, section 46.1 was a bar. The plaintiff's *Charter* claim was initially successful, but reversed on appeal by the Divisional Court.<sup>99</sup>

Under section 34(11) of the *Code*, a human rights application may not proceed at the Tribunal if another claim is being pursued concurrently in the court with respect to the same subject matter. Section 34(11) applies even if the civil Statement of Claim does not plead section 46.1 explicitly.<sup>100</sup>

When the restrictions of sections 46.1(2) and 34(11) are combined, negative consequences may result for a plaintiff. Pursuant to section 34(11), a complainant may not make an application to the Tribunal if a concurrent civil claim has been commenced. The limitation period for bringing an application under the *Code* is only one year. Thus, if the accompanying cause of action in the civil claim (e.g. the wrongful dismissal claim) is dismissed prior to trial and the human rights civil claim cannot proceed alone, the plaintiff may wish to pursue a Tribunal application. However, by this time the one-year limitation period may have expired. As a result, a plaintiff/applicant may be left with no remedy for an alleged human rights violation.

In *Aba-Alkhail v. University of Ottawa*, the applicant had brought a civil claim under the *Charter of Rights and Freedoms'* section 15 equality provision that was nearly identical to his Tribunal application. The Tribunal recognized this problem and addressed it as follows:

With respect to the applicant's argument that he would be left with no human rights redress if both the civil suit and the Application are dismissed, I note that the Divisional Court recently emphasized that even in those circumstances section 34(11) is not discretionary and bars an application from proceeding: *Grogan v. Toronto District School Board*, 2012 ONSC 319. The Tribunal does not have jurisdiction and, to paraphrase the Divisional Court, it does not matter that the civil action could be withdrawn or dismissed. “In short, s.34(11) requires an applicant to choose between the Tribunal and a

(concurrent) civil action”: see para. 48. The Divisional Court also confirmed that the fact that the civil suit was commenced before or after the Application is immaterial to the application of section 34(11).<sup>101</sup>

In *Grogan v. Ontario (Human Rights Tribunal)*<sup>102</sup>, the applicant sought a judicial review of a Tribunal decision dismissing her human rights complaint because she had subsequently filed a civil claim alleging the same acts of discrimination, *inter alia*. The Divisional Court explained the legislature’s intention in enacting s. 34(11):

[A] review of the *Code* reveals not only that the legislator contemplated that a multiplicity of forums may be called upon to address *Code* allegations, but also, that it has provided a means to address and prevent duplicative proceedings that may arise precisely because there are a number of potential forums. It does so in a number of ways, of which s. 34(11) is one.<sup>103</sup>

Accordingly, section 34(11) requires an applicant to choose between the Tribunal and a concurrent civil action. However, given the interaction between section 34(11) and section 46.1(2), this may be a false choice for some.

Further, the courts have not yet pronounced upon whether it has jurisdiction, under section 46.1(1).2, to order non-monetary restitution to the party whose right was infringed. Specifically it remains to be seen whether the courts will ever use section 46.1(1).2 to order reinstatement as a remedy.

The difficulties of proving discrimination in a claim for constructive dismissal where section 46.1 is not specifically pleaded are exemplified in the Ontario Court of Appeal’s decision in *General Motors Limited v. Johnson*<sup>104</sup>. The plaintiff employee claimed constructive dismissal on the basis of racism leading to a poisoned work environment. The Court did not refer to any human rights jurisprudence in determining that the trial judge had erred in finding that an alleged racist comment had poisoned the work environment. Contrast this with *Phanlouvang v. Northfield*<sup>105</sup>, which relied on the test set out by the Court of Appeal’s judgment in *Pieters v. Peel Law Association* to consider whether the plaintiff had established prima facie racial discrimination.<sup>106</sup> It is worth considering whether the outcome in *General Motors Limited v. Johnson* might have been different had the plaintiff plead section 46.1 of the *Code* in addition to his constructive dismissal claim.

For practitioners, it is clear that to make the most optimal use of section 46.1 of the *Code*, such relief, as well as the specific sections of the *Code* which have been breached, should be specifically pleaded.

Outside of these statutory limitations, courts have also begun to explore instances where section 46.1 might not apply to civil claims. *Parapatics v. 509433 Ontario Ltd.*<sup>107</sup> was a decision of the Ontario Small Claims Court dealing with a wrongful dismissal claim and a claim of discrimination based on age and disability. The plaintiff was a low-skill machine operator at the defendant business, which was facing financial difficulties.

After approximately four years of employment, the plaintiff was off work on short-term disability leave as a result of knee replacement surgery and recuperation from that surgery. He was laid off during his disability leave.

The Court found that the plaintiff was laid off for legitimate financial concerns, and not for any discriminatory reason. He was accordingly granted damages in lieu of notice. With respect to the discrimination claims, the Small Claims Court found that it did not have jurisdiction to make a declaration under the *Code*. However, being equivocal about whether a declaration was required, the Court went on to consider the merits of the discrimination claims. The Court determined that the plaintiff's termination was unrelated to his knee surgery as his work was light and not physical labour. It went on to find that as he was hired at the age of 57 and the average age of the business' employees was quite high, age was not a factor in the plaintiff's termination. The discrimination claim was dismissed.

