

Tracking damages

Changes to the Ontario Human Rights Code in 2008 were intended to give more latitude in terms of awarding damages but has that actually happened?

By Jennifer Brown

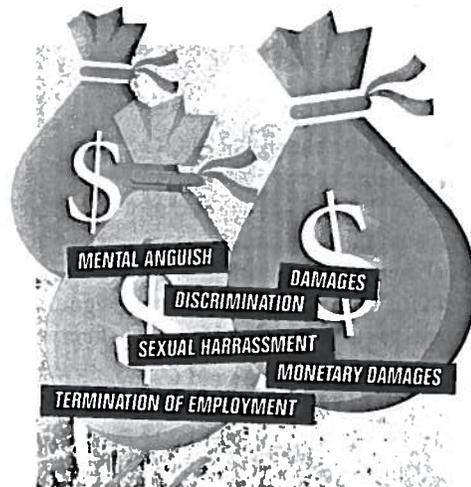
Seven years ago, the Ontario Human Rights Code was amended to address certain shortcomings of the human rights enforcement system with one aspect addressing the awarding of financial damages. But has much changed since 2008?

Part of the change in 2008 included increased monetary damages including: unspecified compensation for losses arising out of the infringement of a protected right; removing the \$10,000 limit on damages for mental anguish; provision for orders of restitution (other than financial compensation); a provision for civil courts to order monetary compensation; and unspecified compensation for losses arising out of the infringement of a protected right.

As well, there was also a provision made to include a potential punitive fine, up to \$25,000, to punish parties that violate the act. Essentially, the code no longer had any limitations as to the amount of monetary compensation or restitution for damage to “dignity, feelings, and self-respect.”

Then, in 2012, the Pinto report — a statutory review of the Ontario human rights process commissioned by the attorney general and conducted by employment lawyer Andrew Pinto — made a recommendation that the Human Rights Tribunal of Ontario should far exceed the previous \$10,000 cap when it came to breaches of the code by corporate defendants.

Even though the code was amended to remove the cap on damage awards, what Pinto had seen was that damage awards imposed from 2008 to 2012 were not



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much different than what had been issued before the amendments.

But since 2008, and more recently since the Pinto report, has the tribunal exercised its ability to levy larger damage awards? Labour and employment lawyers seem mixed on the answer but it does seem the tribunal is taking each case and analyzing the circumstances specifically, and in some cases making larger awards.

Damage awards have been increasing says Maureen Quinlan, an associate with Hicks Morley Hamilton Stewart Storie LLP. “Individuals don’t specifically reference that Pinto report, but the recom-

mendations in the report are well known by members of the tribunal and we have seen the impact that the numbers have increased. Each case tops the previous one.”

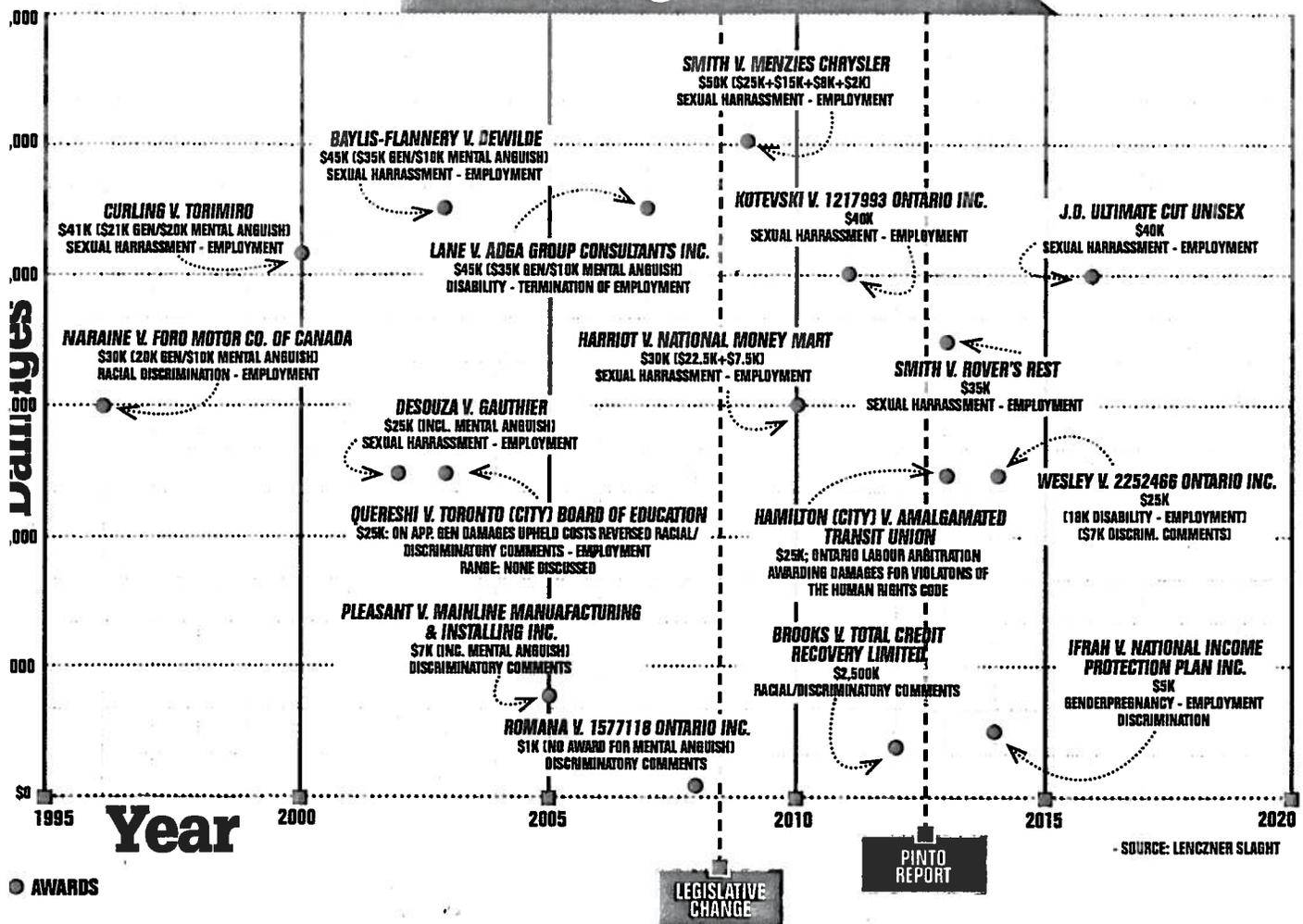
Since the Pinto report came out, there have been a number of awards that have broken the previous mould, says Louis Sokolov of Sotos LLP. “It’s difficult on the basis of looking at a few cases to know if there is a new trend or not, but the impression is the numbers are getting larger.”

