

Awards For Injury To Dignity And Self-Respect On The Rise In Alberta



Two recent cases heard by the Human Rights Tribunal of Alberta have resulted in record damages awards for employees who have suffered injuries to dignity and self-respect ("IDSR") as a result of discrimination in the workplace.

The *Alberta Human Rights Act*, RSA 2000, c A-25.5 (the "Act") prohibits discrimination in employment based on the protected grounds of race, colour, ancestry, place of origin, religious beliefs, gender, gender identity, gender expression, age, physical disability mental, disability, marital status, family status, source of income and sexual orientation. The protected ground of gender also includes protection from discrimination in the form of sexual harassment.

If an employee succeeds in their case at an Alberta Human Rights Commission hearing, the Tribunal may order the employer to put an end to the discriminatory conduct, grant the rights or privileges the employee was denied, or take any other action the Tribunal considers appropriate. This may include ordering the employer to pay damages.

Damages are intended to put the employee in the position they would have been in had breach of the Act not occurred. Some damages are easily calculable, such as compensation for lost wages due to discrimination. However, intangible injuries, such as IDSR are more difficult to quantify. Damage awards for IDSR must not be so great that they unfairly penalize the employer, but awards that do not provide for appropriate compensation can minimize the serious nature of discrimination and undermine the mandate and principles of human rights legislation.

How are damages for IDSR assessed?

The Court of Appeal in *Walsh v Mobil Oil Canada*, 2013 ABCA 238 ("Walsh") offered guidance on how awards for general damages should be calculated for mental distress, injury, and loss of dignity flowing from discriminatory conduct, calling for consideration of the effect of the discrimination upon the employee, and whether that discrimination was engaged in willfully or recklessly. In considering the impact of discrimination, the first step is to characterize the injury based on the nature of discriminatory conduct, depending for example, on how serious the conduct was and for how long it persisted. The second is to recognize the employee's particular experience in response to the discrimination.

The Tribunal in *Mandziak v Taste of Tuscany Ltd.*, 2017 AHRC 10 considered a number of more specific factors in situating appropriate general damages for sexual harassment within the *Walsh* framework. These factors include, amongst others, whether the harassment was verbal or physical, the duration and frequency of the harassment, and the psychological impact of the harassment on the victim.

Historical Damages

In addition to providing a framework for assessing damages in *Walsh*, the Alberta Court of Appeal noted that historically, awards for general damages in the human rights context in Alberta had been “arguably nominal.” The Court suspected that the lack of awards over \$10,000 was the result of Alberta’s human rights tribunals using caps established in other provinces, despite the absence of a cap on awards for IDSR in Alberta’s legislation. More recently, in *Sunshine Village Corporation v Boehnisch*, 2020 ABQB 692, the Court of King’s Bench of Alberta reiterated the importance of adequate damage awards, noting that “nominal damages risk trivializing both the impact and the magnitude of the social wrong” perpetrated in discrimination cases.

Post *Walsh* Damages

Following the Alberta Court of Appeal’s decision in *Walsh* in 2013, damage awards for discrimination have been on the rise. Two recent awards of \$50,000, granted in *Yaschuk v Emerson Electric Canada Limited*, 2022 AHRC 62 (“*Yaschuk*”) and *McCharles v Jaco Line Contractors Ltd.*, 2022 AHRC 115 (“*McCharles*”), stand as the current high watermark for general damages awarded for IDSR at the Human Rights Tribunal of Alberta.

In *Yaschuk*, the employee alleged discrimination on the basis of gender and that she was subjected to sexual harassment by the human resources manager to whom she reported. She alleged that the manager invited her to view a video with sexual content, engaged in flirtatious behaviour outside the office, and involved himself in the employee’s personal relationships. She was terminated shortly after she complained to management about this behaviour and submitted that the sexual harassment was a factor in the termination of her employment.

The Tribunal accepted the employee’s evidence that her manager made comments and jokes of a sexual nature, that he sent her a sexually explicit video, that the manager commented on her appearance, made suggestive comments about other women, and made intrusive enquiries about her personal life. The Tribunal further found that the harassment escalated when the manager found out that the employee had reconciled with her common law partner, and that that the timing and the manner of her termination were related to her manager’s perception that she was no longer sexually available.

The Tribunal also found that the employee suffered from a mental condition the prevented her from working, and that the condition resulted, in part, from the way she was treated by her manager and employer when she complained about the harassment. As a result, the Tribunal awarded \$50,000 in general damages in light of the profound effect of the discrimination on the employee and that her concerns were not properly investigated.

In *McCharles*, the employee, who worked for Jaco Line Contractors as Director of Quality, Health, Safety and Equipment, alleged discrimination on the basis of gender in employment practices, contrary to section 7 of the Act. She alleged that the sole director and shareholder of the company sexually harassed her, by touching her breast and hip without consent while on a business trip. The company terminated her employment shortly after the trip and alleged that the termination was for cause. The employee believed that discrimination was a factor in the termination.

The Alberta Human Rights Tribunal adjudicator found that the owner sexually harassed the employee as alleged and repeatedly used demeaning language to refer to her in the workplace. Further, the adjudicator found that the termination “came on the heels” of the employee’s accusation of sexual harassment and was due, at least in part, to discrimination on the protected ground of gender. The employee was awarded \$50,000 in general damages, with the adjudicator noting that the employee’s self-esteem and self-worth “took a beating” and that she lost confidence in her abilities. The employee was also awarded the equivalent of 30 days’ wages.

Important Information for Employers

Taken together, these two cases show the shift towards greater compensation for those who suffer workplace discrimination in Alberta. For IDSR damages to be awarded, discrimination only needs to be “a factor” in the decision to terminate. Therefore, we highly recommend that employers seek legal advice prior to terminating a vulnerable employee. The recent trend shows that the costs to an employer of terminating an employee on potentially discriminatory grounds are becoming increasingly more significant.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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