In *Eidoo v. Infineon Technologies AG*, a small group of class members alleged that a distribution protocol resulting from the settlement of a class action breached the *Code* by discriminating against them on the basis of family status or marital status.<sup>108</sup> They sought damages under s. 46.1. The plaintiffs had brought a class action against technology companies alleging that the defendants conspired to fix prices for dynamic random access memory devices. The terms of the settlement enabled any person who had purchased such a device to claim \$20 from the fund. However, only one claim could be submitted per household with the result that multiple members of a household could claim \$20 in total and not \$20 each.

Justice Perell found that the *Code* did not apply to distribution schemes of judgments or settlements under the *Class Proceedings Act* because such distributions are not services, goods, facilities or contracts within the ambit of the *Code* and the *Code* does not apply to court orders. Even if it did apply, the Court found no breach of any section of the *Code*. The pooling of household claims did not result in a disadvantage because the \$20 compensation was already a windfall compared to the actual value of an individual claim and furthermore, it did not perpetuate prejudice or stereotyping on the basis of family status.

### **Failure to investigate human rights breaches**

While failure to investigate human rights breaches is a fairly common (and sometimes successful) claim in the Tribunal and arbitration contexts, as seen above, it is less common before the courts. However, a few cases demonstrate that the failure to investigate human rights breaches, or inadequate investigation, have at least been noteworthy factors for the courts' consideration.

In the first case, *Berkhout v. 2138316*, the plaintiff included a claim for "failure to investigate breach of her human rights". The Court made an award to the plaintiff under the *Code*, as well as for wrongful dismissal. The failure to investigate claim was not specifically discussed by the Court, other than a brief mention of the fact that the employer "did nothing" about the complaints of sexual harassment.<sup>109</sup>

A second successful case is *Disotell v. Kraft Canada*<sup>110</sup>, although it does not explicitly rely on the *Code*. The employee alleged harassment and discrimination at the hands of his co-workers, who repeatedly made derogatory sexual comments to him.

The employee's supervisor refused to support a written complaint and warned the employee of the potential adverse consequences of complaining. The employer, in the person of the supervisor, knew the harassment was occurring, failed to report it to senior management, and misrepresented the seriousness and frequency of the complaints. The employer conducted only a minimal investigation into the complaints.

The Court awarded damages for constructive dismissal equivalent to twelve months' notice (\$36,000) to the sixteen year employee. However, no human rights damages were requested or awarded.

While damages were not specifically awarded in these cases as a "free standing award", such awards for failure to investigate or negligent investigation in the human rights context may see more traction in future civil cases where the employer has not satisfied its duty to protect employees' rights under the *Code*.

In *General Motors Limited v. Johnson*, the Ontario Court of Appeal found that the trial judge had erred in finding that the employer had repudiated the contract by failing to conduct a comprehensive investigation into the allegations of discrimination. The employer conducted three investigations and found there had been no racial discrimination.

Similarly, in *Hayden v. Niagara Regional Police Service*<sup>111</sup>, the plaintiff brought an action against his employer, alleging failure to investigate his complaint of harassment. The Court found it had no jurisdiction to hear the claim as it was in the domain of a conciliator under the plaintiff's collective agreement.

It is noteworthy that the Courts have long used the lack of a proper, or any, investigation of *Code* allegations to refuse to uphold terminations for "just cause" and to extend the reasonable notice period, and following *Honda Canada Inc. v. Keays*, to award damages for breach of the obligation of good faith and fair dealing in the manner of dismissal.

For example, in the case of *Elgert v. Home Hardware Stores Limited*<sup>112</sup>, the Alberta Court of Appeal upheld a civil jury award of two years' pay in lieu of notice for wrongful termination as well as punitive damages (albeit in a reduced amount) by virtue of an investigation for sexual harassment which the Court of Appeal agreed was "inept and unfair" and conducted in a malicious, vindictive and outrageous manner. Further, while the aggravated damage award was set aside, it was only because the plaintiff had not provided any evidence of mental distress at trial.

However, in the case of *Tse v. Trow Consulting Engineers Ltd.*<sup>113</sup> the Court rejected an assertion that an improper investigation could result in independent damages. In that case, an employee was summarily dismissed for sexual harassment. The Court found that the employer did not have just cause and commented on the employer's inadequate investigations. In doing so, the Court specifically stated that:

In any event, even though there may be procedural unfairness by the employer in the case at hand, this does not mean there is an actionable wrong on that account.<sup>114</sup>

Thus, it seems that some courts are open to compensating terminated employees for an employer's failure to investigate or for an inept or unfair investigation, where the employees have been improperly accused of harassment or discrimination on grounds protected by the *Code*. It is not certain, however, if those same courts will be willing to provide compensation to the victim of such *Code* violations who alleges a lack of, or negligent, investigation.

### **Human rights claims in the civil context outside Ontario**

Although other provinces have yet to implement provisions similar to section 46.1, the idea of expanding human rights claims to the civil context has gained traction elsewhere in Canada.

In Saskatchewan, a merged administrative and civil system operates to deal with human rights complaints. In that province, the Human Rights Tribunal has been eliminated and discrimination complaints that pass initial screening by the Human Rights Commission, if not successfully mediated, proceed to the Court of Queen's Bench.<sup>115</sup> However, the remedies available are still those set out in the human rights legislation.

