Comparing general damages claims for injury to dignity in employment in Ontario: the Courts, the Human Rights Tribunal of Ontario and arbitrators

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Wrongful infliction of injury to dignity, or the wrongful causing of mental distress at work, is dealt with differently by the courts, by the Human Rights Tribunal of Ontario (the "HRTO" or "Tribunal") and by labour arbitrators deciding Ontario cases.

We refer to some seminal court decisions that set the pattern for more recent court decisions, but our focus is on the most recent period, from 2016 onwards. We have drawn our conclusions without regard to similar claims in other jurisdictions in Canada, focusing only on the differences in Ontario. (We have summarized the cases relied on: Appendix A has the court cases; Appendix B, the HRTO cases; and Appendix C, the arbitration cases).

This paper tries to address the different approaches to awarding damages by the three institutions of labour law adjudication in Ontario. The courts principally deal with the issue among non-unionized employees, often managerial level employees, whose experience of the infliction of mental suffering usually arises in the context of a wrongful dismissal claim. The HRTO is the specialist statutory tribunal charged with deciding complaints of discrimination and harassment described in the Ontario *Human Rights Code*, RSO 1990, c. H. 19 (the "*Code*"). It has a specific jurisdiction for considering claims of mental distress. Arbitrators' jurisdiction arises from the collective agreements under which they are appointed, either expressly or inferentially (*Weber v. Ontario Hydro*, [1995] 2 SCR 929). The arbitrator's jurisdiction includes the consideration of human rights legislation (*Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 SCR 157*; Ontario Nurses' Assn. v. Orillia Soldiers Mem'l Hosp.*, [1999] 42 OR (3d) 692). From these sources, arbitrators are authorized to issue "make whole" remedies, including in human rights cases.

[1] We are indebted to Martin Malin and Jon Werner for their paper on the comparisons between the approach of US and Canadian law to the arbitration of human rights complaints: "14 Penn Plaza LLC v. Pyett: Oppression or Opportunity for U.S. Workers; Learning from Canada," *University of Chicago Legal Forum: Vol. 2017, Article 14*. Available at: https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/14. Their review covered the period 2009 to 2013. This paper provides a more rigorous statistically verifiable comparison of arbitration and HRTO cases than we do. It should be read in conjunction with our paper.

The differences in the approach to awarding general damages for mental suffering at work are found in three separate areas: 1) the heads under which general damages are granted; 2) the evidence required to establish an entitlement to the damages; and 3) the quantum of damages, including the treatment of costs and interest.

1) Heads of damages

The courts

The courts award general damages of two sorts: moral damages and punitive damages. Moral damages, or aggravated damages, are awarded in circumstances when the employer of the claimant has breached the "implied duty of good and fair dealing" in the course of dismissing the employee if that behaviour causes mental distress. The notion of such compensation has its genesis in Canada's highest court in *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 ("*Wallace*")[2]. Prior to *Wallace*, the general rule in wrongful dismissal cases was that damages allocated in such actions were confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages were available to the employee for pain and distress that may have been suffered as a consequence of being terminated. In *Wallace*, damages resulting from the manner of dismissal were found to be available where the employer engaged in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" and were awarded as an extension of the notice period.

Then in 2008, the Supreme Court of Canada had occasion once again to rule on damages in an employment context in *Honda Canada Inc. v Keays*, [2008] 2 SCR 362 ("*Honda*")[3]. *Honda* introduced the concept of moral damages and the test for moral damages, namely that the damages for an employer's breach of good faith and fair dealing must be reasonably foreseeable. *Honda* also removed the distinction between aggravated and moral damages and ruled that they should be quantified as a fixed amount, and not as an extension of a notice period. Such

[2] Jack Wallace was an 11-year employee lured to the employer from a competitor. He was dismissed summarily at 56 years of age, with the employer maintaining termination for cause until the commencement of the trial. No cause was established. The Supreme Court did not allow aggravated damages but awarded Wallace a lengthy notice period of 24 months to partially compensate him for the employer's conduct.

[3] Kevin Keays was terminated by Honda while on a disability leave for chronic fatigue syndrome, when he refused to meet with the employer's doctor. Although at trial the judge awarded punitive damages against Honda, these were later reduced by the Court of Appeal and quashed entirely by the Supreme Court.

damages, including those for psychological injury, are compensatory for the harm suffered. The Court stated that punitive damages are for outrageous conduct by the employer (not found in *Honda*), and not for the employee's loss. In drawing the distinction between damages for conduct in the manner of dismissal, which are compensatory, and punitive damages, the court in *Honda* held that the punitive damages are restricted to "advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own".

In *Galea v. Wal-Mart Canada Inc.*, 2003 CanLII 40536 (ON SC) ("*Galea*"), Justice Emery condensed the principles surrounding moral damages into the following summary of when moral damages may be available:

1. Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;

2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;

3. Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;

4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and

5. The grounds for moral damages must be assessed on a case by case basis.

Justice Emery found that Wal-Mart breached its implied duty of good faith during the period between the date when the plaintiff employee, Ms. Galea, was removed from her position as a vice president and the date on which she was terminated. He found that the President and CFO had already made the decision to dismiss or denigrate her to the point of resignation when she was removed from her position and moved to an ad-hoc position without any real prospects. He found this conduct to be unfair and to have caused Ms. Galea mental distress. He further found that Wal-Mart purposely caused delays in the conduct of the litigation, causing additional

mental distress for Ms. Galea and forming part of the manner of dismissal. He awarded her $200,000 for moral damages for these actions.

The court may also award punitive damages if it is satisfied that the employer intentionally harmed the employee. Punitive damages are punishing; they serve as a deterrent. They are awarded if the employer is shown to have "intentionally inflicted mental anguish", or to have been "maliciously oppressive", or to have acted "in a high-handed manner" towards the employee (*Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 ("*Boucher*"))[4].

In *Galea*, above, Justice Emery found that Wal-Mart's manner of dealing with Ms. Galea in the period between her removal from her position and her termination was callous, high-handed, insensitive and reprehensible. He found that Wal-Mart made representations to Ms. Galea about her career while making contradictory decisions.

In determining the amount of punitive damages to award, Justice Emery reviewed the principle of proportionality, noting that it required an assessment of the blameworthiness of the employer's conduct, the plaintiff's vulnerability, the harm or potential harm directed to the plaintiff, the need for deterrence, and the other penalties paid by the employer. He found Wal-Mart's treatment of Ms. Galea and its conduct before and after her termination deserved a higher award of punitive damages. He noted that the damages must be in an amount within the range provided by authorities but also high enough for the purposes of denouncement and deterrence. He awarded Ms. Galea $500,000 in punitive damages.

It is also noteworthy that since 2006, Ontario courts have had the jurisdiction to award damages for violations of the substantive rights conferred by the *Code*; however, under subsection 46.1(1) of the *Code* orders for monetary compensation are restricted to losses arising out of the infringement of a substantive right under the *Code*, including compensation for injury to dignity, feelings and self-respect. The lack of jurisdiction of courts to order punitive damages for violations of the substantive rights conferred by the *Code* confirms the remedial thrust of the *Code*.

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[4] Ms. Boucher, an Assistant Manager at a Wal-Mart store, clashed with her Manager when she refused to alter a store log to provide a favourable report. Their relationship spiralled downward quickly, internal investigations were initiated, but Ms. Boucher ultimately sued for constructive dismissal. The Ontario Court of Appeal found the conduct of Wal-Mart to be malicious, oppressive and high-handed; punitive damages were also awarded against the Manager personally.

In another recent case, the trial judge found that the tort of harassment exists in Ontario separate and apart from the tort of intentional infliction of mental suffering. The plaintiff in *Merrifield v Canada (Attorney General)* 2017 ONSC 1333 alleged harassment not based on any of the prohibited grounds found in the *Code* and was awarded general damages in the amount of $100,00.00 for harassment and intentional infliction of mental suffering.

The HRTO

The HRTO's jurisdiction under the *Code* is to award damages when it finds there has been an "injury to dignity, feelings and self-respect" (s.45.2 of the *Code*) as a result of discrimination or harassment in violation of the *Code*. The HRTO does not have the jurisdiction to order moral or punitive damages.

Discrimination under the *Code* concerns the following:

> **Employment**
> **5** (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5); 2012, c. 7, s. 4 (1).
>
> **Harassment in employment**
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (6); 2012, c. 7, s. 4 (2).
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> **Vocational associations**
> **6** Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7); 2012, c. 7, s. 5.

Sexual harassment
Harassment because of sex in accommodation
7 (1) Every person who occupies accommodation has a right to freedom from harassment because of sex, sexual orientation, gender identity or gender expression by the landlord or agent of the landlord or by an occupant of the same building. R.S.O. 1990, c. H.19, s. 7 (1); 2012, c. 7, s. 6 (1).

Harassment because of sex in workplaces
(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2); 2012, c. 7, s. 6 (2).

Sexual solicitation by a person in position to confer benefit, etc.
(3) Every person has a right to be free from,
(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7 (3).

Reprisals
8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

Infringement prohibited
9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. R.S.O. 1990, c. H.19, s. 9.

Historically, since the passage of the first *Human Rights Code* in Ontario, aggrieved individuals filed complaints with the Human Rights Commission (the "Commission") which investigated and referred matters to its Tribunal. The Commission was, in effect, a gatekeeper that screened out weak or frivolous applications. In 2008 the *Code* was significantly amended to allow for direct access by complainants to the HRTO. The Commission was left with a policy and advisory role, and a limited ability to refer systemic matters to the Tribunal. Now, claims are filed directly with the Tribunal. The HRTO now has an unlimited monetary jurisdiction to award general damages where such a finding is made.

The factors identified as being appropriate for consideration in assessing general damages for breach of the right to be free from discrimination were described in *Lombardi v. Walton Enterprises*, 2012 HRTO 1675, as follows:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment.

Arbitrators

Arbitrators have an unlimited jurisdiction over matters arising expressly or inferentially from the collective agreement. In Ontario, under the *Labour Relations Act, 1995*, SO 1995, at section 48(12):

> 48(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,
> . . .
> (j) to interpret and apply human rights and other employment related statutes, despite any conflict between those statutes and the terms of the collective agreement.

This provision affords a broad jurisdiction. Arbitrators have no specific heads under which they can, or cannot, grant general damages. As a result arbitrators are able to award damages for mental distress at work under any of the common law tort claims recognized by the courts and as the HRTO would under the *Code*. The model for arbitrators is that they give an aggrieved employee a remedy that “makes them whole”. They grant appropriate damages to meet the severity of the situation and to redress the injustice.

In *Teranet Inc v OPSEU, Local 507*, 2014 CanLII 21572 (ON LA) ("*Teranet*"), Arbitrator Shime, in addressing the union's claim for damages for mental distress and punitive damage, considered the application of common law principles regarding these heads of damages to collective agreements and the remedial authority of arbitrators. After reviewing the common

law principles arising out of employment law cases in both Canada and Britain, Arbitrator Shime concluded that in discharge and discipline cases, a finding of an independent actionable wrong is not required for the award of mental distress and punitive damages.

In his review of Supreme Court of Canada decisions regarding mental distress and punitive damages, he summarized the principles enunciated by the Court into the following ten points:

1. Damages for mental distress may be recoverable if they can fairly and reasonably be considered to arise from the breach of contract or if they may be reasonably supposed to be in the contemplation of the parties when the contract was made;

2. Damages for mental distress may be recoverable where the object of the contract is to secure a psychological benefit or intangible benefit like mental security;

3. Mental distress need not be the very essence or dominant aspect of the bargain;

4. True aggravated damages, which arise out of aggravating circumstances may be awarded as a result of an independent cause of action and has nothing to do with contractual damages. An independent actionable wrong is not a pre-requisite for the recovery of mental distress damages.

5. The degree of mental suffering caused by the breach must be of a degree sufficient to warrant compensation.

6. Punitive damages should be resorted to only in exceptional cases and the required conduct should constitute a marked departure from the ordinary standards of decency and must be independently actionable. A breach of the contractual duty to act in good faith will meet this requirement. However, an award of punitive damages does not depend exclusively on the existence of an actionable wrong. An actionable wrong can be found in breach of a distinct and separate contractual provision or other duty, such as a fiduciary obligation.

7. Punitive damages are awarded for malicious, oppressive and high handed conduct that offends a sense of decency.

8. The objectives of punitive damages are retribution, deterrence and denunciation. The aim is to punish the defendant.

9. The better practice is that a claim for punitive damages should be specifically pleaded.

10. Punitive damages must be proportionate to the blameworthy conduct, the vulnerability of the claimant, the need for deterrence, and the compensatory damages.

Arbitrator Shime further found that arbitrators under collective agreements have a broad mandate to develop doctrines and fashion remedies, including such damages awards. He noted that there were human elements that influenced collective agreement language around compensation, benefits, just cause, and the like. They create an intangible psychological benefit interwoven into the terms of a collective agreement. He noted that the loss of a job included the loss of those emotional or psychological aspects of work, which would be within the contemplation of the parties when the contract is made. He found, as everyone is aware, that the loss of a job is a traumatic event and, where egregious conduct violates the just cause provision, mental distress or punitive damages should not be denied.

Arbitrator Shime said that the authority of arbitrators to award punitive and mental distress damages can be found in a collective agreement's just cause provisions. Just cause is a broad enough term to encompass all types of conduct and to provide an appropriate remedy where it is warranted, without an independent actionable wrong. The reprehensible or egregious conduct informs the mental distress or punitive damages. Unlike the remedy for breach of employment contracts, the usual remedy for the breach of just cause provisions for a discharge is reinstatement, underscoring the importance of being employed for vulnerable employees. In his view, reinstatement should be the primary remedy for discharged employees that can help to assuage mental distress. Only in circumstances where the employer’s behavior is egregious, unfair, reprehensible or the like and has caused excessive mental distress should punitive and mental distress damages be awarded. Examples of such conduct include bad faith, unfair dealing, untruthful or misleading conduct or discrimination.

With respect to punitive damages, Arbitrator Shime relied on the test in *Whiten v. Pilot Insurance Company*, [2002] 1 SCR 595, 2002 SCC 18 (CanLII), namely that the conduct must be malicious, aggressive and high handed and so offends an arbitrator's sense of decency.[5]

In dealing with discrimination claims under the *Code*, arbitrators have followed the approach in *Lombardi v. Walton Enterprises*, above: see also *Renfrew County and District Health Unit and OPSEU, Local 487 (Correia), Re*, 2014 CarswellOnt 3402, 118 C.L.A.S. 54, 241 L.A.C. (4th) 388 (Parmar) ("*Renfrew County and District Health Unit*").

