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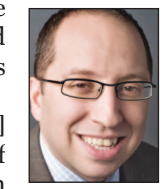
TORT CLAIMS BY EMPLOYEES

Ontario Court of Appeal sets limits



STEVE LEVITT

Over the last couple of years, employment counsel have had to carefully review employees' circumstances to ensure they were not overlooking significant tort claims against employers. However, a recent decision of the Court of Appeal may have closed the door to employee tort claims based on negligence.

In *Piresferreira v. Ayotte,* [2010] O.J. No. 2224, the Ontario Court of appeal decreased a large claim won by an employee who was constructively dismissed and suffered from post traumatic stress disorder as a result of her abusive manager. The case involved an employee who was an account manager at Bell Mobility in Ottawa who suffered from increasingly strong verbal abuse from her manager. Her manager then physically pushed her in 2005 and, when the employee pressed for an apology, informed her that he was filling out a performance improvement plan for her.

While Bell Mobility investigated this incident and reprimanded the manager, it never informed the employee of this, and collaborated with her manager in imposing a performance improvement plan. The employee became ill, never returned to work and commenced an action for constructive dismissal and tort.

The trial judge found Bell Mobility liable for the torts of negligent infliction of mental suffering, intentional infliction of mental suffering, and battery. She concluded that the employee could never work again because of her disability caused by her manager and Bell Mobility, and awarded both general damages (of $50,000) and loss of income until the age of 65 ($500,924) less a 10 per cent contingency for the possibility she would not have worked until the age of 65. The trial judge would have awarded damages for constructive dismissal based on a 12-month notice period ($87,855) and bad faith in the manner of dismissal ($45,000), but did not do so on the grounds that they would have duplicated the tort damages.

The Court of Appeal overturned the damage award and determined that the tort of negligence and the tort of negligent infliction of mental suffering is not available in the employment context. Essentially, the appeal court replaced the tort damages with the damages for constructive dismissal. Despite evidence demonstrating that the employee was no longer able to work and would suffer a loss of future income, the appeal court only awarded the employee damages for constructive dismissal of $87,855, damages for bad faith of $45,000, and damages for battery of $15,000.

While the appeal court found that proximity and foreseeability existed to establish a duty of care, it concluded

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New battle lines emerge in fight to enforce pay equity rights

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&

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With women comprising nearly half of Canada's paid workforce and performing work crucial to the nation's economic recovery, employers and governments are being increasingly challenged to close the 29 per cent gender pay gap. This gap is even larger among women who are immigrants, racialized, aboriginal and/or disabled. The pay gap is not only a human rights violation, but a barrier to Canada's economic success.

Over the last 30 years or so, pay equity laws have been enacted across the country, requiring employers to identify female and male-dominated jobs, value the work performed and then address and eliminate any pay gaps. While enforcement was more aggressive during the early years, a new wave of enforcement efforts has started across the country.

The Ontario Equal Pay Coalition's 20th anniversary campaign lead to renewed compliance efforts in that province, with most of the *Pay Equity Act* applications coming from coalition member unions. Ontario's pay equity hearings tribunal has not yet fully mapped out employers' proactive maintenance obligations following the achievement of pay equity. *CUPE Local 543.3 v. Windsor Essex Health Unit*, (PEHT #0958-09-PE) now awaits a tribunal decision, and should help to define the proactive maintenance obligations of employers and trade unions.

New employers are also being called to account for whether they opened their businesses "pay equity compliant" as required by Ontario's law. In *SEIU Local 1 v. Oakwood Retirement Communities* (PEHT # 1120-09-PE), the tribunal will have its first opportunity to address the obligations of a new employer to involve its employees and bargaining agents in that process, provide necessary information and ensure pay equity is maintained. As Ontario's Act has no time limit for complaints, employers who have failed to achieve and maintain pay equity are liable for many years of pay equity adjustments, with interest regularly being ordered by the tribunal.

Human rights laws are also increasingly being used to advance pay equity rights. A recent Nova Scotia decision, *Reid-Munro-MacDonald v. Town of Truro*, 2009 NSHRC 2, concluded that human rights, pay equity and employment standards statutes should be seen as complementary, with no statute "overpowering" the others. The

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Economic recovery cannot come at expense of pay equity

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board of inquiry decided that equal pay is a fundamental human right covered by the Nova Scotia *Human Rights Act*'s prohibition against sex discrimination in employment.

Another human rights decision, *Quebec (Comm. Des Droits de la Personne et des Droits de la jeunesse) v. Université Laval* (2000), 38 C.H.R.R. D/301, found that the right to equal pay guaranteed by s. 19 of Quebec's *Charter of Human Rights and Freedoms* was violated when an employer retained a single-step salary progression system for male job classes, and a multi-step progression for comparable female job classes in a pay equity plan under Quebec's *Pay Equity Act*. The tribunal held that employers must ensure their entire compensation or salary administration system is cleansed of discriminatory effects and that women are not required to wait longer than men to get to their highest job rate. Expert evidence was heard about the systemic practice of women's work often having longer wage grids than men's work.

This issue is now being litigated before the Ontario Tribunal in two cases — *CUPE Local 1999 v. Lakeridge Hospital Corp.* (PEHT#1788-09-PE) and *CUPE Local 1734 v. York Region Board of Education* (PEHT #1816-09-PE). With the delays involved in bringing a complaint first at Ontario's Review Services section of the Pay Equity Commission and then before the tribunal, employees and trade unions may consider bringing pay equity complaints directly to the reformed Human Rights Tribunal of Ontario as a new strategy for advancing pay equity claims.

Discriminatory pay practices for other disadvantaged workers are also being challenged. The 2004 federal Pay Equity Task Force highlighted the need to redress the pay discrimination faced by visible minorities, aboriginal people and persons with disabilities. In *C.S.W.U. Local 111 v. SELI Canada*, [2008] B.C.H.R.T.D. No. 436, a B.C. human rights tribunal found that Latin American workers brought in on work visas were paid substantially less and provided with lesser accommodation, meal and expense arrangements compared to European workers performing the same work. The tribunal found the unequal pay and conditions to be discriminatory on the basis of race, colour, ancestry and place of origin, contrary to s. 13 of B.C.'s *Human Rights Code*, and ordered the employer to pay the difference in the salaries between the employees, along with an additional award of $10,000 to each worker for injury to their dignity.

Pay equity rights are also at the centre of economic recovery efforts. As short-sighted employers push for smaller pay increases, freezes and cutbacks, women and their unions are relying on the mandatory pay equity obligations placed on employers to push back.

For example, the Harper government, as part of its budget austerity package, passed the *Public Sector Equitable Compensation Act* (PSECA) in March 2009. The PSECA takes away the pay equity rights of federal public service women under the *Canadian Human Rights Act* and instead leaves "equitable compensation" to collective bargaining. This law has been challenged as unconstitutional by several unions, including the Professional Institute of the Public Service (*PIPSC et al v. Attorney General of Canada*, Court File No. CV-09-375977).

The past success of unions in challenging attempts to curtail pay equity adjustments has lead to a recognition by some governments that economic recovery cannot come at the expense of pay equity. For example, a 1995 attempt by Ontario's government to repeal pay equity legislative rights was rejected as unconstitutional under s. 15 of the Charter (*SEIU Local 204 v. AG (Ont.)*, [1997] O.J. No. 3563). More than 10 years after the SEIU Charter challenge, Ontario's *Public Sector Compensation Restraint to Protect Public Services Act, 2010,* enacted in May, exempts pay equity and human rights adjustments from its wage freeze provisions.

With pay equity being pursued on so many legal fronts, Canada's pay gap should soon start to close. ■

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