Handout on Damages

June 21, 2013

The Nova Scotia Human Rights Board of Inquiry derives its remedial powers from section 34(8) of the *Human Rights Act* ("Act").[1] The Board is empowered to order "any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation." In essence, the Board has a wide grant of authority to order appropriate remedies which ensure a complainant is put back into the position that would have been if it were not for discrimination.

General Damages for Emotional Harm

"General damages" are awarded for emotional harm caused by acts of discrimination. The remedy is intended to rectify:

- embarrassment and distress
- depression
- upheaval of having to move geographically
- attending medical appointments
- relational harm
- harm to reputation

Not included are the loss of a house or car that results from losing employment since the loss becomes too remote from the discriminatory wrong.

In Nova Scotia, there appear to be two ranges of general damages depending on the severity of emotional harm. These damages increase when the discrimination results in a loss of employment (or other significant harm) and/or the respondent demonstrates extremely bad behaviour. A lower range emerges when the impact on the complainant is less.

The ranges do not/should not vary according to the type of discrimination in terms of the protected characteristic or the sector of society.[2]

Typically, the general damages are not cumulative but rather a global figure. (e.g., hurt feelings and hurt reputation do not each receive $2,500 for a total of $5,000;rather it might be valued at $3,000, considering the totality of aggravating factors).

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1 Human Rights Act, RSO 1989, Ch.214, s. 34 (8): "A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party , unless that party is the complainant, as to costs as it considers appropriate in the circumstances."

2 There is an unfortunate observable trend in Board of Inquiry remedies, both provincially and nationally, that remedies for sexual harassment – even in its extreme forms of touching, which amount to a criminal sexual assault – are generally on the low range of damages. This is consistent with feminist observations of societal undervaluing of a woman's sexual violation, both criminally and civilly. See *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 as an example of this in the criminal law.

Loss of Employment: ***$2,500 to $10,000***

At a Board of Inquiry, the typical remedy range for emotional harm for discrimination that results in a loss of employment is $2,500 to $10,000.

Cases in the ***lower range*** for emotional harm when the complainant is forced to quit or is fired:

- *McLellan v. MacTara* (2004) NSBdI - awarded $1000 general damages
- *Bennett v. Hau's Family Restaurant* (2007) NSBdI - awarded $2,500 general damages
- *Eagle-Hazelwood v. Taylor Ford* (2005) NSBdI - awarded $3,000 general damages
- *Davison v. NS Construction Safety Association* (2005) NSBdI - awarded $3000
- *Slaunwhite v. Bay Landing* (2005) NSBdI - awarded $3,500 general damages
- *Hall v. Seetharamdoo* (2006) NSBdI - awarded $3,500 general damages
- *Marchand v. 3010497* (2006) NSBdI - awarded $ 4,500 general damages

Cases in the ***higher range*** for emotional harm when the complainant is forced to quit or is fired:

- *Willow v. Halifax Regional School Board* (2006) NSBdI - awarded $5,000 for the false report and $5,000/yr. for four years of discriminatory rumours for a total of $25,000 general damages (Willow remained employed but the employer's extreme behaviour increased the award.)
- *Fleck v. Ashton's Salon* (2006) NSBdI - awarded $8,000 general damages
- *Gough v. Falkenham Backhoe Services* (2007) NSBdI - awarded $8,000 general damages (severe racial taunting)
- *Cottreau v. Chevrolet* (2007) NSBdI - awarded $10,000 general damages
- *Matthews v. Westphal Home Court Ltd.* NSBdI - awarded $10,000 general damages with 2.5% pre-judgment interest for physical disability case
- *Trask v. Department of Justice* (2010) - awarded $15,000 general damages for a systemic failure. (Mr. Trask became permanently disabled due to the impact of the discrimination.)

In assessing damages, the Board will consider the length of time and severity of the discriminatory action, including the impact it had on the complainant.[3]

The principles to be applied when assessing general damages in Nova Scotia were provided by Board Chair Cusak in *Marchand v. 3010497 Nova Scotia Ltd:*[4]

> (a) "The redress for the harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;
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> (b) the need to ensure that a message is delivered to the Complainants and others that human rights must be respected; and
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> (c) the need to ensure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking."

3 *Marchand v. 3010497 Nova Scotia Ltd* 2006 NSHRC 1 at 70.
4 *Supra* note 3, at 67 (CanLII); citing *Willis v. David Anthony Phillip Properties* (1987), 8 C.H.R.R. D13847 (Ont. Bd. Inq.)