Arbitrators appear to take a more cautious approach to claims of mental distress damages than the HRTO. In *Tank Truck Transport Inc. v USW, Local 2020*-70, 2016 CanLII 66673 (ON LA) (Tremayne), though awarding $10,000 in mental distress damages to the grievor as a result of the employer's bad faith attempt to secure his resignation on false pretences, the arbitrator observed that mental distress damages should be awarded only in "extraordinary and exceptional circumstances." In *Toronto District School Board v Local 4400, Canadian Union of Public Employees*, 2016 CanLII 85741 (ON LA) (Albertyn), the arbitrator found a breach of the *Code* (on grounds of creed and failure to accommodate) because of the employer's failure to consult the union and agree upon an accommodation of the grievor that was feasible without undue hardship. Although the union claimed general damages under the *Code* for $1,500, the arbitrator neither made such an award, nor commented on its appropriateness. Similarly, in *Ontario Nurses' Association v North York General Hospital, 2016 CanLII 5033 (ON LA)* (Jesin), despite the finding that the denial of sick benefits to the grievor constituted a breach of the *Code* and the collective agreement (on grounds of disability), the claim for mental distress damages was not granted. This was because the denial of benefits covered a relatively short period (as compared by the arbitrator to the situation in *Ontario Power Generations Inc.*, [2014] O.L.A.A. No. 132 (O'Neil), where damages were ordered for the failure to pay sick benefits for six months).

In *Canadian Union of Public Employees, Local 4400 v Toronto District School*, 2015 CanLII 36308 (ON LA) (Waczyk), the arbitrator determined that delay by the employer in permitting the return to work of the injured worker was a violation of the *Code* (on grounds of disability) and of the collective agreement, and warranted compensatory damages (for lost

[5] In applying these principles to the facts of the case, Mr. Shime concluded that no damages were warranted. He found that there had been no harassment of the grievor whatsoever, that the employer's conduct did not warrant damages for mental distress or punitive damages, nor was there sufficient evidence of the trauma the grievor allegedly suffered.

wage/benefits), but nothing was awarded for general damages for humiliation, pain and suffering claimed by the union.

In *Toronto District School Board v Canadian Union of Public Employees, Local 4400 (Kara)*, 2015 CanLII 104696 (ON LA) (Sheehan), the employer failed to satisfy its obligations pertaining to the procedural obligations associated with the duty to accommodate the grievor. The failure included not consulting with the union and the grievor before placing the grievor in a lower paid job. The arbitrator declined an award of general damages because the employer acted in good faith and its actions were neither egregious nor, in any manner, malicious in nature.

Where arbitrators consider claims under the *Code*, and an employee has also filed a human rights complaint before the HRTO, the HRTO is required, under the *Code*, to consider whether the substance of the complaint has been appropriately dealt with by the arbitration proceeding. In general, if the board of arbitration has given consideration to the human rights elements of the grievance, the HRTO will defer to the arbitrator's award.

More recently, there have been two awards that suggest arbitrators no longer have jurisdiction to award mental distress damages in some circumstances. These cases did not involve human rights issues or, at least, did not result in any finding of a violation of the *Code*. In the first case, *Association of Management, Administrative and Professional Crown Employees of Ontario (Wilson) v Ontario (Natural Resources and Forestry)*, 2017 CanLII 71789 (ON GSB) (Dissanayake) ("*AMAPCEO (Wilson)*"), the grievor suffered reprisals in the form of personal harassment from management after disclosing to his superiors what he thought was dishonest misconduct of another employee. This caused the grievor such anxiety that he had to take an extended leave of absence. Though satisfied that the grievor's illness might otherwise have been remedied by the arbitrator in an award of mental distress damages, the arbitrator noted recent developments in the statutory workplace insurance scheme, the *Workplace Safety and Insurance Act* ("WSIA"), wherein provisions under the WSIA restricting claims for mental stress were found to be unconstitutional, and in fact were to be rescinded by legislative intervention, effective January 1, 2018. In light of these developments, the arbitrator found that he was without jurisdiction to award the make whole remedies and damages that the union was seeking in the dispute, on the basis that the Workplace Safety and Insurance Tribunal (WSIAT) now had exclusive jurisdiction to compensate the grievor for the workplace injury caused by the personal

harassment directed towards him and the failure of the employer to have protected him from that exposure.

That result was followed more recently in *Ontario Public Service Employees Union (Grievor) v Ontario (Community Safety and Correctional Services)*, 2017 CanLII 92683 (ON GSB) (Carrier). There, the grievor claimed mental distress damages as a result of a lengthy, undue delay by the employer in the investigation of an incident involving a physical attack on the grievor by a co-worker. The arbitrator found that the employer had failed to provide a safe workplace, and that its delay in bringing the investigation into the incident to a conclusion contributed to a hostile work environment. However, the arbitrator was persuaded by the reasoning in *AMAPCEO (Wilson)*, above. Because the grievor was eligible to seek damages for mental distress by making a claim for compensation before the Workplace Safety and Insurance Board (WSIB), the arbitrator determined that he did not have jurisdiction to award those damages.

2) The evidence required to establish an entitlement to damages

The question under this heading is whether medical evidence is required for a claimant to prove they have suffered mental distress as a consequence of the employer's actions.

The courts

The courts do not appear to have a fixed rule for proof of mental distress, but there is a clear evolution toward accepting contextual evidence as a whole to establish mental suffering, without the need of medical testimony. In earlier cases, medical evidence was presented and was accepted as the basis for proof of mental distress arising from the circumstances of the employee's dismissal. More recently, the courts have shown an inclination toward a more holistic approach:

> It would appear that the state of the law in Ontario does not require a plaintiff to lead medical evidence to make out a case for damages for mental distress in an employment context. The claim for aggravated or moral damages should be available to a claimant on all of the evidence given, including the subjective evidence of the plaintiff, provided that all other elements under the case law are met. (*Galea* at para. 270.)

Medical evidence to support the claim appears to be no longer a necessity. The court found sufficient proof of mental stress from only the evidence of the plaintiff employee. In *Boucher* (cited above), the Court accepted descriptions by Ms. Boucher of her own physical symptoms (vomiting, insomnia, weight loss) to affirm mental distress (at para. 52). Where medical evidence is presented, however, it can buttress the plaintiff's position (e.g. of post-traumatic stress, major depression) as in *Colistro v T Baytel* 2017 ONSC 2731.

The HRTO

The HRTO is particularly flexible on the issue. Medical evidence is not a requirement to establish that an employee suffered the equivalent of mental distress ("injury to dignity, feelings and self-respect" ("IDFS")) as a consequence of the employer's conduct, although such evidence may contribute to a higher damages award. Generally, the evidence of the employee is sufficient to prove general damages before the HRTO. For example, in *G.M. v. X Tattoo Parlour*, 2018 HRTO 201 (CanLII) ("*X Tattoo Parlour*"), the applicant, a 15-year old girl, testified regarding the negative impact of the sexual incident initiated by the individual respondent, including anxiety, substance abuse, loss of trust, sleeplessness, fear of intimacy, and loss of enthusiasm for her career aspirations. The Tribunal accepted that the experience had a very serious negative impact on the applicant, and noted that she was in a particularly vulnerable position vis-à-vis her age and family relationship to the individual respondent. It did not require separate medical evidence[6].

In *Faghihi v. 2204159 Ontario Inc. c.o.b. The Black Swan*, 2016 HRTO 1109 (CanLII) the complainant's co-worker made a racially charged, hostile comment to the applicant, and the applicant reported it to his supervisor. The supervisor failed to conduct a proper investigation, and two shifts later, the applicant was terminated in part because he had sought the protection of his rights and threatened to enforce them. In assessing $18,000 for IDFS, the Tribunal observed that, subjectively, the applicant was impacted emotionally by the respondent's actions. Further, the fact that he did not provide medical evidence, apart from his oral evidence, did not diminish the impact. However, the effect on the applicant was not severe enough to prevent him from

[6] The applicant asked for and received $75,000 in IDFS damages with pre-judgment interest commencing August 1, 2014 (August being the month in which the incident occurred), and post-judgment interest after 60 days from the date of decision.

securing new employment very quickly after his termination, and this was a mitigating factor in the assessment of the IDFS damages.

The case of *Campbell v. Paradigm Sports, Inc.*, 2017 HRTO 1683 (CanLII) illustrates how medical evidence supplements a general damages award by the HRTO. In that matter, a wife and husband were laid off from their jobs as warehouse labourers following the wife's workplace injury. It was determined that the employer discriminated against the wife due to her disability, and against the husband by virtue of his family association to the wife. The wife's doctor testified to the effect that her layoff exacerbated her mental health issues and turned her into a depressed person. The wife further testified that she felt devastated by the layoff, and could not sleep or eat initially. Her husband testified to similar feelings, as well as the humiliation of having to go on welfare benefits, but did not offer any additional medical evidence. The wife was awarded $20,000 in IDFS damages, whereas the husband received $15,000, or 25% less than his wife. Although it is not expressly acknowledged in the decision, it would appear that the medical evidence concerning the exacerbation of the wife's pre-existing condition accounts for the difference in the award of general damages in that case. It seems doubtful the wife would have achieved the additional $5,000 had she, rather than her doctor, testified about the exacerbating effects of the discrimination on her already frail mental health.

Arbitrators

As a general matter arbitrators have generally required medical evidence to establish psychological harm[7]. Arbitrators are willing to give general damages for injury to dignity, feelings and self-respect, but for establishing actual mental stress damages, arbitrators have generally required medical evidence. This was expressed as follows in *Toronto Community Housing Corporation v Ontario Public Service Employees Union*, 2016 CanLII 21169 (ON LA) (Nairn) ("*Toronto Community Housing Corporation*"):

> 30. Notwithstanding that the grievor has apparently been treated by various specialists, no medical evidence was called to support the grievor's asserted medical history or the assertions of causation to the events at work. While it is reasonable to accept that being the subject of a poisoned work environment is stressful, I am unable to draw more specific conclusions regarding the medical impact of the work environment on the grievor based on the evidence before me. I do accept the grievor's evidence as to the impact on her confidence, self-esteem, and withdrawal

[7] See *Teranet Inc v OPSEU, Local 507*, above, in which Arbitrator Shime stated that a grievor's mental distress must be supported by medical evidence and of a degree sufficient to justify damages.

> in the community. The rumour demeaned the grievor both professionally and personally. She did continue to work throughout the period with the only exception being her absence due to the unrelated motor vehicle accident.

The arbitrator awarded the grievor $10,500 in IDFS damages[8] after finding that, though the employer's management had nothing to do with the perpetuation of sexual rumours involving the complainant, it failed over a prolonged period to take appropriate action in response to the grievor's concerns, resulting in a poisoned work environment.

Similarly, in *AMAPCEO (Bokhari) v Ontario (Economic Development, Employment and Infrastructure),* 2016 CanLII 51073 (ON GSB) (Dissanayake) ("*AMAPCEO (Bokhari)*"), the arbitrator acknowledged an entitlement to damages from wrongful conduct on the basis of injury to dignity, feelings and self-respect, despite the lack of medical evidence:

> [58] The absence of specific and definitive medical evidence, does not, however, necessarily lead to the conclusion that the employer's conduct had no adverse impact on Mr. Bokhari's dignity, feelings and self-respect. Just as much as medical professionals find it difficult to provide definitive opinions on the impact of employer conduct on an employee's mental health, there is no way for the Board to make a definitive finding that the employer conduct had a specific impact on Mr. Bokhari's dignity, feelings and self-respect. However, the Board is not required to make such a definitive finding. Its task is to make objective findings on impact on a balance of probabilities, based on all of the evidence before it. In doing so, the Board must consider the nature of the employer's conduct. More egregious and unfair the conduct when objectively seen, more the probability that there was adverse impact. As already noted, in the present case the employer conduct that resulted in violations were serious.

Some arbitration awards in the last two years have granted relatively substantial remedies in general damages without the benefit of medical evidence. The arbitrator in *Yellow Pages Group Co. v Unifor Local 6006,* 2017 CanLII 51488 (ON LA) (Luborsky) ("*Yellow Pages Group Co.*") awarded IDFS damages of $15,000 in circumstances where the grievor was the subject of age discrimination and deception by the employer in respect of a voluntary severance package.

The highest arbitration award of mental distress damages (in the form of IDFS damages) without the benefit of medical evidence in the last two years was made in *AMAPCEO (Bokhari),* above. The arbitrator awarded $25,000 in IDFS damages in connection with the human rights

[8] The union had sought damages in the amount of $50,000. The employer argued that the appropriate range of damages was between $2,500 and $3,500.

violation, reasoning that the grievor truly felt victimized by the breaches of his rights, and that this would be magnified in circumstances where the victim suffered from a number of health problems. Moreover, the arbitrator found that the impact on the grievor would have been within the reasonable contemplation of the individuals who made the decisions against him.

Where psychological harm, beyond injury to dignity, feelings and self-respect, is to be established, arbitrators have generally required medical evidence.

3) The quantum of damages

As a general proposition the courts are much more generous in the amounts they award to plaintiff employees, who have established mental distress as a result of the wrongful conduct of their employer, than is the case before the HRTO or arbitrators. (See the schedule of damages awards by the courts, Appendix D; by the HRTO, Appendix E; and by arbitrators, Appendix F).

Although less dramatic than the difference between the quantum of the awards of the courts compared to the HRTO and arbitrators, in general the awards of the HRTO appear to be more generous than that of arbitrators, but some recent arbitral decisions suggest this difference is diminishing: *Yellow Pages Group Co*., above, and in *AMAPCEO (Bokhari)*, above. In *London Catholic District School Board* and *Ontario English Catholic Teachers Association*, unreported, July 23, 2015, Arbitrator R. Brown granted $20,000.00 in mental distress damages for a fellow employee touching the grievor on her temples while making a condescending comment and the angry use of a raised voice on another occasion, for the grievor being publically chastised partly in reprisal for complaint against that employee and for the employer's failure to discipline that employee. Arbitrator Brown found as a mitigating factor the employer's decision not to contest adverse findings by an investigator. Arbitrator Brown declined to award punitive damages. In *Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Hyland), Re*, 2014 CarswellOnt 550, [2014] O.G.S.B.A. No. 1, 117 C.L.A.S. 203, 241 L.A.C. (4th) 82 (Petryshen), a correctional officer suffered from asthma with particular sensitivity to cigarette smoke. The employer failed to accommodate the grievor through work assignments, by restricting its search for suitable positions, and by failing to make reasonable efforts to enforce its smoking policy. The grievor was awarded $18,000 for loss of right to be free from discrimination on grounds of a failure to accommodate and for injury to his dignity, feelings and

self-respect. He was awarded a further $12,000 for mental anguish caused by the employer's failure to reasonably accommodate him.