In the Manitoba case of *Sparrow v. The Manufacturers Life Insurance Company et al.*<sup>116</sup> (“*Sparrow*”), the Court of Queen’s Bench refused to strike a statement of claim that alleged a breach of that province’s *Human Rights Code* in the context of an action for wrongful dismissal. The employer relied on *Bhadoria*. The Court stated at paragraphs 15-17:

“The question then, is whether this court has jurisdiction to hear an action for wrongful dismissal based on a breach of the *Code*. The jurisdiction of a superior court to entertain claims based on human rights legislation has been a matter of some controversy over the years. One line of cases, which New Flyer relies on, begins with *Seneca College of Applied Arts and Technology v. Bhadoria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181. There, the Supreme Court of Canada concluded that no independent right of action is created by the prohibition against discrimination existing in The Ontario *Human Rights Code*, R.S.O. 1970, c. 318.

The *Bhadoria* decision can be distinguished for several reasons. Ms Bhadoria had applied for employment with the defendant. She alleged defendant did not hire her because of her race. No common law rights arise when an individual applies for a job, so there was no existing right of action which could be enforced by the courts. The question before the court then, was whether an independent tort was created by the legislation.

The situation here is quite different. Mr. Sparrow is party to a contract of employment, from which a common law right of action arises. That right can be enforced by the courts.”

It should be noted, that the Court in *Sparrow* also distinguished *Bhadoria* on one additional basis; namely, that the statute in *Bhadoria* granted **exclusive** jurisdiction to decide all issues relating to a breach of the legislation to an adjudicator or a panel appointed under that statute, whereas the Manitoba *Code* did not restrict jurisdiction to a human rights adjudicator, except to determine issues of fact and law that arise on a complaint the adjudicator hears.

The Ontario *Code* provision (section 14(b)(6)) which was in issue at the time (since amended) in *Bhadauria* stated as follows:

“The Board of Inquiry has **exclusive** jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to that decision.” (emphasis added)

The current Ontario *Code* (which acknowledges in section 46.1(1) for a direct civil remedy for discrimination when joined with an independent cause of action), in section 39, now provides:

“The Tribunal has the jurisdiction to exercise the powers conferred on it by or under this *Act* and to determine all questions of fact or law that arise in any application before it.”

### **Human rights claims in the civil context under Federal jurisdiction**

It is arguable that a human rights claim can also be pursued in certain circumstances where violations of the *CHRA* are alleged. There is no provision in the *CHRA* granting exclusive jurisdiction to an adjudicator or tribunal under the legislation. Rather, section 50(2) of the *CHRA* states:

“In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.”

Accordingly, it can be argued that as long as an independent cause of action is pleaded, the discrimination may form part of the action as being relevant to the facts and the conduct of the Defendant to support the damages claimed.

In *Picard v. Air Canada*<sup>117</sup>, the Quebec Superior Court took section 46.1 as recognition that “it is sometimes inefficient and contrary to the effective administration of justice to force different aspects of a claim to be adjudicated in different forums”. *Picard* was a motion to certify a class action brought by persons with disabilities against Air Canada and WestJet claiming that requiring them to pay for an additional seat constituted discrimination. The Court rejected the airlines' argument that the matter was in the exclusive jurisdiction of the Canadian Human Rights Commission and proceeded to certify the class action.

In *L'Attiboudeaire v. Royal Bank of Canada*<sup>118</sup> (“*L'Attiboudeaire*”), the Ontario Court of Appeal held that a motions court judge had erred in applying *Bhadauria* to dismiss an action alleging constructive dismissal because of racial discrimination. The Court distinguished *Bhadauria* as follows:

“In my view, the motions court judge in the present proceeding erred in applying *Bhadauria*. The present case is unlike *Bhadauria* in that the cause of action alleged in it is not based upon a breach of the Canadian *Human Rights Act*, nor is it “based on” an invocation of the public policy expressed in that Act - in the sense that the action in *Bhadauria* was based on the Ontario *Human Rights Code*. The plaintiff in the present case had been in an employment relationship with the defendant and, in order to prove conduct on the part of the defendant which amounted to constructive dismissal (generally, a fundamental breach of the terms of the employment contract) he does not

need to invoke the policy of the Canadian *Human Rights Act*. This does not mean that its terms could not be relevant factors to take into account in assessing the defendant's conduct."

The Court in *Metz v. Tremblay-Hall*<sup>119</sup> elaborated on the *L'Attiboudeaire* decision at paragraph 21, as follows:

"[I]t is too broad to state that *Bhadauria* precludes any common law action based on racial harassment or discrimination. In *Y.S. v. H. & R. Property Management Ltd.*, [1999] O.J. No. 5588 (Ont. S.C.J.), at p. 4 Sutherland J. pointed out that where the whole action is based upon the Ontario *Human Rights Code*, with no pleading of a common law right of action, the decision of the Supreme Court of Canada had determined that recourse was to the Human Rights Commission, exclusively, **because the legislation foreclosed recourse to the court for such breaches of the Code, except by way of appeal from the commission**. Sutherland J. stated that *Bhadauria* would not, however, be a bar to a claim of harassment if an independent cause of action was made out, on the authority of *L'Attiboudeaire v. Royal Bank of Canada*, 1996 CanLII 1411 (ON CA), [1996] O.J. No. 178 (Ont. C.A.). In *L'Attiboudeaire* the plaintiff brought an action for constructive wrongful dismissal. The plaintiff was of African-Caribbean heritage. He alleged that he was subject to "racist dehumanizing, derogatory and sexist comments" by the defendant, which conduct resulted in his constructive dismissal. The plaintiff pleaded that the conduct of the defendant was in contravention of, among other things, the Canadian *Human Rights Act*. The defendant brought a motion to dismiss the action on the basis of *Bhadauria*. The Court of Appeal distinguished *Bhadauria* because the cause of action in *L'Attiboudeaire* was based on breach of the plaintiff's employment contract with the defendant, not on a breach of the Canadian *Human Rights Act* nor on an invocation of public policy expressed in that *Act*." (emphasis added)