Special (Out-of-Pocket) Damages

Costs/losses that can be specifically calculated such as out-of-pocket losses and wages losses are called "special damages." The remedy is intended to rectify losses such as:

- loss of employment
- costs of extra travel
- loss of pay rate differential
- loss of pension
- cost to retrain

Special damages do not include the loss of a house or car when that loss results from a discriminatory loss of employment. These losses are considered too remote from the discrimination.

Special Damages: Wage Losses

Wage losses are the most common (out-of-pocket) loss from discrimination. Human rights law sometimes calculates wage losses similarly to civil wrongful dismissal claims. This practice, however, is increasingly being rejected for failing to achieve the remedial aim of human rights legislation – to put the complainant back in the place they were prior to the discriminatory incident.

The general civil rule (or "reasonable notice") provides an employee dismissed without cause reasonable notice of termination or pay in lieu of notice. This approach was relied upon in *Pinner v. Burrill's Supermarket*[5] to calculate the period of reasonable notice, subject to the factors in *Bardal v. The Globe & Mail Ltd.*[6] The Bardal factors require the reasonableness of the notice to be considered with regard to the character of the employment, the length of service, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[7]

The "rule of thumb" approach provides that a person who is wrongfully dismissed (including for discriminatory causes) is owed one month's salary (or the equivalent in notice of termination) for every year worked.[8] This rule of thumb, however, is increasingly being acknowledged as a myth that does not exist in employment law.

In human rights case law, however, there is a strong body of law that is more generous to the complainant. These cases order payment of wages from the date of termination to the date of the

5 *Pinner v. Burrill's Supermarket et. al.,* 2002 (NS BOI)
6 [1960] O.W.N. 253 (On. H.C.J.); *Pinner, supra* note 5: where three months severance was awarded when three years had passed from the date of discrimination to the hearing; In *Minott v. O'Shanter Development Company Ltd*., 1999 CanLII 3686 (ON CA), however, the Ontario Court of Appeal, per Justice Laskin, rejected the "rule of thumb approach, noting that it suffers from two deficiencies: it risks overemphasizing one of the *Bardal* factors, 'length of service', at the expense of the others; and it risks undermining the flexibility that is the virtue of the *Bardal* test."
7 *Bardal v. The Globe & Mail Ltd.,* [1960] O.W.N. 253 (On. H.C.J.)
8 *Pinner, supra* note 5: where three months' severance was awarded when three years had passed from the date of discrimination the hearing

hearing, less mitigation. [9] However, other tribunals have ordered lost earnings to commence from the date the complaint was laid.[10]

The more generous calculation, which considers wage losses, less mitigation, from the date of termination to the date of the hearing ensures the complainant is placed in the position he or she would be have been but for the discrimination.[11] For this reason, Board Chair Cusack in *Marchand v. 3010497 Nova Scotia Ltd.*[12] refused to rely on the unjust dismissal rule or the Labour Standards Code because she found them to be irrelevant.[13] She found that "[t]he issue is appropriate compensation as the [s]tatute calls for restitution to the position the [c]omplainant would have been in but for the discriminatory conduct."[14] In other words, the amount is determined by what the complainant would have earned had s/he not been denied the employment opportunity.

The complainant, as mentioned, has a duty to mitigate the damages. However, the onus rests upon the respondents to prove a failure to mitigate damages.[15] For example, in an employment-related discrimination complaint, the complainant who becomes unemployed must seek new employment to mitigate potential damages.

Other Special Damages

Along with wage losses, other employment benefits such as medical insurance coverage and car allowances, etc., are also owed during the severance period.

Other examples of special damages are the costs of retraining an employee, covering medical care expenses, ergonomic expenses, travel costs, vacation or pension pay losses.

9 Zinn, Russell *The Law of Human Rights in Canada – Practice and Procedure* (20th Ed.) Toronto: Carswell (2013) at 16-18.
10 *Ibid*.
11 *Ibid* at 16-20; *Whitehead v Servodyne Canada Ltd*. (1986), 8 C.H.R.R. D/3874 .
12 *Marchand, supra* note 3
13 *Ibid* at 60; endorsed in *Hall v. Seetharamdoo*, 2006 NSHRC 4 (CanLII)
14 *Ibid* at 60; In *Minott v. O'Shanter Development Company Ltd*., the Ontario Court of Appeal, per Justice Laskin, rejected the "rule of thumb approach, noting that it suffers from two deficiencies: it risks overemphasizing one of the *Bardal* factors, 'length of service', at the expense of the others; and it risks undermining the flexibility that is the virtue of the *Bardal* test."
15 *Hall, supra* note 13; *Gohm v. Domtar Inc.* (No. 4) (1990) 12 C.C.H.R. D/161 at D/180 (Ont. Bd. Inq.), citing *Red Deer College v. Michaels*, [1975] 2 S.C.C. 324.