In general, though, arbitrators' awards for mental distress have been below the $10,000 mark. In *Renfrew County and District Health Unit*, above, on a finding of discrimination under the *Code*, the arbitrator awarded $9,000. In *Canadian Union of Public Employees, Local 4400 v Toronto District School Board (Morrissey)*, 2016 CanLII 26730 (ON LA) (Wacyk), the arbitrator found that the grievor experienced humiliation, pain and suffering as a result of the employer's violation of the *Code*, and awarded $5,000. The wrongdoing in the case was for the employer failing to look for suitable vacancies for the disabled grievor.

In *Toronto District School Board and OSSTF, District 12 (Lazar), Re* 2015 CarswellOnt 1231, [2015] O.L.A.A. No. 61, 122 C.L.A.S. 161, 252 L.A.C. (4th) 39 (Howe), the board of arbitration found that a manager's assignment of teaching non-preferred courses had been retaliatory and punitive, and had been discriminatory under the *Code*. $10,000 was awarded for mental distress damages.

In *Dominion Forming Inc. v. Universal Workers Union (LIUNA, Local 183)*, [2013] O.L.R.B. Rep. 839, [2013] O.L.R.D. No. 2768, 115 C.L.A.S. 233, 233 L.A.C. (4th) 315 (Anderson), the grievor was terminated for filing a workers' compensation claim for an alleged injury at work. Although the arbitrator found the employer's misconduct to be serious, he found that the grievor was not particularly vulnerable because he was represented by a construction trade union and he could readily find alternative work. Also, beyond anger at the employer's treatment, there was no evidence of particular mental harm to the grievor. The arbitrator awarded $2,000 for injury to dignity, feelings and self-respect.

In *Lakehead University and LUFA, Re* 2018 CarswellOnt 2512, 134 C.L.A.S. 238 (Surdykowski), the arbitrator found the grievor was a significant contributor to the conflict and negativity in his workplace. The arbitrator found a breach of the *Code* and awarded $1,000 for injury to dignity, feelings and self-respect.

Having regard to the cases in Ontario when awards could have been granted, arbitrators are the least likely to make a finding that mental distress is the result of the employer's conduct. For example, in *Ontario Public Service Employees Union, Local 548 v Cota Health*, 2016

CanLII 81970 (ON LA) (Rodgers), while the arbitrator found that the employer failed to take every reasonable precaution to ensure the safety of the grievor in her dealings with two threatening clients of the agency, contrary to the *Occupational Health and Safety Act* (OHSA), nevertheless he refused to make any award in general damages because of the lack of any evidence linking the employer's failure to the grievor's pain and suffering, and because the grievor herself contributed to the risk to her safety. See also several cases discussed above: *Toronto District School Board v Local 4400, Canadian Union of Public Employees* (Albertyn), above; *Ontario Nurses' Association v North York General Hospital*, above; *Canadian Union of Public Employees, Local 4400 v Toronto District School (Kara)* (Waczyk), above; and *Toronto District School Board v Canadian Union of Public Employees, Local 4400* (Sheehan), above.

The quantum of damages awarded by arbitrators appears to be lower than the awards issued by the HRTO. The average award of arbitrators from the cases in Appendix F, was $10,400.00. The average by HRTO in 2015 was $14,000 in general damages for similar conduct and similar circumstances[9], and, from Appendix E (excluding the two largest awards in untypical cases, in *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 (CanLII) ("*Joe Singer Shoes*") and *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 (CanLII)), it is about $16,000. There are relatively more awards in the $1,000 to $10,000 range by arbitrators than appears to be the case in the HRTO decisions. However, if awards of less than $2500.00 are excluded then the arbitration damages average rises to $15, 800.00, which is almost the same as the HRTO average In contrast to both arbitrator awards and HRTO decisions, for less egregious employer misconduct, as is apparent from Appendix D, the courts award $50,000 or higher, with the high water mark being $250,000 for moral damages and $500,000 for punitive damages (*Galea*, above).

It is possible that a reason for the differences between the awards of the courts, on the one hand, and the HRTO and arbitrators on the other, is that there is some class bias present in the consideration. It seems that, in the award of general damages as between those in senior employment positions, often management, that come before the courts, and regular employees

[9] See Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-2015, Audra Ranalli and Bruce Ryder, Osgoode Legal Studies Paper, 2017, http://digitalcommons.osgoode.yorku.ca/olsrps/195/.

who come before arbitrators and the HRTO, that higher earners are awarded bigger damages for equivalent injury.

The nature of the claimant's representation appears also to be a material factor in the award of damages[10]. Counsel appear always in the courts and most often in arbitration hearings, though less so before the HRTO. In a significant sample of 464 cases, where employees were self-represented (or no counsel was indicated) before the HRTO, the general damages awards were, on average, about half of what was awarded when the employee was represented by counsel.

Where damages claims are broken down under several headings, for each piece of offensive conduct, the likelihood of being awarded damages for each item is greater, with the overall damages being larger than if a single head of damages were sought[11].

What is the explanation for the differences in damages awards as between the courts, the HRTO and arbitrators? In large part, the remedy of reinstatement to work, which normally accompanies an arbitrator's award for general damages, does much to make the employee whole, to restore the equities between the employer and the employee. While the courts have jurisdiction to order specific performance, which would include reinstatement, in wrongful dismissal cases, they never do. The HRTO typically does not reinstate an employee to work although they have the jurisdiction to do so. The relationship of employment has ended and the damages awarded take this into account. This differs from arbitration. Even if considerable tension might exist between the employer and the individual grievor, the presence of the union is seen as a bulwark to protect the employee from further injustice from the employer, making reinstatement part of the overall remedy. In *Teranet,*the arbitrator explained the value of reinstatement to the employee:

> … the remedy of reinstatement, in my view, goes a long way to assuage any mental distress suffered by a grievor and reinstatement should be the primary redress for a discharged employee. It is only where the employer's behavior is egregious, unfair, reprehensible or the like and the commensurate mental distress that arises is excessive that mental distress damages or punitive damages should be awarded. Both conditions must be

[10] Ranalli and Ryder, *op. cit.*, pp. 18-19.
[11] Ranalli and Ryder, *ibid.*, pp.40-41.

> present. Examples of egregious employer conduct include bad faith, unfair dealing, untruthful or misleading conduct or discrimination. …

Also, employees who go before arbitrators and the HRTO have an easier access to justice than if they were to proceed to court. There is no risk of legal costs being awarded. The processes are more expeditious than before the courts. These are advantages of arbitration and the HRTO that weigh against the lesser general damages likely to be awarded than in the courts. This too can explain why damages in arbitration and in the HRTO are less than that awarded by the courts.

Interest and Costs

Pursuant to subsection 128(4) of the Ontario *Courts of Justice Act*, pre-judgment interest cannot be awarded on certain amounts, including punitive damages. There is no indication that pre-judgement interest was awarded in any of the cases cited in Appendix A. While, the plaintiff in *Galea* requested prejudgement interest, Justice Emery ordered that the issue be dealt with at the same time as submissions on cost. It is unclear whether any pre-judgement interest was ever ordered in the proceeding.

Post-judgement interest automatically applies to money owing under an order, pursuant to subsection 129(1) of the *Courts of Justice Act*.

Unlike proceedings before arbitrators and administrative tribunals, courts have the power to award costs. However, the parties are often encouraged to reach agreement with respect to costs before a judge will make an order for costs. In the cases cited in Appendix A, judges generally directed parties to try and come to an agreement on costs. Where the parties failed to do so, judges made orders with respect to costs. Costs in the six-figure range were commonly ordered at the trial level. For example, $424,584.33 in costs was ordered to be paid in in *Doyle v. Zochem*, 2017 ONCA 130 and $242,756.78 was ordered in *Hampton Securities v Dean*, 2018 ONSC 101. In *Honda*, the trial judge ordered $610,000 in costs on a substantial indemnity scale and including a costs premium, however the Supreme Court of Canada set aside the costs

premium and reduced the costs to a partial indemnity scale. A much lower costs order was made in *Horner v 897469 Ontario Inc o/a Superior Coatings*, 2018 ONSC 121 where the judge ordered costs in the amount of $5,500 because it was an uncontested trial that had lasted less than 3 hours.

The HRTO routinely orders pre-judgment interest on the general damages, and post-judgment interest until the date of payment. Occasionally, in circumstances involving particularly egregious misconduct, the HRTO awards pre-judgment interest preceding the point in time when the complaint was filed: see, for example, *X Tattoo Parlour*, above, and *Joe Singer Shoes*, above.

Arbitrators do not typically award interest on general damages awards. In fact, in *Toronto Community Housing Corporation*, above, the arbitrator expressly rejected the award of interest on general damages. The arbitrator's rationale was as follows:

> 55. With respect to pre-judgment interest, I am not persuaded that such an order is appropriate here. The Tribunal regularly awards pre-judgment interest on damages (notably from the date of application, not from some earlier date reflective of the existence of a poisoned work environment). Arbitration decisions are often silent with respect to the issue of interest, rendering it difficult to conclude whether that silence arises from reticence on the part of arbitrators or reflects that no request for interest was made. Proceeding at arbitration under a collective bargaining regime is different from proceeding before the Tribunal. For example, the access to justice issue raised in the Pinto Report as an argument for increasing damage awards at the Tribunal is not the same issue at arbitration. Representation is provided by the union and any costs of proceeding or of representation are not borne by a grievor. One need be mindful that damage awards from labour arbitrators reflect similar real value to those awarded by the Tribunal in similar circumstances, where the underlying findings are fundamentally based on an individual right granted under a public statute for which arbitrators have been given concurrent jurisdiction within the collective bargaining regime.
>
> 56. The "make whole" principle seems less obviously applicable to damages than to other forms of compensation such as wage loss. Delaying the payment of wage monies attracts an award of interest in order to ensure that the employee receives in real value what they would have received in wages but for the employer's violation of the collective agreement or the Code. Arguably, any assessment of damages is made based on current value. The employer is not arguing that I should assess damages having regard only to amounts awarded prior to 2008 when the grievance was filed. It accepts that any assessment I make will have regard to current caselaw. Notably, in *Ottawa (City) and CIPP*, (2010) 197 L.A.C. (4th) 369 (Picher, P.), referred to by the employer in its written submissions, the arbitration board declined to order pre or post-judgment interest stating that, "[i]n any event, the Board has made some assessment of the passage of time in rendering its determination of the appropriate level of General Damages".

> 57. Consideration of an award of pre-judgment interest also reasonably requires an assessment of who is responsible for any delay. Whether the grievor should appropriately be held responsible for some of the delay in the hearing process here is an open question. That assessment however contains a punitive element, and should be undertaken only in the most egregious of cases within a collective bargaining regime that rests fundamentally on compensatory principles.
>
> 58. Nor do I find it necessary at this time to make an order for post-judgment interest. I will remain seized with respect to the implementation of this award. Should the employer not act in a timely way in response to the release of this award, that matter may be brought to my attention by the union and dealt with if and as necessary.

Despite this, in *Renfrew County and District Health Unit*, above, the arbitrator awarded pre-judgment interest on the general damages from the date of the grievance, as the HRTO does.

Conclusions

The scope of the authors' review herein is limited to a relatively short period, just the last two years and the jurisdiction of Ontario. As a result, our observations are tentative and require a fuller elaboration in a more extended comparison, both over time and over the different labour law jurisdictions in Canada. However, certain preliminary conclusions can be drawn.

The courts have jurisdiction to grant compensatory moral damages, damages under the *Code* and punitive damages. The HRTO can award damages under the *Code* for injury to dignity, feelings and self-respect. Arbitrators can award any make whole remedy including damages for mental distress.

Generally it seems that arbitrators require medical evidence to establish psychological harm more than do the courts and the HRTO.

Interest on damages is routinely ordered by the HRTO from the date of the application (or, in some cases, from the date the harm first occurred). In civil proceedings interest follows the award of any damages and pre-judgement can be awarded for non-punitive damages. The courts generally order interest on damages from the date of the court's decision. Arbitrators routinely do not award interest on damages. Costs are only awarded by the courts.

The quantum of damages varies significantly. The courts are awarding much higher damages for mental distress and psychological harm than are the HRTO and arbitrators. The amount of damages awarded by arbitrators is generally lower than that ordered by the HRTO, though more recent decisions have seen a substantial narrowing of the difference. In large measure, the order of reinstatement of grievors is seen by arbitrators as significant relief that off-sets the amount of damages to be awarded for the mental distress associated with the employer's termination of the grievor's employment.

Although the jurisdiction between arbitrators and the courts substantially overlap, with the HRTO's jurisdiction being restricted to the statutory remedy for "injury to dignity, feelings and self-respect", each adjudicative body has broad jurisdiction to award damages for mental distress at work. Despite the overlap, there is considerable variance among the damages awarded by the courts, the HRTO and arbitrators.

When courts have awarded damages, they have generally characterized them as punitive damages or moral damages for the infliction of pain and suffering. The monetary figures that courts have awarded for such damages are also relatively high, when compared to damages awarded by the Human Rights Tribunal and arbitrators. As noted in Appendix A, courts have not hesitated to award damages in the six-figure range. Moreover, courts have awarded damages against both the employer and individual respondents who have mistreated the plaintiff.

In contrast, damages awarded by arbitrators tend to be dramatically lower than those awarded by the courts. As noted in Appendix C, damages awarded by arbitrators can be as low as several hundred dollars. Damages at the high end of scale afforded to unionized workers tend to be awarded in cases of misconduct involving sexual assault and/or sexual harassment and where mental distress is established through medical evidence. Arbitrators have declined to award damages where they have found a lack of medical evidence to support a claim of mental suffering, where they have not found malice or intent to harm on the part of the employer, and where they have found the conduct was not at the most egregious end of the spectrum. Arbitrators also tend to characterize these damages as general damages or IDFS damages. Despite the fact that arbitrators have the jurisdiction to award punitive damages, arbitrators have not focussed on deterrence or penalizing employers. This may be justifiable because of the

continuing collective bargaining relationship between the parties. Similarly, arbitrators do not award damages against managers or supervisors who may have mistreated the grievor.