The Ontario Court of Appeal stated in *Jaffer v. York University*, already mentioned, that "this court has expressly upheld pleadings that contained allegations of discrimination in constructive dismissal claims."<sup>120</sup> The Court went on to explain:

"In *L'Attiboudeaire v. Royal Bank of Canada* (1996), 1996 CanLII 1411 (ON CA), 131 D.L.R. (4th) 445, this court was satisfied that the cause of action alleged was not based upon a breach of human rights legislation or on an invocation of the public policy expressed in that legislation. Morden A.C.J.O. explained that in order to prove conduct that amounted to constructive dismissal, the plaintiff did not need to invoke the public policy of the Canadian *Human Rights Act*. This did not mean that the *Act's* terms could not be relevant factors to take into account in assessing the defendant's conduct."

Also, the same principles were upheld in *Peng v. Star Choice Television Network Inc.*<sup>121</sup> In that case the Court stated:

"[15] However, in view of the fact that this action is principally a claim for damages for wrongful dismissal, the conduct alleged is said to provide a factual context for the dismissal and thus forms part of the basis for Ms. Peng's argument that the dismissal was wrongful. Ms. Peng further submits that the Defendants' alleged wrongful discriminatory conduct was carried out in bad faith and entitles her to damages for mental distress, an increased period of notice (see: *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701), as well as punitive damages, and is therefore generally relevant to the issue of damages. Such claims have been permitted and

recognized, most recently by the Ontario Court of Appeal which countenanced an award of punitive damages as a result of discriminatory conduct in breach of human rights legislation (see: *Keays v. Honda Canada Inc.*, April 3, 2006, Docket No. C43398 (Ont. C.A.).”

“[16] I conclude that Ms. Peng’s allegations of discrimination, insofar as they are made in the context of a claim for wrongful dismissal and in light of their relevance to the issues of the alleged wrongfulness of the dismissal, length of reasonable notice and availability of certain heads of damages raised in this particular case, entitles the Court to hear evidence and entertain argument about them within those boundaries. This approach does not, in my view, violate or run counter to the principle and precedent established by *Seneca College of Applied Arts and Technology v. Bhadauria*, *supra*, and was explicitly accepted in *Keays v. Honda Canada Inc.*, *supra*.”

Finally, the decision of *Sargeant v. Patterson Dental Canada Inc.*<sup>122</sup>, relying on *L’Attiboudeaire*, confirmed that *Bhadauria* does not oust the jurisdiction of the Court to try an action for damages based upon an independent tort or torts or based on a breach of contract, whether or not there is also a pending human rights complaint.

## **Conclusion**

Human rights remedies granted in the civil context are still in their infancy. So far, relatively few cases have been successful; all have been in the employment context. Statutory limits set by the *Code*, including the need to have an accompanying civil claim and the bar against bringing claims at the Tribunal and in a court concurrently create barriers to some claims. Despite these challenges, the existing successful cases demonstrate that the civil context promises remedies in a new forum for breaches of the *Code*, and potentially breaches of the *CHRA*, with distinct strengths.

## **6. EMERGING THEMES AND COMMONALITIES**

### **Low quantum of general damage awards**

Across contexts, the quantum of human rights general damage awards is relatively low as compared to areas such as tort law. The Pinto Report on the Ontario statutory human rights regime noted the perils of low damage awards; they "send a message that human rights and breaches of the *Code* are of limited importance" when in fact, breaches of the *Code* call for meaningful compensation.<sup>123</sup>

Low damage awards in the civil, arbitral or tribunal contexts also have the negative effect of setting low expectations for the many complainants who settle before a hearing. Further, low damage awards may deter those who are debating whether to bring a claim, for which they might incur costs in terms of time and expense.<sup>124</sup>

Fortunately for those able to retain counsel, awards tend to be higher at the OHRT for applicants represented either by lawyers from the Human Rights Legal Support Centre (HRLSC), (average award of \$13,716) or by private bar counsel (average award of \$12,923). The average award for unrepresented applicants is only \$7,131.<sup>125</sup> This differential may not be reflective of the successful submissions of counsel. Rather, the HRLSC chooses to represent applicants with the

most significant cases and applicants may retain private bar lawyers when there is more at stake. In contrast, some self-represented litigants may choose to pursue their case regardless of the severity of the discrimination that allege.<sup>126</sup>

Counsel may have a role to play in increasing the quantum of general damage awards. Counsel could advocate for the adoption of award indexation to inflation to counteract the stagnation in absolute value of awards. In addition, counsel can point to the recommendation in the Pinto Report that damages ought to be increased and request six-figure damage awards at the outset.<sup>127</sup> In the meantime, the factors enunciated in *ADGA Group Consultants Inc. v. Lane* should be set out to justify an award of damages in an amount at least as generous as in the Tribunal and Arbitration jurisprudence until a sufficient body of civil cases has established a clear guideline.

### **Choice of forum**

With a variety of forums to choose from, each of which takes a slightly different approach to remedies, how does a practitioner go about recommending which route to follow?

In the employment context, for unionized workers making complaints against their employer, the choice is clear; the labour board and arbitrators have exclusive jurisdiction. For non-unionized workers, a choice between the civil context and the human rights tribunals exists.

