Human Rights Tribunal Issues Second Highest Award For Injury To Dignity



Sometimes bad facts make bad law. The BC Human Rights Code ("*Code*") provides that if the Tribunal finds discrimination under the Code it can order a variety of remedies under section 37 including under section 37(2)(d) (iii) ordering the respondent to:

(iii)pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for **injury to dignity, feelings and self respect** or to any of them. (Emphasis added)

An order for such damages is particularly worthwhile for a complainant as the award is generally not taxable versus an award for lost wages.

But such awards are very hard to estimate in advance of an actual award. As one judge said in another context it is somewhat like judging "by the length of the Chancellor's foot" . For example under the Code the complainant does not have to prove intent on the part of the Respondent but when intent to discriminate is found then the awards might differ. In one case involving a McDonald's restaurant the employer acted in a totally bona fide manner in finding that the complainant could not do the work due to a rash she had. The Tribunal found discrimination and awarded the complainant $25,000 for injury to dignity, feelings and self respect, representing more than one year's wages. At the time that was considered by many of us as a significant escalation of such damage awards.

In the recent case of *Ms. L v. Clear Pacific Holdings Ltd. and others*, 2024 BCHRT 14, the Tribunal raised the bar in awarding damages for injury to dignity, feelings and self respect by awarding the Complainant **$100,000**.

The case is highly unusual. The respondent did not appear at the hearing so the Tribunal relied on the evidence of the Complainant and her witnesses including some experts. The evidence of sexual discrimination, assault and abuse was extraordinary. The Complainant suffered from a drug addiction that the respondent took advantage of.

The Tribunal summarizes the decision in the opening paragraphs of the Award:

I caution the reader that this decision discusses sexual assault and violence.
[2] Ms. L worked as a personal executive assistant to Sydney Hayden and his companies, Clear Pacific Holdings Ltd. and Whitehawk Investments Ltd. During her

employment, Mr. Hayden sexually assaulted and harassed Ms. L, withheld her wages, emotionally abused her, physically assaulted her, and abandoned her in a foreign country. He exploited her disability, a substance use disorder, to maintain control over her.

Clearly the facts in this case are so egregious that there can be little sympathy for the respondents. I will not summarize the facts beyond the opening passage quoted above but invite the reader to review the decision to see how outrageous the respondent's conduct was.

What was important about this decision was that the Tribunal analyzed the law under section 37(1)(d)(iii) and awarded the second highest amount ever, highest was awarded in Francis v BC 2021 BCHRT 16 (Remedy Decision), which I summarized in our article here:
https://www.kswlawyers.ca/blog/bc-human-rights-tribunal-orders-record-damages-award-of-over-1-million-to-terminated-employee-following-racial-discrimination

Injury to Dignity, Feelings and Self Respect

The Tribunal provides a very thorough analysis of the law under this heading of damages. It is worthwhile to consider the full legal analysis:

[63] A violation of a person's human rights is a violation of their dignity. The primary way that the Human Rights Code addresses this violation is by giving the Tribunal discretion to order compensation for injury to a complainant's dignity, feelings, and self-respect. The purpose of these awards is to compensate the complainant, and not to punish the respondent.
[64] To determine an appropriate award, the Tribunal generally considers three broad factors: the nature of the discrimination, the complainant's social context or vulnerability, and the effect on the complainant: Torres v. Royalty Kitchenware Ltd., 1982 CanLII 4886 (ON HRT); Gichuru v. Law Society of British Columbia (No. 9), 2011 BCHRT 185 at para. 260, upheld in 2014 BCCA 396. Ultimately, the amount of injury to dignity damages is "highly contextual and fact-specific": Gichuru at para. 256. While the Tribunal may consider awards in other cases, the exercise is not to identify a "range" established in other cases. Rather, it is to try to compensate a complainant, as much as possible, for the actual injury to their dignity: University of British Columbia v. Kelly, 2016 BCCA 271 at paras. 59-64; Francis v. BC Ministry of Justice (No. 5), 2021 BCHRT 16 at para. 176. In this case, Ms. L seeks an award of $100,000. I agree this amount is appropriate.
[65] To begin, the nature of the discrimination was extremely serious. It was ongoing over a 21-month period and included sexual and physical assault, as well as rampant sexual harassment, and emotional and economic abuse. This Tribunal has frequently recognized that sexual assault by a supervisor is "at the extreme end of the spectrum" of sexual harassment: Ban v. MacMillan, 2021 BCHRT 74 at para. 39; MP v. JS, 2020 BCHRT 131 at para. 196. Physical assault is in the same category. The discrimination ultimately resulted in the loss of Ms. L's employment and – for some period – her ability to work in any capacity. Because of the significance of employment to a person's dignity, cases which involve the termination of employment have often attracted the top end of this Tribunal's awards: see e.g. Senyk v. WFG Agency Network (No. 2), 2008 BCHRT 376 at paras. 463-470; Basic v. Esquimalt Denture Clinic and another, 2020 BCHRT 138 at para. 194.
[66] Next, Ms. L was uniquely vulnerable to the impacts of Mr. Hayden's conduct. In using the term "vulnerability", I am mindful that the causes of this vulnerability are rooted in systemic social inequality and not factors endemic to Ms. L as a person: Nelson v. Goodberry Restaurant Group Ltd dba Buono Osteria and others, 2021 BCHRT 137 at para. 35; Ms. K at paras. 139-140.