Similar to labour arbitrators, the highest HRTO damages appear to be awarded in cases involving sexual harassment-related touching and, in those circumstances, can reach the six-figure range. Damages with respect to other violations of the *Code* tend to attract damages in the range of several thousand dollars. The HRTO, like labour arbitrators, tends to award these monetary figures as general damages for breach of the *Code* or for injury to dignity, feelings, and self-respect. The HRTO has previously held that it does not have the jurisdiction to award punitive damages. Similar to the courts, the HRTO awards damages against both employers and individual respondents.

The outcome of these differing approaches is that workers accessing justice through labour arbitration and, to an extent the HRTO, receive lower damages awards for mental distress in similar circumstances than other employees who have the means to turn to the court for remedy , The value of access to justice cannot be understated; however, labour arbitration should not reproduce existing societal inequities by placing a lower value on the mental suffering and/or injury to dignity, feeling and self-respect experienced by unionized workers.

Appendix "A"

Cases from Ranalli & Ryder

(from footnote 97)

Leclair v Ottawa (Police Services Board), 2012 ONSC 1729

Velvet Leclair , a 26-year old female employed as a child care worker, was out with friends when their car was stopped after one of its occupants made a rude gesture to police. There was an altercation outside of the stopped vehicle, and subsequent allegations of mistreatment, including sexual assault at the police station. Leclair ultimately pled guilty to an obstruct justice charge but sued the police for treatment and violations of the Code.; she sought general and punitive damages.

The police services were absolved of any wrongdoing in the civil suit.

General damages of $2,500 but no finding of liability; plaintiff's claim dismissed in its entirety.

Wilson v Solis Mexican Foods Inc., 2013 ONSC 5799

Patricia Wilson was a certified general accountant employed for 16 months with the employer, initially as Assistant Controller, later as a Business Analyst (lateral move). She was dismissed without cause and given two weeks' notice (at age 54). She claimed she was terminated in part because of a disability (back ailment), i.e. a violation of the Code.

The issue of her back was the subject of a management meeting about nine months into employment. After 13 months, she stopped coming to work (with weak doctor's notes, unsatisfactory Functional Abilities Forms). Return to work advised, with restrictions. Unacceptable to employer, who wanted her return following full recovery.

No *viva voce* evidence called.

The decision states that the plaintiff's back issues were clearly a factor in her termination.

General damages of $25,000 for wrongful dismissal based in part on disability.

Strudwick v Applied Consumer and Clinical Evaluations Inc., 2016 ONCA 520

Vicky Strudwick worked for the employer for just over 15 years, first as a data entry clerk, latterly as an instructor of recruiters, when she suddenly and unexpectedly became completely deaf. Management immediately began a campaign to get her to resign, including harassment and belittling.

Strudwick sued for wrongful dismissal. Employer did not defend. Aggregate damages awarded: $113,782.29 (20 months' notice and 4 months for the "Wallace factor") plus $20,000 for Code violation and $40,000 in costs.

Strudwick appealed, arguing damages were too low. Employer cross-appealed for a reduction in costs.

CA considers two-part test from HRTO jurisprudence, looks at *seriousness* of employer's conduct and *effect* on the plaintiff.

Employer cited for misconduct in failing to defend and generally making Strudwick's life unbearable, causing her mental distress and forcing her to apply for social assistance when she could not find adequate employment. Employer is vicariously liable for conduct of its managers.

There were two aspects to the abuse: treatment of the plaintiff and failure to accommodate.

Court of Appeal increases damages award to $246,049.92; does not reduce costs. (Epstein JA says she is limited in ability to increase award by quantum from Statement of Claim).

Silvera v Olympia Jewellery Corporation, 2015 ONSC 3760

Michelle Silvera was a 47-year-old receptionist for this jewellery manufacturer. Having successfully put a life of abuse (by her stepfather and mother) behind her, she was sexually harassed and assaulted by the manager of the operation (brother of the owner). She was terminated after an absence for dental surgery (and unexpectedly long recovery).

Employer did not defend claim.

Manager and employer jointly and severally liable for:

Aggravated:	90,000
Punitive:	10,000
Code:	30,000
Future Therapy:	42,750
Future Lost income:	33,924.75

Employer alone:

Notice:	7475.50
Aggravated:	15,000
Punitive:	10,000
Lost earning:	57,569.13

General damages of $30,000 for sexual assault and sexual/racial harassment

Nason v Thunder Bay Orthopaedic Inc., 2015 ONSC 8097

Darren Nason, 43, a 19-year Registered Orthotic Technician, developed problems in his arms, diagnosed with carpal tunnel syndrome (17 years of active employment). On WSIB-supervised leave for almost two years, undergoing various surgeries. Ultimately fit to return to work. Terminated, with an attempted after-discharge rescission (which the judge rejected).

Wrongful dismissal: 15 months (less WSIB benefits received): $14,665.00

General damages under the Code of $10,000 for wrongful dismissal based in part on disability

Partridge v Botony Dental Corporation, 2015 ONCA 836

Lee Partridge, 39 at time of trial, was a (female) dental hygienist, later office manager, for a small dental office (7-year employee). Following her return from a second maternity leave, she was placed in a hygienist's position (although the managerial position was still available). She was dismissed one week later with allegations of dishonesty, impropriety and theft. These allegations rejected by the trial judge, who awarded 12 months' notice, plus damages for Code violations. The dentists appealed.

Notice award and general damages of $20,000 for discrimination based on family status upheld on appeal.

Williams v Vogel of Canada, 2016 ONSC 342

Derrick Williams, 60, was a 32-year employee of the employer, working as an upholsterer. He died during the litigation and the estate continued the action.

During the last five years of Williams' employment, he was allowed to travel to Jamaica from January until March or April to spend time with his family. On May 2012, he was not returned to his home position. An ROE was issued in May, indicating "illness or injury." Williams attempted to return to work over the summer, until he was given a "To Whom It May Concern" letter in October 2012 that said his quality of work had deteriorated and Vogel had no position for him. He sued for wrongful dismissal and Code violations.

This was a dismissal without cause. Williams had never indicated any intention to quit or retire.

Damages: 23 months' notice and $5,000 for Code violation based on age and disability.

No aggravated or punitive damages.

Background and Other Significant Ontario Cases (pre-2016)

Wallace v United Grain Growers Ltd [1997] 3 SCR 701, 1997 CanLII 332 (SCC)

Jack Wallace was 56 years old at the time of his dismissal. He had been an 11-year employee working as a publishing and printing sales representative. The employer had lured Wallace from a competitor at age 45; he sought and was given assurances of secure, permanent employment. For all 11 years, he was the employer's top sales representative. He was dismissed summarily with no explanation.

Wallace sought psychiatric help after his dismissal (he was an undischarged bankrupt at the time of the dismissal and when he launched his civil action).

The employer maintained dismissal for cause until the commencement of the trial. Ultimately, there was no cause found.

At trial, Wallace was awarded 24 months' salary and $15,000 in aggravated damages for mental distress in tort and contract. The Court of Appeal reduced the notice period to 15 months and overturned the aggravated damages award.

The Supreme Court of Canada restored the award of 24 months' salary but did not allow aggravated or punitive damages. The case is silent on interest.

Honda Canada Inc. v. Keays [2008] 2 SCR 362

Kevin Keays was an 11-year employee of Honda, hired originally on the assembly line, later transferred to a data entry position. He goes on disability leave (for chronic fatigue syndrome), refuses to meet with the employer's doctor, and is dismissed in the 14th year of his employment.

Keays sues for wrongful dismissal. The trial judge found he was entitled to a notice period of 15 months. He held that the employer had committed acts of discrimination, harassment and misconduct, and he increased the notice period to 24 months to award additional damages for the manner of dismissal. The trial judge also awarded punitive damages against Honda in the amount of $500,000. The Court of Appeal reduced the punitive damages to $100,000.

The Supreme Court affirmed the 24 months' salary, as found by trial judge but did not award damages for the conduct of the dismissal, nor punitive damages. The decision is silent on interest.

Honda removes the distinction between aggravated or moral damages—imposes a fixed amount (not an extension of notice). The Supreme Court decision says that punitive damages are for outrageous conduct (not employee's loss).

Boucher v Wal-Mart Canada Corp., 2014 ONCA 419

Meredith Boucher, 43 (married with one child) worked for Wal-Mart for 10 years. She enjoyed various promotions, up to Assistant Manager. At one point, she clashed with her Manager when she refused to alter a store log to provide a favourable report. Their relationship deteriorated, the Manager became abusive, notwithstanding internal investigations, and ended in a suit for constructive dismissal.

At trial, Boucher was awarded $200,00 in aggravated damages for the manner of her dismissal, as well as $1 million in punitive damages, both from corporate Wal-Mart. Her Manager was saddled with $100,00 for intentional infliction of mental suffering and $150,000 in punitive damages. Both appealed.

The Court of Appeal upheld the jury's damages against the supervisor for intentional infliction of mental suffering and the aggravated damages awarded against Wal-Mart. The punitive damages against the Manager were reduced to $10,000 and against Wal-Mart to $100,000. A majority of the court held that, in light of the significant compensatory awards against each appellant, those amounts were all that was rationally required to punish them and to denounce and deter their conduct.

Punitive damages are not compensatory; they will arse in the context of malicious, oppressive and high-handed conduct.

Aggravated damages are compensatory.

Doyle v Zochem 2017 ONCA 130

Melissa Doyle, 44 at tie of dismissal, was a 9-year employee at a zinc oxide plant. She was the plant supervisor and health & safety coordinator, the only woman of 50 employees. She was sexually harassed by her supervisor, ignored and belittled at a meeting (when others knew about her imminent termination but she did not). She was previously and subsequently under psychiatric care for depression.

At trial, she was awarded 10 months' salary plus $25,000 damages for violation of the Code and an additional $60,000 in "moral damages." Only the last head of damages was appealed.

Court of Appeal upheld the head and quantum of moral damages.

Colistro v TBaytel 2017 ONSC 2731
Linda Colistro was 49 years old at time of trial, married for 25 years with 2 children.

Colistro started her employment with TBay Tel as summer student in 1988 and joined full-time in 1990 For the last 8 years of her employment, she was the administrative assistant to the Executive Vice-President. She leaves her employment when she learns a former sexual harasser is being re-hired by the company. She alerts the company to the earlier harassment; an internal investigation is poorly handled. Options for accommodation are rejected (she would never be able to work totally in isolation of the former harasser). Colistro sues for constructive dismissal.

At trial, Colistro is awarded 12-months' notice, less salary continuance and LTD, plus what the trial judge calls "Honda" damages of $100,000 (Utility and City are jointly liable for "flagrant and outrageous" conduct).

Galea v Wal-Mart Canada Corp 2017 ONSC 245

Gail Galea worked in senior positions with Wal-Mart for 8 years. She advanced through several rungs of management, culminating in Vice-President, General Merchandise. She had originally been lured from the position of President of Muffins Canada.

Galea was called into a routine meeting with one of her supervisors and told that her position was effectively being eliminated. She was offered lateral transfers abroad (in much smaller markets, India and Brazil). A public announcement of her new position was embarrassing to her. She floundered as a Wal-Mart executive for a further year before she left and sued for constructive dismissal.

Galea sued for breach of contract of employment (including terms of a non-competition agreement that provided her a salary continuance and prohibited her from working for a competitor for two years following dismissal without cause) and for moral and punitive damages.

The Ontario Superior Court awarded her the balace owing to completion of the two-year non-compete agreement) as well as other benefits and profit sharing options.

Galea was also awarded $250,000 in moral damages. Wal-Mart was also charged with punitive damages in the amount of $500,000 for conduct that was described as "callous, highhanded, insensitive and reprehensible."

The decision is silent on interest.

Merrifield v Canada (Attorney General) 2017 OSC 1333
Peter Merrifield, an RCMP Officer and one-time candidate for political nomination, was accused of improperly seeking "leave without pay" status for his candidacy, other relatively minor reimbursement infractions. One superior officer in particular seems to have targeted the plaintiff.
The trial judge found that the tort of harassment exists in Ontario, separate and apart from the tort of intentional infliction of mental suffering. The plaintiff in this case was alleging harassment not based on any of the prohibited grounds found in the Ontario *Human Right Code.*

The test for harassment from earlier case law (*McHale* and *McIntomney*) sets out four questions to be answered:

(a) Was the conduct of the defendants toward Mr. Merrifield outrageous?
(b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing Mr. Merrifield to suffer from emotional stress?
(c) Did Mr. Merrifield suffer from severe or extreme emotional distress?
(d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

The court awarded him $41,000 loss of income as well as $100,000 general damages for harassment and intentional infliction of mental suffering.

Superior Officer's directive that plaintiff be transferred from high security positions was unjustified and punitive. Other transfers and internal investigations of the plaintiff had devastating effects on him. He suffered post-traumatic stress, depression and was unable to work for significant periods of time.

No punitive damages.

Horner v. 897469 Ontario Inc o/a Superior Coatings 2018 ONSC 121 (undefended claim)
Wendy Horner alleged that a fellow employee harassed and belittled her. Following a final confrontation, she asked for the rest of the day off, or to be laid off. The employer said they would "figure it out" and sent her home. Then she got a termination letter delivered to her home (in fact, (stuck in her back door).

The claim was undefended. A trial judge found wrongful dismissal but was not available to rule on damages. A different judge handled the award.

The award was made up of $10,000 notice, $10,000 for the employer's malicious, oppressive and high-handed conduct (instead of investigating her claim, the employer fired Horner), and $20,000 aggravated damages for the manner of termination (which led to Horner's depression).

There was no evidence of discrimination, so there as no award for injury to dignity etc. Similarly, there was no finding of intentional infliction of suffering. One employee's conduct does not necessarily make an employer vicariously liable; plus, there was no evidence that the other employee's conduct was calculated to produce harm.

Hampton Securities Limited v Dean 2018 ONSC 101
Christina Dean was a securities trader (13-month employee). During 2008/2009 downturn, her productivity decreased. Hampton ordered her to increase the float in her reserve account, or she would be fired. She refused, claiming that was not part of their original agreement. Dean was terminated for cause. Hampton notified the industry regulator of her termination for failing to follow trading policies and engaging in unauthorized trading.

The trial judge found she had been constructively (wrongfully) dismissed. He awarded her six months' salary in lieu of notice, $25,000 for defamation (in making the false communication to the regulator); an order directing corrective communication to regulator.