The civil context offers some advantages, including the opportunity to seek a variety of different types of damages and to address several related claims in one forum. For example, in *Doyle v. Zochem Inc.*<sup>128</sup> the Ontario Court of Appeal confirmed that a Plaintiff can seek general damages under the *Code* as well as moral damages. In *Doyle*, the Plaintiff employee was sexually harassed by her manager, and was terminated after making a complaint. After her termination, she experienced significant emotional issues and was diagnosed with a major depressive disorder and anxiety. The Court of Appeal upheld the trial judge's award of \$60,000 in moral damages and \$20,000 of *Code* damages. Though the same conduct formed the basis for both awards, the Plaintiff was not receiving double recovery because the heads of damages were not identical. *Doyle* shows that in the civil context, it may be possible for a Plaintiff to recoup more types of damages.

Tribunals are limited to considering breaches of the *Code*<sup>129</sup> and the *CHRA*. As the monetary cap of \$10,000 on damages at the Tribunal has been eliminated, that is no longer a reason to instead pursue damages in the civil context. However, the longer limitation period, the availability of a comprehensive discovery process, and the possibility of costs to the successful party may make a civil claim more attractive than a Tribunal application.<sup>130</sup>

Another factor to consider is that the Tribunal and arbitrators uniquely maintain the broad remedial power to make orders under s. 45.2(1) of the *Code* to grant systemic remedies by directing "any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act".<sup>131</sup> The non-monetary restitution jurisdiction of the courts under section 46.1(1)2 of the *Code*, which has been interpreted by the Tribunal in respect to a similar provision (45.2(1)2) to include a right to order reinstatement, has yet to be utilized. However, such relief, including reinstatement and public and systemic interest

awards, should be sought in appropriate circumstances. Moreover, the availability of costs may be considered an added risk rather than a benefit to potential civil litigants.

Practical considerations for the plaintiff may come into play in deciding whether to include a human rights claim within a civil action. In his 2012 report on changes to the Ontario human rights regime, Andrew Pinto points out that a number of practitioners have caught on to the tax advantages of categorizing damages as a remedy under section 46.1 rather than as damages in lieu of income<sup>132</sup>. It appears that at mediations or settlements following a civil pre-trial, cases are often resolved by converting taxable damages into non-taxable human rights damages where there is a legitimate human rights claim. However, anecdotal reports indicate that the Canada Revenue Agency may sometimes take issue with such a classification of damages because "human rights" damages have not technically been awarded by a court or tribunal. Practitioners should be aware that apportioning an award to human rights damages is not a failsafe method to avoid tax consequences.

A further consideration may be the extent to which courts and arbitrators are familiar with the Tribunal's human rights jurisprudence, making human rights arguments a gamble. Tribunals, on the other hand are abundantly familiar with the *Code* and the *CHRA* and the legal precepts which should be taken into account in reaching their decisions.

### **Intersection between contexts**

The tribunal, arbitral, and civil context are not air-tight silos. There has been substantial cross-pollination of ideas as between the different forums.

Reinstatement has travelled from the labour arbitration context to the tribunal context. In *Fair v. Hamilton-Wentworth District School Board*, the Divisional Court and Court of Appeal upheld the Tribunal's remedial award. The Divisional Court held that while reinstatement may be uncommon in human rights litigation, it is not unusual in labour relations litigation under a collective agreement where the same issues would be addressed. It further stated that the *Code* provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the *Code* and that there is no barrier or obstacle to reinstatement as a remedy at law. The Court of Appeal stated that the Divisional Court's reference to the labour relations context was not unreasonable.

Another practice from the arbitration context that is beginning to translate into the tribunal and civil contexts is the approach of breaking down a single lump sum award for a breach of human rights into separate amounts for each violation. An example of this can be seen in *Ontario Public Service Employees Union (Ranger) v. Ontario (Community Safety and Correctional Services)*<sup>133</sup>, Where Vice-Chair Leighton awarded \$45,000 in damages as compensation for harassment, discrimination and poisoned work environment, a further \$35,000 for the failure to accommodate the employee when he was able to return to work and a further \$18,000 to compensate the grievor for the second failure to accommodate him. A similar approach was seen in *Wesley*, where the Deaf, Aboriginal, gay complainant received different heads of damage for the different harms he had suffered.<sup>134</sup> This may assist in allowing a plaintiff/applicant to take advantage of the non-taxable effect of general damages awards.

The arbitration context may also borrow from the civil context. In *The City of Calgary v. Canadian Union of Public Employees, Local 38*,<sup>135</sup> where the arbitration board awarded \$125,000 in general damages, the Board compared the facts of the case to two non-human rights civil cases. Although to some, reliance on civil cases does not provide a principled basis for an arbitration award, it would not be surprising to see more of the same as the civil jurisprudence grows.

## Conclusion

As human rights jurisprudence continues to grow in provincial and federal tribunals, the labour arbitration context and the civil courts, lessons can be drawn from the similarities and differences across contexts and the increasing breadth of issues facing human rights applicants and respondents.

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<sup>1</sup> [2006] 1 SCR 513, 2006 SCC 14 (CanLII)

<sup>2</sup> [1985] 2 S.C.R. 536.

<sup>3</sup> [1987] 1 S.C.R., 1114.

