Mediation: The Effect of "Me Too" Movement on Mental Distress and Moral Damage Awards

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The Ontario Court of Appeal decision in *Boucher v. Wal-Mart Canada Corp.*, [2014] O.J. No. 2452, and the recent trial decision in *Galea v. Wal-Mart Canada Corp.*, [2017] O.J. No. 6444 (S.C.J.), have breathed fresh life into damage awards for abusive employer conduct. A claim for these damages, and for punitive and aggravated damages, may be appropriate but only where there is a basis for the claim.

Since the “Me Too” movement, there has been a definite increase in claims of both sexual harassment and generalized harassment presented at mediations. This may be in the context of a mediation for a Human Rights Code allegation or, in certain circumstances, the human rights allegation can be contained within the civil lawsuit along with a wrongful dismissal action.

These claims can be especially difficult to mediate for various reasons:

1 Both the accuser and the accused have a strong emotional attachment to the issue. It is one thing to beaccused of not paying reasonable notice but quite another thing to be accused of being a racist or a serial harasser.

2 There is often a lack of third-party or objective evidence of the allegation, resulting in a “he said she said” scenario. Issues of credibility are hard to mediate because very few people like to even admit that there is a possibility that a judge or a jury may not believe them.

3 While medical reports substantiating claims of harassment are helpful, they are not strictly necessary. Often plaintiffs may not wish to open their entire personal medical and psychiatric history to their ex-employers, which makes a realistic discussion of damages difficult. In Ontario, this may result in defendant employers claiming the right to a defence medical examination by the company-hired doctor (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 105(2)).

4 There are usually personal defendants named in these lawsuits as well as the corporate employer. If that named personal defendant is the same person who decides how much the defendant will pay to settle the case, it can be extremely difficult to convince that person that he or she should pay extra to end the case. The personal defendant will often say that he or she will not pay for “extortion”. This is a common response when the personal defendant is an executive but not an owner. In this situation, there is little constraint on the executive to authorize the corporate defendant to spend “whatever it takes” to defend his or her honor or principles.

5 There is no easy math formula to determine the value of these claims because they are largely based on heads of damages that are not based on economic loss. For instance, under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, damages are based not only on direct economic loss but also on losses “arising out of the infringement, including restitution for injury to dignity, feelings and self-respect” (Ontario *Human Rights Code*, s. 46.1(1)(2)). The only guidelines are Human Rights Tribunal cases and civil cases, which are all over the map. The variation can be from the low thousands to over a million dollars. This lack of predictability can be both an asset and a liability in trying to bring about a settlement.

6 Furthermore, the economic damages are not limited to reasonable notice where a human rights breach is at play. Rather, the damages are based on a determination of what would have happened if the discrimination had not occurred. If absent the discrimination the person would have remained employed until normal retirement, then the damages could be well beyond the reasonable notice period. In *Hamilton-Wentworth District School Board v. Fair*, [2016] O.J. No. 3059, the Ontario Court of Appeal upheld a

reinstatement order of the Ontario Human Rights Tribunal which had the effect of ordering back-pay for a period of approximately 9 years.

7 Arising from this unpredictability of the likely court outcome, there is a tendency for plaintiffs to make massive monetary demands for these non-economic claims. One theory is that big numbers will scare the defendant into paying large settlements. However, these types of offers often have the opposite effect on employers in that they see the plaintiff's offer as so ridiculous that they will not even consider making a reasonable offer, as it seems unlikely that a settlement will be reached that day anyways.

Despite these difficulties in mediating matters of mental and moral damages, there are benefits to including such claims if they can be substantiated. For example, damages from a human rights claim or pre-termination harassment claim are considered non-economic losses under the *Income Tax Act*, R.S.C. 1985, c. 1, and thus are not taxable. Parties may want to characterize some or all of the settlement as moral damages in order to avoid tax consequences.

Moreover, if the settlement funds can be lawfully allocated to human rights damages, then the claw back provisions in ss. 45 and 46 of the *Employment Insurance Act*, *S.C. 1996, c. 23*, do not apply and thus the plaintiff will not have to pay back his or her employment insurance ("EI") benefits in respect to this payment of general damages.

The income tax and EI consequences of the treatment of these types of damages often are the driving factor in why so many wrongful dismissal actions contain allegations of these types of damages. Separating the legitimate claims from tax-driven claims is one of the challenges when mediating these types of disputes.

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