No Wallace damages awarded as there was no evidence of Dean having sought medical attention or professional assistance; plus, this head would overlap with defamation damages.

Finally, there was an award of $25,000 punitive damages. Untruthful statements to the regulator were found to be a breach of good faith; allegations of impropriety went to the heart of the plaintiff's integrity, prevented her from continuing in her profession.

Appendix "B"

DAMAGES FOR MENTAL DISTRESS/AGGRAVATED DAMAGES/MORAL DAMAGES: THE APPROACHES OF COURTS, ARBITRATORS AND THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

HRTO Cases

G.M. v. X Tattoo Parlour, 2018 HRTO 201 (CanLII)

The 15-year old female applicant was employed by the individual respondent's tattoo business over the summer of 2014. The individual respondent, a close friend of the applicant's family, attempted to engage the applicant in sexual discussion. On one occasion the individual respondent initiated sexual touching with the applicant, resulting in criminal charges for which he was convicted.

The applicant testified regarding the negative impact of the experience with the individual respondent, including anxiety, substance abuse, loss of trust, sleeplessness, fear of intimacy, and loss of enthusiasm for her career aspirations. The VC accepted that the experience had a very serious negative impact on the applicant, and noted that she was in a particularly vulnerable position vis-à-vis her age and family relationship to the individual respondent.

The applicant asked for and received $75,000 in IDFS damages with pre-judgment interest commencing August 1, 2014, and post-judgment interest after 60 days from date of decision.

McDonald v. CAA South Central Ontario, 2018 HRTO 163 (CanLII)

The complainant was a Afro-Caribbean Canadian woman employed in the position of Technical Service Representative ("TSR") in the respondent's brokerage in February 2013 until the cessation of her employment some eight months later. As a TSR, the complainant was responsible for entering information supplied to her by licensed brokers into insurance portals and databases.

The applicant was subjected to the bigoted views of a co-worker, some of which were directed specifically at the applicant, and she complained to Human Resources, and later to her supervisor, but declined to make a formal complaint. However, after further complaints regarding her treatment in the workplace, the employer conducted an investigation.

The applicant requested a transfer to another position, which had the support of her attending physician, but the employer declined to grant the transfer, and as a result, the applicant refused to come back to work. The applicant claimed at the

hearing that the denial of the transfer amounted to discrimination because of disability and race, and constituted an unlawful reprisal for having raised her complaints and for having advised of her intention to make a complaint to the Tribunal.

The adjudicator found that the actions of the co-worker constituted harassment, and that the employer's investigation did not adequately respond to the complaints of the complainant. However, the adjudicator declined to find that the employer's refusal to transfer the complainant was unlawful in any way.

In assessing the damages for injury to dignity, feelings and self-respect arising from the co-worker's bigoted comments and the employer's inadequate investigative response thereto, the adjudicator stated:

> [215] The Tribunal's jurisprudence has primarily applied two criteria in evaluating appropriate compensation for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination. See Arunachalam v. Best Buy Canada, 2010 HRTO 1880 (CanLII) and Sanford v. Koop, 2005 HRTO 53 (CanLII).
>
> [216] I have found that the respondent is liable for the harassment experienced by the applicant as a result of D.C.'s [the co-worker] comments due to its failure to properly investigate and respond to these comments.
>
> [217] The range of compensation awarded by the Tribunal for harassment arising from a few comments has been relatively modest and has generally ranged between $2500 and $5000. See, for example, *Dhamrait v. JVI Canada*, 2009 HRTO 1085 (CanLII) ($3000); *Ibrahim v. Hilton Toronto*, 2013 HRTO 673 (CanLII) ($5000); *Monrose v. Double Diamond Acres Limited*, 2013 HRTO 1273 (CanLII) ($3000); *Michelin v. Johnson*, 2014 HRTO 321 (CanLII) ($3000); and *Brooks v. Total Credit Recovery Limited*, 2012 HRTO 1232 (CanLII) ($2500).
>
> [218] In the circumstances of this case, it is my view that an award of $5,000 is appropriate compensation for the injury to the applicant's dignity, feelings and self-respect and that it is consistent with this Tribunal's case law described above. Among the factors that I have considered in making this assessment was the applicant's evidence about how D.C.'s comments, and the respondent's failure to respond appropriately to them, had a significant effect on her; the number of comments; the fact that they were made by a co-worker and not a supervisor; and the fact that some of the comments were arguably less serious than the comments in some of the cases described above.

The adjudicator also awarded pre- and post-judgment interest.

A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107 (CanLII)

The complainant was a female migrant worker, born in Thailand, who worked for the employer for about 28 years since arriving in Canada. Her first and only job in Canada was with the employer, who also became her landlord in respect of an apartment she leased above the shoe shop where she worked. Over the period of many years the employer's principal sexually harassed and assaulted the applicant both in her apartment and in his office which was part of her place of employment. The applicant was vulnerable given she had no family in Canada apart from a disabled son for whom she cared, was single, lived above the store and English was not her first language. The employer's principal told the applicant she was stuck, that he had money and would get the best lawyers if she reported him while she would have to rely on community lawyers, and that she stayed because she felt she had no option.

The employer's principal created a poisoned work environment for the applicant by ridiculing her body, her accent and her use of language, and by making sexual comments and jokes.

The hearing involved the testimony of two of the applicant's doctors. The medical evidence supported the applicant's evidence that she had flashbacks and nightmares, depression and difficulty being around people, could not sleep well, and experienced shakes and sweats almost every night except when she remembered to take medication.

The adjudicator, relying on the facts in *Presteve*, awarded the applicant $200,000 for injury to the applicant's dignity, feelings and self-respect.

Titze v. O.I. International Inc., 2018 HRTO 77 (CanLII)

The applicant, a male, was employed as a labourer and assembler with the employer. The employer provided its employees, including the grievor, to a third party. A few weeks after becoming involved in a workplace accident that caused the grievor serious injuries requiring hospitalization and bedrest, the grievor was terminated at the request of the third party, ostensibly because he failed to wear fall arrest equipment. In fact, he had not been trained in the use of the fall arrest equipment, had been instructed to carry out the tasks that led to his fall without fall

equipment, and was aware that the third party's "zero tolerance" in respect of fall violations was not being enforced.

The employer conducted a superficial investigation of the accident, but only after the decision to terminate the grievor had been made. Moreover, the employer was aware that the grievor was still bedridden and recovering from his injuries when it advised him of his termination.

The adjudicator had little difficulty in finding that the employer had violated the Human Rights Code.

With respect to remedy, there had been evidence from the grievor's girlfriend and his friend concerning the grievor's personality before and after the accident. An individual who was described as previously being stable and happy was described as moody, irritable and unable to focus.

In assessing damages under s. 45.2(1) of the Human Rights Code, the adjudicator said it was necessary to distinguish between the impact of the infringement of the Code, that is to say the termination, and the impact of the injuries sustained by the applicant.

While the adjudicator found that the conduct of the employer was serious, many of the difficulties pertaining to the emotional and psychological effects the applicant experienced were found to be attributable to the injuries he sustained and not the termination.

Accordingly, the adjudicator awarded $15,000 in respect of injury to dignity, feelings and self-respect, plus interest.

[Query why the award was not higher, given reference by the adjudicator to Chittle v 1056263 Ontario Inc., 2013 HRTO 1261 (CanLII) in which, in very similar circumstances, damages of $30,000 were assessed, in addition to lost wages amounting to nearly $20,000. In that matter the male complainant was a pizza store manager of approximately four months when he was terminated after being admitted to hospital for a cardiac problem. There were legitimate employer concerns about his performance at the time, but the finding was that his disability was part of the reason for his termination. In awarding $30,000 for the breach and for injury to dignity, the adjudicator stated:

> *115. Obviously, the applicant was dismissed at a time of considerable stress and vulnerability for him, as he had just been released from hospital, was under continuing assessment, and was receiving surgical and other treatment for a cardiac condition. The applicant's evidence was that following his dismissal, his blood*

> *pressure was very high and he was an "emotional wreck". He indicated that he is a widower and therefore has no spouse to help. His son eventually moved in with him to help him pay his bills. The applicant was obviously grateful, but was also distressed at what he saw as a reversal of roles: his evidence was "your kids are not supposed to help you; you're supposed to help your kids when they need it". The position of temporary dependence on his son clearly had implications for his personal dignity.*

Instead, the adjudicator lined up with Defina v. Lithocolor Services Ltd., 2012 HRTO 1768 (CanLII), which involved the termination of a female, probationary pre-press manager after she suffered a workplace back injury. Again, the employer had some performance concerns, but the injury itself was also found to be a reason for the termination. The adjudicator granted $15,000 for injury to dignity, feelings and self-respect, having regard to the method of termination (by e-mail) and the accusations contained in the letter which either had not been previously brought to the complainant's attention or had been dealt with.]

Williams v. 2234101 Ontario Inc. o/a York Regional Collision Centre, 2018 HRTO 2 (CanLII)

The complainant, a male, was employed as a car detailer. He was subjected to a single incident in which the owner called him racist and homophobic names and threatened the complainant physically. However, the applicant's termination was found not be motivated by a prohibited ground.

[56] In terms of remedy for this reprisal, the applicant is entitled to some amount of monetary compensation for injury to his dignity, feelings and self-respect. In terms of the quantum, I have had regard to my decision in Bobkin v. 2439604 Ontario Inc. o/a Stackhouse Pizza and Sub Co., 2016 HRTO 1677 (CanLII), in which I awarded $2,000 in general damages as compensation for reprisal, in the context of a threat made by a former employer to report the applicant to government authorities. In my view, the threat made by the personal respondent in the instant case is much more serious than the threat made in the Bobkin case. Accordingly, I find that an award of monetary compensation in the amount of $5,000 is appropriate in the circumstances of the instant case.

Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256, 2017 HRTO 886 (CanLII)

The adjudicator determined that the respondent trade union adversely affected the applicant, an apprentice tradesperson, by failing to permit the applicant to write his Certificate of Qualification ("COQ") exam in a manner that accounted for his disability-related needs once it knew that the applicant had a disability (anxiety) and the nature of the disability. The neutral rule (applicable to all apprentices represented by the trade union) of imposing a deadline on the applicant to write the exam and get his COQ had an adverse effect on him because the local would not permit him to continue working without his COQ. He was subsequently laid off temporarily, after the union asked the employer to lay him off because of his lack of COQ. The adjudicator also found that the Local failed to adequately accommodate the applicant.

The applicant claimed $20,000 for injury to dignity, feelings and self-respect. The adjudicator, relying on the applicant's evidence about the strong adverse reaction the union's discrimination had upon him, awarded $8,000 with interest, and 8 months lost wages.

[Request for reconsideration denied: *Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256*, 2017 HRTO 1564 (CanLII)]

Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing, 2017 HRTO 1694 (CanLII)

The applicant identified as African Canadian and Aboriginal. There are no details in the decision concerning his occupation. He and two white co-workers drank a beer during lunch, and upon admitting having done so, the complainant was fired, while his co-workers were issued warnings.

The adjudicator determined that one of the reasons behind the firing was the applicant's previously disclosed disability to the employer, and the employer's concern that the applicant might not be able to work in certain circumstances. The adjudicator found that the dismissal, however, was not motivated by race.

With respect to remedy, the adjudicator stated:

> [45] From an objective point of view, the applicant was terminated, in part, because of his disability. He was, however, also terminated because he had, knowingly, breached the respondent's drug and alcohol policy. Though, based on his previous experience, he may not have expected that he would be terminated, he was aware of what the policy said, and as such he knew the risks he took by having a birthday beer on his lunch.

> [46] In my view, the circumstances of his termination support a lower amount of compensation for injury to dignity, feelings and self-respect than in many other cases involving a termination of employment. In the circumstances, I find that **$5,000.00** is an appropriate amount.

Tavares v. Mistura Restaurant & Hang Out Inc., 2017 HRTO 1553 (CanLII)

The complainant, a male with 25 years experience in the restaurant business, had Multiple Sclerosis at the time he began working as a server and then as a bartender with the employer. After several shifts, the applicant was terminated. A factor in his termination was his disability, and a violation of the Code was found. However, in assessing remedy, the adjudicator determined that the employer would not have retained the applicant much longer than it did, because of the applicant's poor performance and attitude problems.

The adjudicator awarded $6000 plus interest in respect of injury to dignity, feelings and self respect.

Sheldon v. St-Marys Ford Sales Ltd., 2017 HRTO 497 (CanLII)

The complainant was a female receptionist with the employer for approximately 15 years at the time of the events giving rise to her complaint. After returning from pregnancy leave, the employer refused to place her back in her receptionist job, but instead offered a service job. The complainant reluctantly took the new job. Shortly afterward, one of the employer's salespersons repeatedly told the applicant that she did not get her old job back because she had not slept with her supervisor. She complained about harassment to the employer. Following the investigation by the employer, the complainant took a leave of absence, and was still on leave at the time of the hearing. During the hearing, her doctor testified

The adjudicator found that the employer breached the Code by not placing the complainant in her former position, and by conducting a cursory investigation into her complaint of sexual harassment and not providing a satisfactory resolution to the complaint. The adjudicator awarded $5000 for injury to dignity, feelings and self-respect personally against the salesperson, and, in addition to damages for lost wages, $5000 and $10,000 against the company for its breaches of the Code regarding its inadequate investigation of the harassment complaint and the failure to reinstate following pregnancy leave respectively. Interest was also awarded.

[Request for reconsideration dismissed: *Sheldon v. St. Marys Ford Sales Ltd.*, 2017 HRTO 1557 (CanLII)]

Groh v. Waterloo (Regional Municipality), 2017 HRTO 1460 (CanLII)

Male unionized worker suffering from mental health conditions, including Aspergers. The employer made four separate requests for medical documentation to support complainant's leave of absence from June to September 2011. The complainant returned to work in latter September for a week, then went on leave again. Just prior to his anticipated return to work, the employer held a meeting with him that the Vice Chair found to be insensitively conducted having regard to the complainant's condition. The employer also sent the complainant a letter of expectation which, though non-disciplinary, contained a threatening tone. The employer subsequently took steps to correct the complainant's perception of the return to work meeting and the letter of expectation. However, after the complainant's return to work, there was an incident in which he asked for clarification regarding a task which led to a discussion with his superiors that caused the complainant anxiety. His request to take a break was denied, and he was told to work or go home.

Having regard to all of these pre and post-return events, the Vice Chair concluded that the complainant had been subject to constructive discrimination.

