
Human Rights Damages in Wrongful Dismissal Cases: *Wilson v. Solis Mexican Foods Inc.*

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When the Ontario *Human Rights Code* (the "Code") was amended in June 2008 to include section 46.1 which allows a court to order remedies for an infringement of a right under the Code, many observers in the employment bar expected to see claims for damages for breach of the Code to be joined with wrongful dismissal claims. It took five years from when that amendment was enacted before an Ontario Superior Court judge exercised this new judicial power in the context of a wrongful dismissal action.

In *Wilson v. Solis Mexican Foods Inc.*, Justice A. Duncan Grace found that the employer discriminated against the employee in the termination of her employment and awarded \$20,000 in general damages for the infringement of her rights under the Code in accordance with section 46.1. This decision is significant as it is the first time that a superior court judge has awarded damages for an infringement of the Code pursuant to section 46.1 and it provides a framework for the analysis and assessment of damages in such claims.

The Code was amended on June 30, 2008 to include, among other things, section 46.1 which provides as follows:

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

46.1 (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

Prior to this amendment, the court did not have authority to award damages for breach of the Code. Therefore, if an employee wanted to pursue a claim for wrongful dismissal and also felt that she had been discriminated against in violation of the Code, she would have had to pursue a lawsuit for wrongful dismissal before the courts and a complaint or application under the Code.

Section 46.1 was designed to create efficiency and avoid multiplicity of proceedings. While it does not give a former employee the right to commence a civil action based solely on the alleged breach of the Code, section 46.1 does permit her to include a claim for discrimination under the Code in a claim for wrongful dismissal. If the court finds that there was an infringement of a right under the Code, it now has broad powers

to award monetary compensation or order remedies other than monetary compensation, in order to remedy the violation.

In *Wilson*, the court was dealing with the termination of a relatively short-term employee that occurred in the middle of a medical leave of absence.

Wilson was employed by Solis for approximately 16 ½ months as a Business Analyst. Her employment was terminated without notice by way of a letter dated May 19, 2011. No cause for termination was alleged. The reason that Solis stated for the termination was that it was the result of organizational changes (specifically the sale of its New Orleans Pizza division) that made many of her job functions redundant. Wilson received two weeks' pay in lieu of notice at the time of termination. She was 54 years old at the time of termination. She was successful in finding new employment within five months.

Wilson commenced an action for wrongful dismissal. She also alleged that her employment was terminated, at least in part, because of an ongoing back ailment and made a claim for damages pursuant to section 46.1 of the Code for an alleged violation of her rights under the Code.

The basis for the human rights claim was that Wilson had raised the issue of her back ailment with Solis in December 2010, had taken a leave of absence as a result of her back in March 2011 and was still on that leave of absence when her employment was terminated. During the leave, Solis had requested numerous medical notes from Wilson. When Wilson presented a note that indicated that she was capable of returning to work on a graduated basis, Solis indicated that this was not acceptable and

required that Wilson be capable of returning to full-time hours and full duties before she could make the transition back to work. Solis required Wilson's doctor to complete a Functional Abilities Form. When the doctor did so, Solis raised concern with it and requested a further Functional Abilities Form be completed. The last communication from Wilson's doctor was delivered three weeks before her employment was terminated and indicated that Wilson was required to be off work for another six weeks. There was also evidence that Solis' management had been discussing Wilson's health condition dating back to December 2010 after she disclosed the same.

With respect to the wrongful dismissal claim, Solis conceded that it had not provided reasonable notice of termination or pay in lieu thereof. Solis maintained that a three month notice period was appropriate. Wilson sought damages based on a six month notice period. Considering all of the evidence, Justice Grace found that the reasonable notice period was three months and awarded damages accordingly.

With respect to the human rights claim, Solis maintained Wilson's termination was unrelated to her back issues but was the result of the sale of the New Orleans Pizza division which eliminated a number of Wilson's duties – Wilson in fact conceded that her work load would have been cut in half after the sale.

Justice Grace began his analysis by confirming that Wilson's back ailment, while temporary, nevertheless constituted a "disability" under the Code. He then went on to consider the jurisprudence before the Human Rights Tribunal of Ontario (the "HRTO") regarding discrimination in the context of termination of employment and accepted the proposition that "a decision to

terminate an employee based in whole or in part on the fact that employee has a disability is discriminatory and contrary to the Code”.

Justice Grace found that Wilson’s ongoing back issue was a significant factor in the decision to terminate. In so doing, he relied on evidence that showed that Wilson had been assessed as performing at a satisfactory level weeks before advising Solis of her back issues in December 2010 and that, after her disclosure of this disability, Solis questioned for the first time whether Wilson was suited for her role. Justice Grace also found that Solis’ requests for documentation and its insistence that Wilson be ready for full-time hours and duties as a condition of her return to be evidence of it being disingenuous and failing to offer or even consider accommodation as required under the Code. He was also critical of Solis’ failure to notify Wilson at any time prior to the termination letter of the pending sale of the New Orleans Pizza division or the potential impact of the sale on her job.

Justice Grace concluded without hesitation that the decision to terminate Wilson’s employment started in December 2010 when she raised issues about her back. Accordingly, he found that her right to equal treatment and to be free from discrimination under section 5(1) of the Code was violated by Solis.

In considering the appropriate award of damages, Justice Grace noted that the only evidence that he had with respect to Wilson’s loss relating to “feelings, dignity and self-respect” was limited to two statements she made in her affidavit about being shocked, dismayed and angered by one of Solis’ letters that pre-dated the termination. Justice Grace nevertheless relied on previous HRTO

jurisprudence in concluding that compensation for breach of the Code was not limited to claims for a loss relating to “feelings, dignity and self-respect”. In this regard, he relied on *ADGA Group Consultants Inc. v. Lane* in which the Divisional Court upheld the HRTO’s award of \$35,000 in general damages “to compensate for the intrinsic value of the infringement of rights under the Code” and a further \$10,000 for mental anguish. Justice Grace also relied on previous case law for the proposition that employers are under a duty to act fairly and are required to be candid, reasonable, honest and forthright when dismissing employees. He found that Solis did not meet that standard when it claimed in one breath that Wilson was “valued” and then created obstacles for her return and ultimately terminated employment when the time was ripe.

Having considered those principles and all of the evidence, Justice Grace determined that the appropriate award of general damages under section 46.1 was \$20,000.

This damage award was significant considering that it represented approximately 30% of the Wilson’s annual salary and it was greater than the amount that was awarded for wrongful dismissal damages.

Also, Justice Grace made this award while recognizing that there was limited evidence as to the effect that the violation had on Wilson. Presumably, if Solis’ conduct had been more serious and had Wilson presented medical or other evidence to demonstrate a more significant impact on her well-being, Justice Grace would have been inclined to award considerably more in damages. Indeed, given the minimal evidence of “loss” or “injury” that was presented in this case, this ruling can be expected to be relied

upon by plaintiff counsel as a starting point for damages under section 46.1.

It is clear from the ruling in *Wilson* that the court will adopt the same principles that HRTO has established in assessing claims of discrimination, in particular the well-established principle that the disability (or other protected ground) need only be a factor (and not the only or a primary factor) in the decision to terminate, in order to constitute a violation of the Code. It is also clear that damage awards for breach of the Code are on the rise.

Accordingly, employers are well advised to take these issues seriously and to ensure that they are complying with their obligations under the Code. Those that do not may be exposed to significant damage awards and other remedies in court.

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