Sokolov says there is a “perfect storm” occurring in the context of the human rights tribunal. “You have a trend towards increased damages, you have no notion of reasonable notice in the case of employment decisions and the absence of any costs regime. You put all those factors together and end up with claimants who are emboldened, you have respondents who often are encumbered in their ability to defend the claims and you end up with bigger numbers.”

Sokolov says adjudicators look at what has happened in other cases and once the trend starts it builds momentum. He notes claimants are being more aggressive in what they are asking for and the more pressure there is for larger settlements will naturally lead to larger awards.

“I think a lot of clients are unaware of both the substantive rights protected in the human rights code as well as the potential scope of remedy,” says Sokolov. “It becomes something of a rude awakening to many clients when they are on the receiving end of such a complaint. Smart employers are insulating themselves from potential complaints by making sure their policies and practices are up to date.”

Human Rights Awards



However, other labour and employment lawyers aren't seeing much of a change at all. "In my experience it doesn't appear damages awards have increased much, if at all," says Danny Kastner, of Kastner Law LLP. "There have been some huge human rights cases with awards for back pay that have been very significant because a lot of time has passed, but what Pinto was talking about was just general damages for breach of the code."

That's different than damages for income loss, says Kastner. "Where they have been shy in the past, and continue to be somewhat conservative about, is awarding general damages for breach of the code, which is when you have violated someone's human rights, you injured their feelings of dignity and self-respect, and as a result, separate and apart from any income loss, you are liable to pay a certain

amount in damages, which are what most people are referring to in human rights damages — it's still hovering around the \$10,000 to \$15,000 mark in most cases," says Kastner.

Kastner points out that Pinto's recommendations were not binding on the tribunal — cases are still adjudicated on individual facts and circumstances. He says vice chairs of the tribunal have maintained the "same compass" when it comes to assessing damages.

Anne Posno, counsel at Lenczner Slaght Royce Smith Griffin LLP, says prior to the change in legislation, there was a particular provision that the tribunal would award essentially general damages and something on top of that if they wanted to for mental anguish. "They tended to award mental anguish when it was something that was trig-

gered by willful or reckless conduct — it was along the lines of punitive-type damages," says Posno. "Usually those punitive-type awards occurred in the context of sexual harassment in the context of workplace wrongful dismissal."

Post-legislative change, the language used is for "injury for dignity, feelings, and self-respect." She says, "There is a provision allowing the tribunal to do anything they want, but they seem to lump everything into the general damages, loss of dignity, and self-respect."

In the context of sexual harassment-related terminations, Posno says the damage award numbers don't seem to have changed over the years, even if you incorporate what you used to include as punitive damages. She points to a trilogy of cases in 2014 involving three young women sexually harassed during their

employment as hairdressers. In *J.D. v. Ultimate Cut Unisex* the tribunal awarded the three individuals damages ranging from \$25,000 to \$40,000 for injury to dignity, feelings, and self-respect, as well as amounts for lost wages.

"There's no doubt the range of general damages exceed the \$10,000 cap that was in the legislation prior to 2008, but that was focused on mental anguish only. There was no cap on general damages before," she says. "Today they look at the offensiveness of the conduct and how it impacted the individual."

J.D. v. Ultimate Cut Unisex stated: "historically, sexual harassment under human rights statutes has tended to attract a comparatively higher quantum

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ANNE POSNO, Lenczner Slaght Royce Smith Griffin LLP

of damages than simple discrimination. . . . This can be rationalized by the vulnerability of victims, the heightened personal impact and the more severe dignity interests implicated."

Ellen Low, of Whitten & Lublin Employment Lawyers, says she's not sure

there's been a marked increase "for general damages, for things like injury to self respect and dignity." In terms of general damages, Low points to two cases that garnered a lot of interest in the last few years due to the extraordinary general damages awards: \$125,000 in *The City of Calgary*

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