The Vice Chair's award under injury to dignity, feelings and self respect totalled $10,500, of which $8000 was in respect of the last incident involving the complainant's denied request to take a break from his tasks.

Bonnici v. Loblaws Inc., 2017 HRTO 1456 (CanLII)

The complainant, a male, was a part-time grocery clerk with a back injury requiring accommodation. He performed duties that were outside of his restrictions, and the employer failed to ensure that the complainant's physical restrictions were not exceeded.

The Vice Chair awarded $500 with respect to injury to dignity, feelings and self-respect, and gave the employer 30 days to pay without incurring any interest.

Qiu v. 2076831 Ontario Ltd., 2017 HRTO 1432 (CanLII)

The complainant, a female, performed bookkeeping and accounting tasks for the employer for approximately 1.5 years. Her supervisor on several occasions snapped the applicant's bra strap, smacked her backside and squeezed her shoulders. He also made sexualized jokes and comments, shared sexualized

pictures on his computer and made derogatory comments about female clients of the employer, all in the presence of the complainant. The complainant frequently objected to the supervisor's behaviour. Eventually, the supervisor fired the complainant on the spot for disclosing to him salary information of another employee.

The Vice Chair found that the employer was liable for having created a poisoned work environment, and that the termination was motivated in part by the complainant's objection to her mistreatment by the supervisor. Damages for injury to dignity, feelings and self-respect were assessed at $30,000 with interest. No claim for lost wages was advanced by the complainant.

Puniani v. Rakesh Majithia CA Professional Corporation, 2017 HRTO 1335 (CanLII)

The complainant, a female, with an accounting background was hired by an accounting firm. Shortly after her hire, the employer's principal learned she was pregnant, and berated the complainant. Ultimately, the employer fired the complainant, purportedly for poor performance.

The Vice Chair determined that the treatment and firing of the complainant was discrimination on the basis of sex. Regarding injury to dignity, feelings and self-respect, he stated:

[73] ...I do accept that the decision to dismiss coming as it did on the eve of her pregnancy leave and the birth of her child was stressful for the applicant. However the applicant's evidence made clear that this effect appears to have been transitory. I would award $10,000 in compensation for injury to dignity, feelings and self-respect for the respondents' decision to terminate her employment when they did.

[74] The applicant is also entitled to an award of $2000 for compensation to her feelings, dignity and self-respect caused by Mr. Majithia's treatment of her in the meeting between them described earlier. I accept the applicant's evidence that she was hurt and upset about his conduct during this angry meeting and the implicit threat to her employment that I accept was made.

The Vice-Chair ordered pre-judgment interest on all the damages awarded, and post-judgment interest on any amounts not paid to the complainant after 30 days from the date of decision.

Sellner v. Canadian Cab Ltd., 2017 HRTO 1060 (CanLII)

The applicant, a female, was on the employer dispatcher's roster of taxi drivers since 2009. The applicant's pregnancy, and in particular her accommodation request, was a factor in her being suspended from work for failure to attend a disciplinary meeting. The decision to terminate her on April 7, 2016 was directly as a result of the discriminatory suspension. Therefore her termination was also contrary to the *Code*.

In dealing with injury to dignity, feelings and self-respect, the Vice Chair said:

[72] From an objective point of view, being disciplined for following instructions respecting how an accommodation request would be addressed clearly will have a negative impact.

[73] The applicant's termination on April 7, 2016 meant that she was subsequently ineligible for EI benefits, and would have no income once she went on her parental leave. The prospect of facing having a newborn with unexpectedly limited income would clearly have an impact on the applicant.

[74] I also take into account that the applicant had to go back to work some 6 months earlier than she would have had she been eligible for EI. The fact that she had to forgo that time with her new child as a result of the timing of the respondent's decision to terminate her employment also clearly had a negative impact on the applicant, and is a factor which also favours a higher award under this heading.

[75] In the circumstances, I find that the $20,000 requested by the applicant is an appropriate amount to compensate her for injury to dignity, feelings, and self-respect.

The Vice Chair also awarded post-judgment interest on the $20,000 after 30 days following the decision.

***Campbell v. Paradigm Sports, Inc.*, 2017 HRTO 1683 (CanLII)**

Husband and wife applicants were full-time warehouse labourers of a US-based manufacturer located in Ontario. They had worked for the employer for about fifteen years and were earning $15 per hour at the time of the events from July

2015 to February 2016 that gave rise to their human rights complaints. The company ceased operating in Ontario at the end of October 2016.

Winsome Campbell fell and injured herself while working, which required her to be off work for a brief period of time. After learning that her employer was docking her pay for the lost time, and then complaining about it, both she and Byron Campbell were laid off. They alleged that the layoffs were discriminatory reprisals against them in employment on account of disability (Winsome Campbell) and marital status (Byron Campbell).

The Vice Chair determined that the employer ought to have known that Winsome Campbell was suffering from mental health issues, and failed to accommodate her but rather seized on the opportunity to lay her off. The Vice Chair further determined that her applying for workplace safety and insurance benefits was a factor in her layoff. With respect to Byron Campbell, the Vice Chair determined that the fact of his marriage to Winsome was a factor in the decision to lay him off.

Among other things, the applicants sought general damages for compensation for injury to dignity, feelings and self-respect pursuant to section 45.2(1)1 of the Code. During the hearing, Winsome Campbell's doctor testified to the effect that her layoff exacerbated her mental health issues and turned her into a depressed person. Winsome testified that she felt devastated by the layoff, and could not sleep or eat initially. Her husband testified to similar feelings, as well as the humiliation of having to go on welfare benefits.

In assessing the damages under this head, the Vice Chair wrote:

> [179] Section 45.2 (1)1 of the *Code* provides the authority for the Tribunal to award monetary compensation to an applicant's whose rights under the *Code* have been found to have been violated. This provision states:
>
> 45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part 1 of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> [180] The guiding principles governing an award of compensation for injury to dignity, feelings and self-respect were set out in the Tribunal's

decision in *Arunachalam v. Best Buy Canada,* 2010 HRTO 1880 (CanLII), where it stated at paras. 52 – 54:

The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination; see, in particular, *Seguin v. Great Blue Heron Charity Casino,* 2009 HRTO 940 (CanLII) at para. 16.

The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury too dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop,* 2005 HRTO 53 (CanLII) at paras. 34 -38.

[181] The considerations identified in the *Sanford v. Koop* decision, above, as being relevant to the applicant's particular experience in response to the discrimination are (at para. 34):

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment

> [182] I also have borne in mind that it is well established that the Tribunal's remedial powers are not punitive in nature: *McCreary v. 407994 Ontario,* 2010 HRTO 2369 (CanLII).

The Vice Chair awarded Winsome Campbell $20,000, and Byron Campbell $15,000 as compensation for injury to dignity, feelings and self-respect, as well as damages for lost wages, plus pre- and post-judgment interest.

Hayes v. R.J. Burnside & Associates Ltd., 2017 HRTO 790 (CanLII)

The female complainant was employed as an Environmental Assessment Coordinator/ Environmental Planner.

Shortly after starting her employment the applicant had an asthma attack in the workplace. She believed she was reacting to the cat dander on a co-worker's clothing and attempted to deal with the problem directly with the co-worker. When this was not successful, she escalated the problem to the office manager and other management.

While the solution offered by the employer – placing the applicant in an office with a note on the door warning not to enter without permission of the complainant - largely addressed the problem, the applicant was alienated from the other people on her team. Approximately one month later, her employment was terminated.

The Vice Chair found that the applicant did not establish on a balance of probabilities that she was bullied, her work unfairly scrutinized and criticized or her employment terminated for discriminatory reasons. However, contrary to the *Code's* protection against discrimination in employment on the basis of disability, the VC determined that the respondent provided workplace accommodation that did not respect the applicant's dignity, and which served to further isolate her from her colleagues. The complainant received damages for injury to dignity, feelings and self-respect in the amount of $7,500 plus post-judgment interest in the event the damages were not paid within 30 days of the decision.

Carter v. Chrysler Canada Inc., 2017 HRTO 168 (CanLII)

The VC found that the respondent discriminated against the applicant, a paint shop worker, when it looked only for jobs that were permanent and suitable for the applicant and did not look for jobs that were temporary or non-standard and suitable. The VC found that there was no evidence that would allow a determination about whether there were temporary suitable jobs that may have become available

and which were not considered. He also found that it appeared that there were no records available that might provide evidence about this question. The reason for this was that the document that was used to match disabled employees with available jobs was a "living document" that constantly changed based on changing availability of jobs and changing restrictions for the disabled employees.

The Decision found that in the circumstances, the appropriate compensation was $5,000 for injury to dignity, feelings, and self-respect.

George v. 1735475 Ontario Limited, 2017 HRTO 761 (CanLII)

The applicant, a man in his early twenties who self-identifies as a Black African-Canadian, was employed as a labourer for a general contractor. The general's principal subjected the applicant to vile racial epithets and demeaning racial comments over the course of a few weeks. The principal terminated the applicant's employment.

The VC determined that the employer and its principal created a poisoned work environment. However, while the termination was found to be discriminatory, the VC determined that the termination would have occurred regardless of race or colour, and therefore no damages for lost wages were awarded.

The VC awarded $20,000 for injury to dignity, feelings and self-respect, observing:

[84] In terms of the impact on the applicant, the applicant was a young man at the time of the events at issue in this proceeding, and was just in the early stages of his working life. He enjoyed the work that he was doing in the construction industry, and testified that he liked learning new things. He testified that he initially felt very positively about the opportunity to work for Mr. Seto. He gave evidence about his very understandable upset at the racial comments directed towards him by Mr. Seto. He felt that Mr. Seto was trying to put him down, and this made him feel "low". He stated that Mr. Seto was supposed to be in a leadership position and setting an example, but it was nothing like that. He testified that he felt hurt and depressed as a result of the way he had been treated by Mr. Seto, although he acknowledged that he did not seek any medical treatment. He stated that after what had happened with Mr. Seto, he did not feel comfortable working and was scared that the same thing would happen again.

[85] In terms of the objective seriousness of the conduct at issue, I find that Mr. Seto's racial comments are at the high end in terms of seriousness. Indeed, I would call his comments egregious. There is no place in the workplace, or in society as a whole, for comments of this nature.

[86] The applicant seeks the amount of $25,000 as compensation for injury to dignity, feelings and self-respect. I was referred to this Tribunal's decision in *Khan v. 820302 Ontario Inc.*, 2010 HRTO 265 (CanLII), in which an award of such compensation in the amount of $25,000 was ordered. In that case, I note that there was a finding that the owner of the corporate employer repeatedly referred to the applicant as a "Paki" and also made references to the applicant's children as "nigger babies" and to the applicant as having "slept with a nigger". This conduct took place over a period of approximately five months. In my view, the factual circumstances of the *Khan* case are objectively more serious than the instant case.

[87] I also was referred to this Tribunal's decision in *Brathwaite*, above, in which $15,000 was awarded as compensation for injury to dignity, feelings and self-respect. In that case, the award was based on two racially discriminatory comments made in the workplace by the owner of the respondent company. In my view, the objective seriousness of the comments I have found were made in the instant case are as serious, if not more serious, than in *Braithwaite*, and were made to the applicant more frequently.

[88] In the end, in my view, the amount of $20,000 as an award of compensation for injury to dignity, feelings and self-respect is appropriate in the circumstances. I also grant the applicant's request for pre-judgment and post-judgment interest on these amounts, calculated in accordance with the rates established under the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Trinh v. CS Wind Canada Inc., 2017 HRTO 755 (CanLII)

The applicant, a female, was hired by the respondent as a production technology specialist in its wind turbine business. She was promoted to management positions. During her employment she was subjected to a number of indignities and harassment related to her gender, ethnic origin, family status which created a poisoned work environment and led to the applicant's resignation.

Among other damages awarded, the VC made an award for injury to dignity, feelings and self-respect and in so doing stated:

[190] The harassment and discrimination that the applicant experienced was serious. The acts and comments were vexatious, offensive and humiliating and were aggravated by the fact that most were made by the most senior person in the workplace.

[191] After considering the overall seriousness of the applicant's experiences and the cases cited above, I grant the applicant the $25,000 she has requested as

compensation for impact on her feelings of dignity and self-worth as a result of the experiences of discrimination; being denied financial bonuses and potential opportunities because of her sex and pregnancy; and for having to work in a poisoned work environment. I find that the although the harassment and discrimination the applicant endured may be different in nature, it is comparable to that experienced by the applicants in *Insang*, above, where the award was $20,000, and *Khan v. 820302 Ontario*, 2010 HRTO 265 (CanLII), where an employee was subject to continuous serious racial harassment that was found to amount to a poisoned work environment and she was awarded $25,000 in general damages. I have determined that $25,000 is a reasonable amount.

The VC also order pre and post-judgment interest.

Conklin v. Ron Joyce Jr. Enterprises Ltd. (Tim Horton's), 2017 HRTO 723 (CanLII)

The applicant, a female, was employed for about one month as a server at a Tim Horton's restaurant. She had an anxiety condition. After calling in sick and bringing a doctor's note advising that she required to be on a leave of absence for 30 days, the employer terminated the applicant. The employer did not consider, or ignored, its duty to accommodate the applicant.

In awarding damages for IDFS, the VC stated:

[64] In this case, the applicant had been in the job for only about one month. Her evidence is that she was upset by the termination. However, she indicated that her anxiety and depression symptoms were not affected by the termination and in fact they gradually improved as the medication became effective. She did not require medical attention for the consequences of the termination. She did testify that she experienced increased stress because she was unemployed and had a precarious financial situation and concern for the future.

[65] In consideration of the available evidence and in consideration of the cases mentioned above, I find that $10,000 is an appropriate level of compensation for the applicant's injury to dignity, feelings, and self-respect as a result of the discriminatory termination of her employment.

[66] The respondent is directed to pay the applicant $10,000 without deduction within three weeks of the date of this decision. Post-judgement interest as calculated under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 is payable on any amount not paid within three weeks of the date of this decision.

E.T. v. Dress Code Express Inc., 2017 HRTO 595 (CanLII)

The applicant, a 14-year old girl of Persian heritage, was employed for several months as a general helper in a clothing retail shop. The owner, a 65-year old man, sexually harassed the applicant by making sexual comments and invading her space, sometimes making brief bodily contact. He also made several racist slurs about some of the store's customers, which the applicant asked him to stop. The applicant eventually quit when she was not paid.

