Case In Point

Ontario Court Awards Damages under Human Rights Code

Date: October 8, 2013

In what appears to be the first decision under s. 46.1 of the Ontario *Human Rights Code* ("*Code*"), which permits courts to award damages for violations of *Code* rights, the Ontario Superior Court of Justice has awarded damages for infringement of *Code* rights in an amount of $20,000. (Prior to the changes enacted to the *Code* in 2008, courts were unable to make damages awards for the infringement of *Code* rights.)

These damages were awarded against an employer found by the Court to have terminated the employment of the plaintiff at least in part because of her disability (an ailing back). The case, *Wilson v. Solis Mexican Foods Inc.*, provides yet another cautionary tale for employers.

The plaintiff, who was employed as a business analyst, commenced her employment in December 2009 and was dismissed without cause 16 months later with only two weeks' notice in accordance with the *Employment Standards Act*, *2000*. The reason for the dismissal given by the employer was that the company had been "organizationally restructured" (i.e. it had been sold) and her job had become redundant.

The evidence before the Court disclosed that the plaintiff had received a satisfactory performance review in November 2010, that a few weeks later she disclosed to the Human Resources Manager that she had back problems, and that a few days after this disclosure the Human Resources Manager met with senior management who shortly thereafter concluded that the plaintiff might not be "suited" to be an employee with the company. This sequence of events proved to be critical in the Court's judgment.

In March 2011, the plaintiff booked off sick and provided a medical note stating that she was required to be off work until further notice. A subsequent gradual return to work plan proposed by her doctor was rejected by the employer on the basis that the employer wanted the plaintiff to return to work only after she had had a "complete recovery" and could perform all duties. The employer also expressed concern about the doctor's accommodation proposal which involved the plaintiff performing her duties in a combination of sitting, standing and walking. The plaintiff remained off work. At no point prior to the termination of her employment did the employer advise the plaintiff of the pending sale of the business.

Ultimately, a letter was sent by the employer to the plaintiff on May 19, 2011, eight days after the company was sold, advising the plaintiff that her employment was being terminated due to an organizational restructuring and providing her with two weeks' notice. The plaintiff commenced a wrongful dismissal action alleging that the termination had occurred because of her ongoing back ailment. In addition to damages for wrongful dismissal, she asked for damages for the breach of her human rights, pursuant to section 46.1 of the *Code*.

Based on the evidence, the Court concluded that upon learning about the plaintiff's back problems, senior management had decided that they wanted to get rid of the plaintiff. It also noted that the employer had failed to cooperate in the temporary accommodation of the plaintiff through a gradual return to work. The Court commented that the employer, having managed without the plaintiff for a period of time while she was off sick, used the restructuring as "the excuse it needed to rid itself of the plaintiff for once and for all." It held that the plaintiff's disability was at least part of the reason for the decision to dismiss her.

Having found that the plaintiff had been dismissed without reasonable notice, the Court awarded notice in the amount of three months.

With respect to the plaintiff's human rights claim, the Court noted that any decision to terminate an employee which is, in whole or in part, made on the basis of a disability is discriminatory and contrary to the *Code*. It concluded in this case that, for the reasons recited above, the plaintiff's ongoing back problem was a significant factor in the employer's decision to terminate her.

The Court justified the award for damages for the infringement of the plaintiff's rights under the *Code* based on the following considerations:

[90] 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.

[91] As Aston J. wrote in *Dwyer*, supra, at para. 50:

When dismissing employees, employers are under a duty to act fairly. They are required to be candid, reasonable, honest and forthright.

Telling an employee they are valued while making them overcome various obstacles so that they do not return temporarily and then terminating them permanently when the time is ripe, does not meet that standard.

While this appears to be the first wrongful dismissal claim in which damages have been awarded under the *Code*, it will certainly not be the last.

Consequently, in order to proactively defend against such claims, employers must ensure that they treat employees fairly. In this regard, the following factors should be noted:

- Accommodation of disabilities and other *Code*-related rights must be taken seriously. The fact that an employee has unrelated performance issues is not an excuse for failing to provide accommodation. Affording a graduated return to work opportunity to employees who have been off because of a disability is a reasonable accommodation which must be provided unless doing so would be an undue hardship to the employer.
- Care must be taken to ensure that employee performance assessments are based on standards of performance that are legitimate, defensible and consistent with the expectations placed on all other employees doing similar work. When concerns arise about an employee's competence or attitude, these cannot be ignored or soft-pedalled but must be addressed with the employee in a complete (that is to say, in clear words that accurately describe the concerns) and timely manner. Failing to do so will lead the employee – and potentially any adjudicator who subsequently reviews the situation – to infer that the employee's performance had been acceptable, contrary to what the employer now asserts.
- As a result, if the employee is subsequently disciplined or dismissed for the incompetent performance that has been previously condoned for a period of time, the employee may look for a reason why she or he is now being the subject of such discipline or dismissal. If the employee has a *Code*-related issue going on in his or her life, the employee might infer that the employer's actions were the result of discriminatory motivations. If the employee is dismissed, a claim for human rights damages will likely be included in any claim for wrongful dismissal. In this regard, the failure by the employer to deal with the performance issues in a timely and fair manner may lead to the conclusion that the employer's actions were motivated in part by discriminatory reasons.

Wilson v. Solis Mexican Foods Inc., 2013 ONSC 5799 (CanLII)