<sup>4</sup> Audra Ranalli & Bruce Ryder, "Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-2015" (2016) Submitted for publication. [Ranalli & Ryder]

<sup>5</sup> This was a bar to human rights claims in: *Dobreff v. Davenport*, 2009 ONCA 8, aff'g [2008] OJ No. 6001 (SCJ), leave to appeal to SCC dismissed, [2009] SCCA No. 96; *Leclair v. Ottawa (City) Police Services Board*, 2012 ONSC 1729; and *Mackie v. Toronto (City)*, 2010 ONSC 3801 at para. 58.

<sup>6</sup> 1998 CarswellOnt 2806.

<sup>7</sup> 2015 ONSC 2213 at paras 7-9.

<sup>8</sup> (1992) 17 C.H.R.R. D/79.

<sup>9</sup> 2014 HRTO 272 (February 28, 2014).

<sup>10</sup> 2013 HRTO 420; aff'd 2014 ONSC 2411 (Div. Ct.); aff'd 2016 ONCA 421.

<sup>11</sup> 2014 ONSC 2411 (Div. Ct.); 2016 ONCA 421.

<sup>12</sup> 2009 HRTO 1804 (October 28, 2009).

<sup>13</sup> 2011 SCC 53.

<sup>14</sup> Ranalli & Ryder, see note 4 at p. 30-31.

<sup>15</sup> *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315.

<sup>16</sup> 2005 HRTO 53, at para 35 (CanLII).

<sup>17</sup> *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, at para 45 (CanLII) ["Arunachalam"].

<sup>18</sup> 2008 CanLII 39605 (ON SCDC), 91 OR (3d) 649 at paras 149, 154.

<sup>19</sup> *ADGA*, *ibid* at paras 153-54.

<sup>20</sup> Ranalli & Ryder, see note 4 at p. 2-3.

<sup>21</sup> Ranalli & Ryder, see note 4 at p. 17.

<sup>22</sup> 2012 HRTO 21 (January 5, 2012).

<sup>23</sup> 2013 HRTO 1307.

<sup>24</sup> 2014 HRTO 1591.

<sup>25</sup> 2016 HRTO 821

<sup>26</sup> 2017 HRTO 354.

<sup>27</sup> See *Perry v. The Centre for Advanced Medicine*, 2017 HRTO 191; *Kerceli v. Massiv Automated Systems*, 2016 HRTO 1324.

<sup>28</sup> 2015 HRTO 675 (CanLII).

<sup>29</sup> 2014 HRTO 956 (CanLII).

<sup>30</sup> Ranalli & Ryder, see note 4 at p. 35.

<sup>31</sup> 2015 CHRT 10.

<sup>32</sup> See *Canada (AG) v. Turner*, 2015 FC 1209, aff'd 2017 FCA 2, leave to appeal filed to Supreme Court.

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- <sup>33</sup> 2015 CHRT 14.  
<sup>34</sup> 2015 CHRT 1.  
<sup>35</sup> 2010 CHRT 23.  
<sup>36</sup> 2013 FC 117.  
<sup>37</sup> 2013 CHRT 20 (September 18, 2013).  
<sup>38</sup> 2014 FCA 110.  
<sup>39</sup> 1993 CanLII 683 (CHRT).  
<sup>40</sup> (No. 2), (2002), 44 C.H.H.R.R. D/37 (Ont. Bd. Inq.)  
<sup>41</sup> *Mills v. Bell Mobility*, 2017 CHRT 1.  
<sup>42</sup> (No. 3) 1998 32 C.H.R.R.D/11.  
<sup>43</sup> (2002), 112 L.A.C. (4th) 60.  
<sup>44</sup> (1984), 5 C.H.R.R. D/2170.  
<sup>45</sup> 1982 CarswellOnt 1559.  
<sup>46</sup> 2003 FCT 341.  
<sup>47</sup> [1999] O.H.R.B.I.D. No. 15.  
<sup>48</sup> 2011 HRTO 932.  
<sup>49</sup> 2012 HRTO 938.  
<sup>50</sup> *Devoe v. Haran*, 2012 HRTO 1507.  
<sup>51</sup> 2013 HRTO 304.  
<sup>52</sup> 2011 HRTO 1519.  
<sup>53</sup> Karen Jensen & Arleen Huggins, "Emerging Trends in Human Rights Remedies" (LSUC 2015 Summit on Human Rights).  
<sup>54</sup> *Re Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Hyland)* (2014), 241 LAC (4th) 82 (Ont GSB) (Petryshen) ["*Re Hyland*"].  
<sup>55</sup> 2013 CanLII 62266 (Waddingham) ["*City of Hamilton*"].  
<sup>56</sup> *Ottawa-Carleton District School Board and ETFO (Bonnell) (Re)* (2012), 216 LAC (4th) 333 (Weatherhill) ["*Bonnell*"].  
<sup>57</sup> (2013) 233 LAC (4<sup>th</sup>) 315 (OLRB).  
<sup>58</sup> 2013 CanLII 50479 (ON GSB) (Leighton).  
<sup>59</sup> *The City of Calgary v. Canadian Union of Public Employees, Local 38*, 2013 CanLII 88297 (AB GAA).  
<sup>60</sup> *Re Greater Toronto Airport Authority and Public Service Alliance Canada, Local 0004 (CB Grievance)* (2010), 191 LAC (4th) 371 (Shime); [2011] OJ No 358 (Ont Div Ct).  
<sup>61</sup> *Ibrahim v. Hilton Toronto*, 2013 HRTO 673 (CanLII).  
<sup>62</sup> 2014 CanLII 12448 (ON LA) ["*Renfrew County*"].  
<sup>63</sup> *Ibid* at para 110.  
<sup>64</sup> (2015), 121 CLAS 268, at paras 27, 29 & 30.  
<sup>65</sup> 2015 PSLREB 30, at para 87 ["*Kinsey*"].  
<sup>66</sup> *Ibid* at para 121.  
<sup>67</sup> *Ibid* at para 107.  
<sup>68</sup> (2013), 229 LAC (4th) 382.  
<sup>69</sup> (2010), 195 LAC (4th) 217.  
<sup>70</sup> [1981] 2 S.C.R. 181 (S.C.C.).  
<sup>71</sup> [2008] 2 S.C.R. 362 (S.C.C.), at para. 63.  
<sup>72</sup> Andrew Pinto, "Report of the Ontario Human Rights Review 2012" (November 2012) [Pinto Report], at p. 175.  
<sup>73</sup> 2009 CarswellOnt 582.  
<sup>74</sup> *Jaffer v. York University*, 2010 ONCA 654, 2010 CarswellOnt 7531, leave to appeal to SCC dismissed, [2010] SCCA No. 402.  
<sup>75</sup> *Ibid* at paras 34-36.  
<sup>76</sup> *Ibid* at para 39.  
<sup>77</sup> 2011 CarswellOnt 109, 2011 ONSC 269 at para 6.  
<sup>78</sup> 2010 ONSC 2133 at para 15.  
<sup>79</sup> Of note is the Ontario Superior Court's consent order in a class action certification in *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308 (CanLII). It included a common issue with respect to