The applicant asked for $35,000 for IDFR; the VC awarded $15,000 taking into account the applicant's young age, her distress at being sexually harassed and being subjected to the owner's racist views, but also taking into account that the owner's behaviour did not appear to have any long-lasting impact on the applicant.

Pre and post judgment interest awarded (after 30 days from decision).

Valle v. Faema Corporation 2000 Ltd., 2017 HRTO 588 (CanLII)

The applicant, a female of Italian heritage with strong Catholic convictions, was hired by the owner of a coffee equipment maintenance shop at $13 per hour. The owner knew of the applicant's religious affiliation, and engaged in blasphemous and gender-targeted swearing in front of the applicant, which she found offensive and asked to cease. Ultimately the owner fired the applicant at least in part because she refused his order to fire some racialized employees. She was employed for about four months.

The VC found that the owner's behaviour created a poisoned work environment, and the incidents had a significant impact on the applicant's self-worth and well-being: she felt useless as a women, she was stressed and had difficulty managing her diabetes.

She asked for, and was awarded, $25,000 for IDFR plus the usual interest award.

Nwagbo v. Li, 2017 HRTO 458 (CanLII)

A representative of the employer wrote an email to a third party in which he referred to the applicant, one of the employer's Client Service Representatives, as a large African man, and suggested that clients of the firm might stereotype the applicant if they were to meet him in person, rather than deal with him over the phone. The applicant was terminated after less than three months for performance related issues.

The VC found that the e-mail was discriminatory, and that though the applicant was a poor performer, part of the employer's reasons for firing him was its assessment that he was a poor performer because of his race.

The applicant sought $20,000 for IDFS; the VC granted $2500 plus post-judgment interest after 30 days, and stated:

[53] Since this was one isolated comment, I find it appropriate to award $2,500 as monetary compensation for injury to the applicant's dignity, feelings and self-respect in relation to this comment. Despite saying the comment was inappropriate and caused him distress, the applicant did not provide any evidence of significant emotional distress caused by the comment. He continued to attend work. Notwithstanding his belief that his work performance was negatively impacted after he received the email, I rely on the respondent's evidence that the applicant's work performance was consistently weak throughout his employment. In addition, the applicant waited until after his termination, more than one month after the March 4, 2016 email, to raise the issue with the applicant and demand monetary compensation. I also note that there is no evidence before me of medical, health or psychological issues arising from this incident, which is a significant factor considered by this Tribunal when making an award of compensation at the higher end of the scale.

[54] In arriving at my conclusion, I have also taken into account the fact that the comments came from the applicant's supervisor, rather than from a co-worker as in *Baisa,* above; the March 4, 2016 email was sent to a third party and the applicant while he was still employed at Top Choice; other employees had access to the series of emails; and after Mr. Borrelli advised the respondent that the GTA is racially and culturally diverse and a man in professional attire should not evoke suspicion, the respondent held on to her views and shared them with the applicant.

Dix v. The Twenty Theatre Company, 2017 HRTO 394 (CanLII)

The applicant, a young woman who worked for a non-profit organization was subjected to an unwelcome sexual advance by one of the members of the board of directors by virtue of his text messages; and the applicant was subjected to reprisal on the basis that her threat of human rights action was a factor in the decision to terminate her employment after about six months of employment.

The VC awarded $6,500 for IDFS plus the usual post-judgment interest.

Crete v. Aqua-Drain Sewer Services Inc., 2017 HRTO 354 (CanLII)

The applicant, one of three females employed by a plumbing and sewer business, was subjected to inappropriate sexualized comments by her supervisor and sexual solicitation by others. She complained about the situation, but her complaint was not investigated. She was terminated after a year of employment, and the fact that she complained about the poisoned work environment was a factor in her dismissal. The applicant became anxious and consulted a counsellor for a 4-month period.

The VC awarded $20,000 for IDFS, plus pre and post judgment interest.

Graff v. Jones Lang LaSalle Real Estate Services, Inc., 2017 HRTO 331 (CanLII)

The applicant, a male, was employed as a financial analyst for about 6 years when he was terminated for performance reasons linked to his depression and because he was overpaid.

While not all of the applicant's distress following the termination was related to the discrimination he experienced, a portion of it was. He was awarded compensation for injury to dignity, feelings and self-respect in the total amount of $10,000.00 plus post-judgment interest after 35 days.

Insang v. 2249191 o/a Innovative Content Solutions Inc., 2017 HRTO 208 (CanLII)

The male applicant (whose length of employment is not disclosed in the decision) was found to have been discriminated against because of creed after being required to work on Sundays notwithstanding that he had requested that his creed-based needs be accommodated and had been told that he would not be required to work on Sundays. The applicant also experienced discrimination and harassment when his supervisor referred to him as "bumbaclot" or "bambaclaat", Jamaican slang that is highly offensive. The applicant told the supervisor that it was an offensive and racist term but the supervisor continued to use the term in a racist manner aimed at the applicant. Finally the supervisor touched the applicant's buttocks on three occasions, and did so even after the applicant told him that the touching was not welcome. All of this contributed to the development of a poisoned work environment.The applicant quit, finding the situation intolerable.

He sought medical attention and was prescribed medication. He also was referred to a psychologist, who he saw on two occasions. In a report, the psychologist reviewed the applicant's history and the events that gave rise to the complaint before HRTO. He concluded that the applicant had some mild residual symptoms resulting from the workplace experience, including some loss of self-worth and loss of confidence.

The VC awarded $7,500 as compensation for the failure to accommodate the creed-based requirement to not be scheduled on Sundays; a further $7500 for the racial discrimination by the supervisor; and another $5,000 for the unwanted touching. Pre and post judgment interest was awarded in respect of the damages incurred by corporate respondent, post judgment interest in respect of the personal respondents.

Perry v. The Centre for Advanced Medicine, 2017 HRTO 191 (CanLII)

The female complainant, an RN, was employed for less than a year in a medical centre. The medical director of the centre kissed the applicant on one occasion and hugged her on two other occasions. He also often massaged or touched the applicant's neck and shoulders, put his arm around her, rubbed against her as they passed and turned his body toward hers as they spoke.

Once the applicant made clear that the medical director's advances were unwelcome, her work performance became the subject of greater scrutiny and ultimately of discipline and termination.

The VC determined that the applicant was the victim of sexual harassment and a poisoned work environment, and that the discipline and termination were reprisals for seeking the protection of the Code. The VC awarded $15,000 re IDFS for the sexual harassment and poisoned work environment and another $10,000 re IDFS for the reprisals. Plus pre and post-judgment interest.

Demers v. MatchTransact Inc., 2017 HRTO 98 (CanLII)

The male applicantwas employed as a Manager in a cell phone kiosk. After requesting a parental leave of absence, the applicant was pressured into foregoing the leave. He was not considered for promotional opportunities because he had made the request for the leave. When he went off on an emergency parental leave in May 2015, his supervisor told other employees he had resigned. When he visited one of the employer's kiosks during his leave, the same supervisor demanded that he leave and threatened to have him expelled from the mall.

The applicant filed his Application on August 20, 2015, while he was still on parental leave, and it was served on the respondent in September 2015. Following his return to work on October 1, 2015, he alleges that his supervisor micro-managed scheduling and recruitment – duties over which

the applicant had previously had autonomy – and had the applicant's subordinates secretly report back to the supervisor in an effort to find fault with the applicant and/or to force him to resign.

The applicant reported those aspects of this conduct about which he was aware to human resources. The employer did not investigate his concerns or allegations that he was being subject to reprisal. Three weeks after his return, he was fired over what the applicant states was a false accusation of sexual harassment. In the final days of his employment, the applicant experience great stress and visited his doctor with elevated blood pressure and

The VC awarded the applicant $5,000.00 for the injury to his dignity, feelings and self-respect for the discrimination on the basis of family status that led to the Application being filed. With respect to the post-Application reprisal, including the termination of his employment, the VC awarded the applicant $25,000.00 for the injury to his dignity, feelings and self-worth. Plus post-judgment interest.

The VC declined the applicant's request for reinstatement.

Brittain v. 2374855 Ontario Inc. o/a Minden 50s Diner, 2017 HRTO 1688 (CanLII)

The female applicant, a server for the employer restaurant hired in January 2015, experienced discrimination by the actions of the respondent because of her mental health disability. While the respondent made some efforts to accommodate the applicant's disability related needs it ceased doing so on or about August 7, 2015 and subsequently took steps to end the employment relationship while contriving to assert that the applicant had quit her employment when she had not. While the applicant's supervisor was at times supportive of the applicant, that support ended on August 7, 2017 when the applicant was unable to work two extra shifts and found herself unable to attend work that day. As a consequence, the supervisor removed the applicant from the schedule for the following Thursday and appears to have determined that the employment relationship must end because the applicant was in her view unreliable.

In awarding $15,000 for IDFS, the amount claimed by the applicant, the VC found that the applicant was a significantly vulnerable individual and the events described above provoked a significant mental health crisis for her. There was no *vive voce* medical evidence from a treatment provider which limited the impact of this evidence to some degree. Nonetheless the various

impacts including the applicant's feeling that her mental health issues were now widely known in the community requiring her to leave the area with the result that she left behind much of her mental health support justified significant IDFS damages. This is in addition to the fact that the applicant was in effect dismissed from her employment which had a significant impact on her life. The VC also considered the fact that $15,000 was the amount that the applicant requested. The VC said at para 49: "To a very significant degree the quantification of these damages is a subjective exercise and who better to assess their damages than an informed applicant."

Thompson v. Michele's Italian Ristorante Inc., 2017 HRTO 82 (CanLII)

The applicant, a male person of colour, became employed by the respondent as a sous chef in March 2014. He was subject to a number of racially demeaning comments by the owner that amounted to harassment. The owner referred to the applicant by a derogatory Italian term for black people. In addition, the owner suggested that the applicant was involved in the drug trade and made comments linking the applicant to bananas. As well, the owner he sought to minimize the applicant's visibility around the restaurant. Race was found to be a factor in the applicant's termination in June 2015.

The applicant said he was depressed after losing his job and had trust issues with employers. In these circumstances, the VC found that $15,000 (plus pre- and post-judgment interest) was an appropriate remedy in respect of IDFS.

Ben Saad v. 1544982 Ontario Inc., 2017 HRTO 1 (CanLII)

The male, Tunisian applicant, in Canada on a work permit, worked for the company for less than a year before his termination. He was injured on the job. The employer terminated him for poor attendance, which was due to the injury.

In ordering $20,000 (plus pre- and post-judgment interest) in respect of IDFS, the VC relied on the following:

a. The respondent considered the applicant's disability-related absences when deciding on termination;

b. The applicant's testimony about the financial impact of his termination on him and his family;

c. The fact that the respondent hired the applicant and brought him to Canada from Tunisia to work here and then terminated him after 7½ months based on his disability;

d. the applicant's testimony about the negative impact of his termination on his plans to bring his family to Canada, which he would have been permitted to do if he had been able to acquire enough working hours to get permanent resident status;

e. The applicant provided no medical reports to support his evidence about the impact of the termination; and

f. The applicant was employed for just under 7½ months.

Anderson v. Law Help Ltd., 2016 HRTO 1683 (CanLII)

The applicant, a female paralegal in her 20's, commenced working with the employer on January 6, 2014 as a Legal Assistant. The employer's Manager repeatedly made sexual advances to her, mainly be text message, which she rejected. Eventually, the Manager stopped paying the applicant (which ultimately forced her to quit) and treated her in a hostile manner.

The VC found that the applicant was particularly vulnerable to sexual harassment as a person beginning her career, and that there was a substantial power imbalance between her and the Manager.

The VC accepted the applicant's evidence concerning the mental and physical symptoms she developed as a result of her mistreatment, and the fact that she sought, and required further, counselling, but noted the lack of medical evidence. The VC awarded $22,000 for IDFS, plus pre- and post-judgment interest.

Bobkin v. 2439604 Ontario Inc. o/a Stackhouse Pizza and Sub Co., 2016 HRTO 1677 (CanLII)

The Jewish male applicant was hired as a part-time delivery driver in September 2014 and later became full-time. His supervisor twice made anti-semitic remarks, purported to fire the applicant, threatened the applicant and spat on the applicant. The applicant was also the victim of a threatened reprisal by the personal respondent, who threatened to report the applicant to OSAP in order to compromise his right to student funding if he went to the Human Rights Commission. Eventually the applicant was

fired. The employer failed to take any action upon being notified by the applicant of his concerns about the supervisor.

The VC awarded $22,000 (apportioned between the employer and the supervisor) and post-judgment interest.

Ronquillo v. 2436436 Ontario Inc. o/a Healthplex Medical Services, 2016 HRTO 1640 (CanLII)

The hours of work of the female applicant, an administrator in a medical centre, were reduced partly because of her pregnancy.

The VC ordered $10,000 in IDFS, noting at paragraph 23 that, "[t]he caselaw suggests that this amount is within the range of awards for monetary compensation where an individual has experienced pregnancy-related discrimination during employment, as opposed to a discriminatory termination of employment."

Galoglu v. A Wesley Paving Ltd., 2016 HRTO 1525 (CanLII)

The male applicant, who identified as Turkish, worked for a paving company. After several months of employment, the applicant injured his finger and was off work. He was subsequently terminated, ostensibly because of a shortage of work.

The VC determined that the reason for the termination was the injury, but that ethnic origin did not play a role. The VC awarded $10,000 for IDFS, plus pre and post-judgment interest.

Prothero v. Ontario (Community Safety and Correctional Services), 2016 HRTO 1481 (CanLII)

The male applicant, an IT professional, became ill in the course of his employment and took a leave of absence. His immediate supervisor engaged in an overly zealous campaign to obtain medical information from the applicant, and denigrated him in the presence of the applicant's co-workers. This was found to constitute harassment on account of disability.

The VC found that the respondent's actions caused the applicant a high level of anxiety, upset and trauma.

The VC determined tha the type of discrimination the applicant experienced falls closer to the high end of the spectrum with respect to seriousness, and awarded $25,000 as against the employer and $2500 as against the supervisor in damages for IDFS, plus pre-judgment interest and post-judgment interest after 60 days.

The VC rejected the applicant's request for punitive damages, saying that the Tribunal lacked jurisdiction to make such an award.

Brillinger v. Edery, 2016 HRTO 1450 (CanLII)

The young, female applicant suffered a concussion in her third month of employment and had to take time off. She was terminated as a result.

