

# Human Rights Tribunal General Damages are Rising

You have just received notification from an Intact Public Entities (IPE) examiner that your Human Rights Tribunal (HRT) claim has been settled. However, you may be asking yourself if that settlement was justified.

Our claims department has noted an increase in discrimination claims. However, this increase does not necessarily mean that there is merit to the allegations made in the issued Applications. The increased number of claims is important to note because it does not necessarily correlate with the increase in damages awards. As will be demonstrated below, there are various reasons why we are seeing an increased number of claims.

## Trends

Across Canada, damages awarded by the HRT for injury to dignity, feelings, and self-respect have been increasing. We typically saw damages between \$10,000 to \$20,000, but no higher than \$50,000. We understand that there may be certain outliers as each individual claim has the potential to be exposed to a higher general damages award.

Andrew Pinto was appointed by the Attorney General of Ontario, to conduct a review of the Ontario human rights system in 2011. As part of his review, he discovered the general damages awards were routinely low and recommended the awards be significantly increased. In his report he noted:

“Low damage awards may have the unintended and undesirable effect of discouraging claims before the Tribunal and causing claimants to pursue civil remedies before the courts, where such a forum is available to them. In keeping with the Tribunal’s purpose, higher compensatory awards will encourage applicants to pursue their human rights claims before the Tribunal, as it will be efficient and economically worthwhile to do so.”

IPE Examiners have noticed that various contributing factors have led to an increase in general damages awards. They include some of the following:

- No cap on compensation for injury to dignity, feelings, and self-respect.
- Current financial climate within Canada (i.e. inflation) resulting in Applicants seeking a higher demand for damages.
- No cost consequences for the Applicant.
- Increased social awareness with respect to various areas of discrimination, such as the Black Lives Matters movement and #MeToo.
- Alleged discrimination claims for COVID-19 vaccination beliefs.

## Case law Development

The HRT will award significant injury to dignity awards where it determines that egregious discrimination has occurred and the impact on the complainant is severe. Although the facts of these decisions below can be very different, there is still a trend with respect to the increase of awards over the years.

### General damages

For organizations found to be liable, there appears to be a steady increase of the general damages awards.

#### Ontario

In *NK v. Botuik*, 2020 HRTO 345 (CanLII), the Human Rights Tribunal of Ontario (HRTO) made a \$170,000 damage award to an employee who was being sexually harassed by her direct supervisor. The Applicant employee feared if she refused to engage in the unwelcomed sexual activity, she would lose her job and the ability to care for herself and son. In its decision, the HRTO noted that an employee’s participation in sexual activity with a direct supervisor in “a state of fearful compliance” is not “true consent.” The Applicant produced documentary evidence to support her claims which was accepted by the Adjudicator thereby increasing the damages awarded.

#### British Columbia

In *Francis v. BC Ministry of Justice* (No. 5), 2021 BCHRT 16, the British Columbia Human Rights Tribunal (BCHRT) awarded \$964,197.24 to the Applicant, LF. This award included \$176,000 for injury to dignity, which is the highest ever award for this category in British Columbia. This decision serves as a reminder that workplace discrimination poses a significant and increasing financial risk to employers.

LF, who was a corrections officer, had been discriminated against multiple times. When he complained, his supervisors retaliated against him with additional discrimination.

LF was stereotyped by supervisors and officers as being “slow” and “lazy”. A supervisor referred to him as a “lazy Black man”. Another supervisor disparaged him by attributing poor performance to his race before an audience of inmates and officers. LF reported many such incidents over the years, however, the complaints were not addressed. Instead, LF was accused of “playing the race card” to manipulate his co-workers.

LF reported many of these incidents of discrimination in a timely fashion and requested they be investigated. However, the evidence indicates only some of the incidents were investigated by the Respondent, which was problematic leading to higher damages being awarded.

The *Francis* decision will certainly be relied upon to argue for higher injury to dignity awards going forward.

## **A Tribunal Win**

While damage awards are trending upwards at the HRT, all is not lost! Applications have been successfully defended per the following decision:

In *A.D. v. The Children’s Aid Society of Hamilton, HRTO (No. 1533) 2012*, the Applicant alleged discrimination based on race, ancestry, ethnic origin, and reprisal. The Applicant and his former spouse had been involved in a long and contentious custody and access battle with respect to the rights of their children. The Respondent CAS had been involved with the family with respect to the treatment of their children. The Respondent’s case notes were entered into evidence in the defence of this matter. These notes were helpful in determining the context of the Applicants alleged discrimination. The Adjudicator upon reviewing the informative and concise case notes, determined the questions posed by the case worker to the Applicant, were not discriminatory in nature. The case was dismissed.

## **Discussion and Recommendations**

These above-noted decisions serve as a reminder that people are within their rights to issue HRT Applications in a free and democratic society. However, it does not mean that there is merit to the allegations and unrealistic remedies posited in their Applications. We wish to point out that reasonableness has always been the standard and not perfection.

The Ontario Human Rights Commission has provided guidance with respect to preventing and responding discrimination. You can find their recommendations following this link: <https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/11-preventing-and-responding-discrimination>.

In addition to the above recommendations, we further suggest:

- An updated and robust insurance policy is in place.
- If warranted, conduct a third-party investigation before an Application could potentially be issued.
- When conducting a third-party workplace investigation relating to human rights issues, ensure it is carried out diligently, effectively, and in good faith.
- Follow the applicable Human Rights Code legislation and implement appropriate policies and procedures. Confirm that they are in line and up to date with all applicable statutes:
  - *Occupational Health and Safety Act*
  - *Occupiers Liability Act*
  - *Employment Standards Act*
  - *Pay Equity Act*
- Implementation of a Wellness, Diversity, Equity and Inclusion Committee, and provide education to employees.
- Human Rights Code training. The HRT provides training at no charge!
- Utilization of the HRT mediation process which could potentially expedite the resolution of claims.
- Carefully review the liability and damages assessment provided by defence counsel in response to an Application.
- Completing and maintaining contemporaneous records and case notes.

## **Lessons Learned**

Applications have been successfully defended at the HRT, in large part due to effective discrimination policies and procedures that have been implemented by the employer/entity. As outlined above, there are various actions that you can enact today which can help minimize your potential exposure to these claims.

**Put our expertise to work for you. Contact your company representative to learn more.**