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whether the plaintiffs suffered human rights damages compensable under s. 46.1. The plaintiffs also pleaded claims of breach of fiduciary duty, negligent misrepresentation, conversion, conspiracy.

<sup>80</sup> Pinto Report, see note 67 at p. 174.

<sup>81</sup> [2013] O.J. No. 1125.

<sup>82</sup> 2013 ONSC 5799 [*Solis*].

<sup>83</sup> *Ibid* at para 90.

<sup>84</sup> 2015 ONSC 343.

<sup>85</sup> 2015 CarswellOnt 1232.

<sup>86</sup> 2015 ONSC 3760, [2015] O.J. 3225 [*Silvera*].

<sup>87</sup> *Ibid* at para 151.

<sup>88</sup> The plaintiff received \$90,000 in general and aggravated damages and \$10,000 in punitive damages, \$33,924.75 in lost earning capacity, three months' notice for wrongful dismissal equal to \$7,475.50, \$57,869.13 in lost past income, and \$15,000 under the *Family Law Act*.

<sup>89</sup> 2015 ONSC 3408 [*Strudwick*].

<sup>90</sup> 2016 ONSC 3188; aff'd 2017 ONCA 130.

<sup>91</sup> 2016 ONSC 342.

<sup>92</sup> 2015 ONSC 8097, 2015 CarswellOnt 19874.

<sup>93</sup> Sheila Osborne-Brown, "The "Right To Sue" as Access to Justice: Discrimination in Employment before the Courts in Canada and California" (2014) 18 C.L.E.L.J. 291 – 330 at para 65 [Osborne-Brown].

<sup>94</sup> [2008 CarswellOnt 4677 (Ont. Div. Ct.)], 2008 CanLII 39605, cited in e.g. *Silvera v. Olympia Jewellery Corp.*, 2015 ONSC 3760 at para 150.

<sup>95</sup> See e.g. *Silvera*, see note 81 at para 152, *Strudwick*, see note 84 at para 28, *Solis*, see note 77 at para 84.

<sup>96</sup> *Mackie v. Toronto (City)*, 2010 ONSC 3801, 2010 CarswellOnt 4757.

<sup>97</sup> *Ibid* at para 59.

<sup>98</sup> *Cavic v. Costco Wholesale Canada Ltd.*, 2012 ONSC 5307, 2012 CarswellOnt 13359 [*Cavic*] at para 47.

<sup>99</sup> *John v. Peel Regional Police*, 2015 CarswellOnt 17836 (ONSC); rev'd on other grounds, 2017 ONSC 42 (Div. Ct.).

<sup>100</sup> *Beaver v. Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282 (CanLII) at paras 10-11.

<sup>101</sup> *Aba-Alkhail v. University of Ottawa*, 2012 HRTO 656 at para 29.

<sup>102</sup> 2012 ONSC 319.

<sup>103</sup> *Ibid* at para 45.

<sup>104</sup> 2013 ONCA 502 at para 94.

<sup>105</sup> *Phanlouvang v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585, 2014 CarswellOnt 16082 [*Phanlouvang*].

<sup>106</sup> *Phanlouvang*, see note 98 at para 109, citing *Pieters v. Peel Law Association*, 2013 ONCA 396 at para 56.

<sup>107</sup> *Parapatics v. 509433 Ontario Ltd.*, 2010 CarswellOnt 1200. See also *Dwyer v. Advanis Inc.*, 2009 CarswellOnt 2610, [2009] O.J. No. 1956, 177 A.C.W.S. (3d) 714, 2009 C.L.L.C. 210-029 where the financial considerations, rather than the plaintiff's heart attack was found to be the reason for dismissal.

<sup>108</sup> *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493, 2015 CarswellOnt 13325.

<sup>109</sup> *Berkhout*, see note 76.

<sup>110</sup> 2010 ONSC 3793, 2010 CarswellOnt 5781.

<sup>111</sup> 2008 CarswellOnt 6396, 171 A.C.W.S. (3d) 130.