[67] The power imbalance between the parties was profound. Some of that imbalance was inherent to the relationship. Ms. L was vulnerable as an employee: Ms. K at para. 143. She had a history of traumatic sexual assault and domestic violence: Araniva at para. 135. When she began working for Mr. Hayden, she had an active substance use disorder and was engaged in expensive court proceedings with her abusive ex-husband over his refusal to pay spousal support. Mr. Hayden was 17 years older than Ms. L, and positioned himself as her "mentor" and caretaker. Most of Ms. L's work took place in the isolation of Mr. Hayden's home or boat: Basic at para. 202; Araniva, at para. 134; JS at para. 156.
[68] Mr. Hayden then leveraged these power dynamics to his advantage. His conduct exhibited many of the markers that the Tribunal outlined in PN, which allow abusers to maintain power and control in a relationship: para. 68. He intimidated and threatened Ms. L, for example telling her that he had access to her medical records and had given his lawyers incriminating evidence about her. He denigrated and demeaned her, infantilized her by calling her a "good girl" and making her call him "sir", took unflattering photos to embarrass her, and treated her like a servant that he "owned". He manipulated her connection to his dog to make her feel guilty and beholden to him. He blamed her for the abuse, isolated her from her friends and family by constantly monopolizing her time, and controlled who she could interact with in Mexico. He justified his actions by his jealousy and concern for her, and his health problems. He exerted economic power over Ms. L by ensuring that she was dependent on him for money and drugs. He knew about Ms. L's struggles with money. He put Ms. L in the position to constantly have to be asking for her wages. He encouraged and exploited her dependence on cocaine by encouraging her to use cocaine from his supply. He gave her drugs and alcohol and then assaulted her.
[69] In this context, the impact on Ms. L was profound. I have set out some of that impact already. Here, I do not intend to repeat myself but rather to identify some of the most significant considerations. In determining the award, I have considered all the impact set out in this decision.

I would hope that this case is an outlier based on the most egregious misconduct of sexual harassment and assault but I am afraid it is not. In my view over the last number of years the Tribunal's analysis and awards are moving very much towards findings that are favourable to complainants both in the context of liability (including findings of what constitutes discrimination under the Code) and in making significant damage awards. For a good recent example of this see my recent blog regarding the City of Nanaimo: https://www.kswlawyers.ca/blog/mema-v-city-of-nanaimo-a-600-000-wake-up-call-on-human-rights

Coupled with this trend is the Tribunal's struggle to process and adjudicate complaints—an employer might not find out for upwards of 2 or 3 years that there is even a complaint filed and then have to wait another few years before a formal hearing. That creates a huge problem for employers to marshall the evidence to defend themselves whereas the complainant and their lawyer can prepare the evidence in a timely manner.

Employers may think that such cases would never happen to them perhaps because they are small employers. But remember—it only takes one employee to have a Human Rights Complaint filed against you. So the best course of action is to learn what the law requires and avoid any suggestion that you and your business discriminated under the Code.

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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