<sup>112</sup> 2011 ABCA 112 (CanLII).

<sup>113</sup> [1995] O.J. No. 2529 (Gen.Div.)

<sup>114</sup> *Ibid* at para 73.

<sup>115</sup> *Ibid* at para 6.

<sup>116</sup> 2004 MBQB 281.

<sup>117</sup> *Picard c. Air Canada*, 2011 QCCS 5186, cited in Osborne-Brown, see note 63 at para 62.

<sup>118</sup> 1996 CanLII 1411 (ON CA).

<sup>119</sup> 2006 CanLII 34443 (ON SC).

<sup>120</sup> *Jaffer*, see note 69.

<sup>121</sup> 2006 CanLII 34720 (ON SC).

<sup>122</sup> [1997] O.J. 4775 (Gen Div.)

<sup>123</sup> Pinto Report, see note 67 at 70-71.

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<sup>124</sup> Ranalli & Ryder, see note 4 at p. 7.

<sup>125</sup> Ranalli & Ryder, see note 4 at p. 20.

<sup>126</sup> Ranalli & Ryder, see note 4 at p. 21.

<sup>127</sup> Ranalli & Ryder, see note 4 at p. 35-36.

<sup>128</sup> 2017 ONCA 130. see note 89.

<sup>129</sup> See Osborne-Brown, see note 86.

<sup>130</sup> Mary Cornish, Fay Faraday & Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora: Canada Law Book, 2009) at p. 151-152.

<sup>131</sup> *Code*, s. 45.2(1), para 3.

<sup>132</sup> Pinto Report, see note 67 at p. 174-75.

<sup>133</sup> 2013 CanLII 50479 (ON GSB) (Leighton).

<sup>134</sup> *Wesley v. 2252466 Ontario Inc. o/a The Grounds Guys*, 2014 HRTO 1591.

<sup>135</sup> CanLII 88297 (AB GAA).

## Schedule "A"

### Fact Scenario

Aziz has worked in the sales department of Xco, a major business in Toronto for the past five years. He is originally from Pakistan, but has lived in Toronto for almost 10 years. He left Pakistan because of his sexual orientation. He did not feel he could be "out" to his family, and wanted to be himself.

Aziz was doing well and enjoying work for the first four years of his employment at Xco. About six months ago, Xco hired a new, young manager named Chad, who had just finished his undergraduate business degree, citing his great personality and "potential." Aziz thought he was next in line for this management position, as his sales targets had been steadily growing, and he got along well with most of the staff. While he was disappointed, Aziz is a team player, and decided to continue working at Xco.

While Chad is friendly with many people in the office, he communicates with Aziz primarily by joking around with him. While some of the jokes are funny, others make Aziz feel uncomfortable. For example, once, Chad made fun of Aziz's pants, saying, "did you get those at Gays r' us?" Another time, Chad asked him, "so how much pussy did you get on the weekend? Oh wait, you're probably a virgin. Your people don't have sex until marriage, right?" Aside from being profoundly unfunny, the jokes also seem personal and hurtful to Aziz.

The situation at work has been wearing on Aziz. For the past year, he has been gradually drinking more and more. In the past six months, since Chad was hired, his drinking has become far worse. Now, Aziz is drinking every day. Chad has commented on Aziz's drinking habits – mostly in a "congratulatory" manner, by saying things like, "hey buddy, hear you hit the club last night, way to get wasted and then still show up here. I admire your people's work ethic, that's for sure."

Due to Aziz's increased drinking, and his stress stemming from Chad's behaviour, his sales numbers took a dip. One day, Chad came by Aziz's desk and said, "hey man, you've been slipping, sales-wise. You've got to keep those numbers up, otherwise it's back on the boat for you." Needless to say, this made Aziz feel angry and humiliated. After work, Aziz coped by drinking heavily. He also picked up a male sex worker, Kyle, and brought him back to the office at approximately 10:30 pm. Aziz took him into the secure area of the office.

A dispute then arose between Aziz and Kyle, and no services were performed. Aziz left the office, leaving Kyle behind. Kyle was not interested in the company files or sales targets, but in getting paid. He picked up the telephone and left the following message on Chad's voicemail:

Hi, I don't know what time it is at night, but I'm here at Xco. A man who works in your office named Aziz brought me up here. I'm a male escort, and he hasn't

paid me the money I'm owed. He left me here in your office, I don't know where he is. I don't know how to get out. So I'm sure you'll have many questions for me tomorrow. Call me at 416-555-5555, my name is Kyle. I'm not joking around about this, I need to get paid.

Kyle left the office, and Aziz returned later that night to discover he was gone. The following day, Kyle started to call people in the office looking for his fee. He also attended the office and confronted the receptionist in an aggressive manner. Eventually he left, but stated he would return until he was paid.

When Chad confronted Aziz about whether he brought a male escort back to the office, Aziz denied everything – until he was told there was a videotape from the security camera. Aziz then said he “blacked out” and didn't remember what happened, as he had been drinking a lot.

Aziz is terminated, allegedly for cause.

1. In what forum would you recommend Aziz bring his claim? Which parties would you claim against?
2. If Aziz commenced a claim in the Ontario Human Rights Tribunal, what relief would you recommend he request? What quantum of damages would you recommend he request?
3. What facts would be especially relevant to the Tribunal in determining the amount of damages to award? What amount would you predict the Tribunal might order?
4. What systemic order would you request or design for this situation? Do you need additional information? If so, what information would you ask for?