In awarding $10,000 (and post-judgment interest after 30 days) for IDFS as a result of her discriminatory dismissal, the VC took the following into account:

- The applicant was young, and this was her first job following graduation from high school. She had hoped to use the money earned at it to attend a post-secondary program;

- At the time of her termination, she was experiencing the effects of a debilitating concussion that left her unable to work for several months;

- in addition to the confusion and anger resulting from her termination, she also had a lot of anxiety associated with it and wound up taking anti-anxiety medication; and

- She felt embarrassed about being "fired" and told she was a "bad" employee.

Kerceli v. Massiv Automated Systems, 2016 HRTO 1324 (CanLII)

The male applicant was employed as a saw operator in the employer's assembly line manufacturing business from June 2014. One of the respondent's saw operators would not allow him to touch company property and called him "crazy". Another employee called him homophobic names and said his face looked like a girl. The applicant spoke to management about both these employees. Their behaviours continued until he was terminated from his employment. The VC determined that the treatment of the applicant (both serious and degrading) over the span of 9 months, and the employer's failure to act, infringed his rights to be free from harassment and

discrimination in the workplace, and created a poisoned work environment. The VC, however, did not find that the termination was a reprisal under the Code.

As a result, the applicant received $25,000 for IDFS, plus pre and post-judgment interest.

Huard v. NCR Leasing Inc. o/a Aaron's Stores, 2016 HRTO 1139 (CanLII)

The respondent, a furniture retail and leasing business, discriminated against the male applicant, employed as a manager trainee, by terminating his employment after about nine months service while he was on a disability leave, and by refusing to re-hire him because of a past or presumed disability.

In awarding damages for IDFS of $17,000 (plus pre- and post-judgment interest), the VC observed that this was a single, though significant incident. Though the applicant did indicate he was upset and felt betrayed, the evidence also did not support compensation at a higher level. Though the applicant testified as to the ongoing impact, his evidence was brief and lacking in specifics. The compensation awarded, therefore, are based primarily on the objective impact that an individual would face following a discriminatory termination.

Faghihi v. 2204159 Ontario Inc. c.o.b. The Black Swan, 2016 HRTO 1109 (CanLII)

The applicant, a 23-year old male Muslim of colour, was a sous chef at the respondent, a restaurant, where he worked from March 5, 2014 until July 21, 2014 when he was terminated.

During one of his shifts a co-worker made a racially charged, hostile comment to the applicant, and the applicant reported it to his supervisor. She failed to conduct a proper investigation, and two shifts later, the applicant was terminated in part because he had sought the protection of his rights and threatened to enforce them.

In assessing $18,000 for IDFS, the VC observed that, subjectively, the applicant was impacted emotionally by the respondent's actions. Further, the fact that he did not provide medical evidence, apart from his oral evidence, did not, in the VC's view, diminish the impact. However, the effect on the

applicant was not severe enough to prevent him from securing new employment very quickly after his termination.

Maurer v. Pursuit Wellness Inc., 2016 HRTO 999 (CanLII)

Shortly after commencing employment with the respondents as a registered kinesiologist, the applicant announced that she would be taking a pregnancy leave in the foreseeable future. She was then terminated on the false assertion that the respondents' business was at a low ebb. However, no other employee was let go or had their hours reduced, and the respondents later hired someone to fill the applicant's position.

The VC awarded $10,000 (and post-judgment interest) for IDFS, and observed that this amount is within the range of awards for general damages where an individual has lost her job as a result of pregnancy.

Granes v. 2389193 Ontario Inc., 2016 HRTO 821 (CanLII)

The female applicant was a full-time server in a restaurant. During a shift, one of the restaurant's co-owners subjected the applicant to inappropriate sexual comments and touching amounting to sexual harassment and solicitation in violation of the *Code.* The applicant became extremely distraught, suffered physically and mentally, and sought medical attention. The employer failed to address the matter, which caused the applicant to leave her position.

Observing that cases of sexual harassment involving explicit sexual touching tend to garner higher monetary compensation awards, the VC found the business and the co-owner jointly and severally liable for damages for IDFS in the amount of $20,000, with pre- and post-judgment interest.

O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675 (CanLII)

O.P.T. and M.P.T. were temporary foreign female workers who came to Ontario from Mexico to work for a fish processing plant in Wheatley. The owner and principal of the business subjected O.P.T. and M.P.T. over the course of their employment (no more than a year) to: unwanted sexual solicitations and advances by the personal respondent, including sexual assaults and touching; a sexually poisoned work environment; discrimination in respect of employment because of sex; and reprisal, including threats to send them back to Mexico (in MPT's case, she was in fact returned to Mexico at the owner's doing). OPT suffered the loss of her

job as a result of a final act of gender discrimination. OPT was subject to six instances of unwanted sex acts, and was awarded $150,000 as compensation for IDFS, whereas MPT, who was subject to several instances of unwanted sexual touching, was awarded $50,000. The VC awarded pre-judgment and post-judgment interest as well.

Appendix "C"

Arbitration Cases

Middlesex London Emergency Medical Services v Ontario Public Service Employees Union, Local 147, 2018 CanLII 1735 (ON LA) (Steinberg)

The grievor was a female primary care paramedic in a two-classification bargaining unit. Her complaint was that, as a pregnant employee whose condition necessitated performing modified duties (excluding lifting) in early January 2015, she was not accommodated to perform modified duties until March 2015.

The arbitrator agreed that there were two earlier job opportunities that the employer did not consider when it looked for modified work for the grievor, and as a result, the employer breached the *Human Rights Code* by failing to accommodate the grievor prior to March.

The union claimed general damages for the grievor in the amount of $25,000.00 for "injury to dignity, feelings and self-respect." The arbitrator found that this was out of all proportion to what occurred and appeared, on the face of the claim, to be intended to be punitive rather than compensatory in nature. The employer had responded to the grievor's requests for modified work respectfully and with due regard to her fundamental right to be accommodated under the Code. The employer had administered its policy fairly and with sensitivity to the needs of all its employees, including the grievor, who required accommodation at the relevant time. Moreover, there was no evidence about the impact of the employer's failure to accommodate on the grievor's dignity, feelings or self-respect.

After considering all of the evidence, including the nature, extent and impact of the breach, the arbitrator awarded the grievor $500.00 in general damages.

Ontario Public Service Employees Union (Grievor) v Ontario (Community Safety and Correctional Services), 2017 CanLII 92683 (ON GSB) (Carrier)

The grievor, a male Corrections Officer, alleged in his grievance that the employer failed to provide an harassment free workplace and thus violated the collective agreement. The genesis of the grievance occurred at a workplace-related event at a bar in which the grievor was slapped in the face repeatedly and called vile racist names by a co-worker. The grievor complained to the employer, but the employer failed to investigate the matter promptly. The grievor claimed that the length of time between the incident and the conclusion of the investigation gave rise to damages for mental distress.

The arbitrator found that the employer failed to provide a safe workplace and contributed by its delay in investigating the incident to a hostile work environment. However, the arbitrator, following a previous arbitration decision in *Ministry of Natural Resources and Forestry and the Association of Management Administration and Professional Crown Employees of Ontario* (the "Wilson" case/award) [see below], determined that he did not have jurisdiction to award damages for mental distress, on the basis that provisions of the Workplace Safety & Insurance Act which narrowly restricted compensation for mental distress were found to be unconstitutional by the Workplace Safety & Insurance Appeals Tribunal. Moreover, those provisions were to be repealed as of January 1, 2018. The arbitrator concluded that, as the grievor was eligible to seek damages for mental distress by making a claim for compensation before the Workplace Safety and Insurance Board, the arbitrator did not have jurisdiction to award those damages.

Association of Management, Administrative and Professional Crown Employees of Ontario (Wilson) v Ontario (Natural Resources and Forestry), 2017 CanLII 71789 (ON GSB) (Dissanayake)

For purposes of the employer's preliminary motion requesting that the Grievance Settelement Board find that it had no jurisdiction to award the complainant any damages or monetary "make whole" remedies with respect to the alleged harm and injury because those would have been compensable under the Workplace Safety and Insurance Act. ("WSIA"), the employer agreed to the following facts. As part of the grievor's position of Aviation Security & Safety Coordinator, he was required to review and approve expense claims submitted by safety officers. The complainant noticed irregularity in expense claims submitted by a safety officer ("X") and began to monitor X's claims. When he was convinced that X was using government resources for his personal benefit and was stealing, he brought this to the attention of management. Management, instead of following up, took no action to investigate. When the complainant persisted, reprisal action was taken against him in a number of ways, while protecting X. The grievor was off work for a substantial period as a result of the anxiety he experienced from the employer's actions. The employer failed to protect the grievor from personal harassment, and he was subjected to a poisoned work environment, contrary to the collective agreement.

The arbitrator was satisfied that the complainant's illness would have been compensable under the WSIA at the relevant time, having regard to the fact that the provisions under the WSIA restricting claims for mental stress were found previously to be unconstitutional, and in fact were to be rescinded by legislative intervention, effective January 1, 2018. Therefore, the arbitrator found that the

GSB was without jurisdiction to award the make whole remedies and damages that the union was seeking in the dispute.

***Hamilton (City) v Canadian Union of Public Employees Local 5167*, 2017 CanLII 85727 (ON LA) (Slotnick)**

Following lengthy surveillance initiated by the City as a result of rumours of criminal behaviour involving the dumping of asphalt, the City terminated the employment of 21 asphalt crew members and imposed lengthy suspensions on four other crew members for various misconduct, including significant amounts of time being wasted by employees taking long breaks and lunches, running personal errands and engaging in other unproductive activities. Prior to the terminations and suspensions, while the employees were being interviewed by City officials and suspended pending the results of the City's investigation rumours circulated in the local press about illegal activity involving City workers. The source for that information appears to have been two of the grievors, who told the press the nature of the questions they had been asked by City officials when they were interrogated. More unattributed stories circulated in the media about the possibility of illegal asphalt selling. The City refused comment on those stories. After the discipline was imposed the City issued a press release indicating that the employees had been disciplined for neglect of duty and time theft. However, subsequently some City officials were quoted suggesting that the police had been contacted by the City and that the City expected there would be a police investigation, even though the City's surveillance investigation did not uncover criminal activity of any kind. This drew a barrage of media attention and reporting. Ultimately, the City did not rely on criminal wrongdoing at the 56-day arbitration hearing of the grievances, and in fact the police investigation yielded no evidence of such.

All but seven of the fired grievors were reinstated, some with, some without, back pay. The suspensions of the other four employees were either rescinded or significantly reduced.

The union took the position that the employer's public act of referring the possibility of criminal activity to the police was a breach of the management rights clause in the collective agreement requiring the City to exercise its management rights in good faith. The union alleged that the public allegations of theft and/or sale of asphalt caused the grievors to endure a significant loss of reputation and damage to relationships with their family, friends, neighbours and community. The union contended that the allegations also dramatically affected the grievors'

employability, and many of them experienced significant distress, anguish, anxiety, and frustration as a result of these allegations. Furthermore, submitted the union, the allegations of theft and/or sale of asphalt caused many of the grievors to be doubted by and in some cases isolated from, and exposed to embarrassment, humiliation and ridicule by, family, friends, neighbours, former co-workers and acquaintances.

The arbitrator found that he had jurisdiction to award the type of damages sought by the union. However, the arbitrator determined that "there must be some element of malice or intent to harm employees, or at least blatant disregard, for an employer to be liable for bad faith damages." The arbitrator concluded that the City's move to involve police was not warranted but it was not motivated by bad faith. The evidence indicates it was designed to pursue the sincerely held but unsubstantiated and misguided idea that asphalt had been dumped, rather than to cause harm to the grievors. Accordingly, the City was not liable under this head of damages.

Yellow Pages Group Co. v Unifor Local 6006, 2017 CanLII 51488 (ON LA) (Luborsky)

The grievor, a female, was a customer service representative with about 35 years seniority. She found to have been improperly refused a voluntary severance package in violation of article 17 of the collective agreement. Instead of eliminating the girevor's job in the Customer Services Department and providing her with a severance package on the basis of service seniority, the Company removed another position or positions with employees having less service but who were older than the Grievor and thus "most pension eligible" after considering the relative age of the employees. The arbitrator further found that the company's consideration of the grievor's age violated the Human Rights Code. The arbitrator awarded $102,144 in damages for the breach of the collective agreement, and said the following concerning damages for injury to dignity, feelings and self-respect:

> [126] Thus adopting the foregoing principles, and recognizing that the assessment of such damages is not an exact science, I have determined that an award to compensate the Grievor for injury to her dignity, feelings and self-respect as a result of the Company's infringement of the *Human Rights Code, supra,* including the aggravating factors arising out of the manner in which she was misled in a sum equivalent to approximately 15% of the restitution also owing to the Grievor for breach of the collective agreement, is appropriate in all of the circumstances. This results in an award of

> $15,000 to the Grievor on account of general damages for the Company's breach of the *Code*.

The Vice Chair remained seized to deal with any issues of implementation of the award, including the question of interest.

Toronto District School Board v Local 4400, Canadian Union of Public Employees, 2016 CanLII 85741 (ON LA) (Albertyn)

The arbitrator found a breach of the Code (creed/failure to accommodate) because of the employer's failure to consult the union and agree upon an accommodation of the grievor that was feasible without undue hardship. Although the union claimed general damages under the Code for $1,500, the arbitrator neither made such an award nor commented on its appropriateness.

***Toronto Community Housing Corporation v Ontario Public Service Employees Union*, 2016 CanLII 21169 (ON LA) (Nairn)**

This was a supplementary arbitration award on remedy following an earlier finding that the employer had violated the Human Rights Code and the collective agreement by failing to take timely action to deal with the sexual harassment against the grievor by her co-workers. As a result, the grievor endured a poisoned work environment for about two years, notwithstanding her repeated requests to the employer for intervention. As described by the arbitrator at paragraph 25:

> ...the grievor was subjected to a poisoned work environment in that rumours were circulating in the workplace that she was engaged in an inappropriate sexual relationship with a supervisor and was thereby in receipt of preferential treatment at work. Such a rumour causes resentment, anger, and frustration in co-workers who come to believe that the individual is receiving unwarranted workplace benefits, undermining any sense of fairness and trust in workplace rules, leading to an untenable workplace environment for all. That rumour persisted in the workplace from at least early 2006 until sometime in 2008, and was particularly highlighted in late May 2007 at and following the WIN meeting. There is no evidence that the employer, including its managers and supervisory staff, was involved in the initiation of the rumour or that it played a role in advancing the rumour. The employer failed at various opportunities to investigate, intervene, or act in any concrete way to counteract the resulting poisoned work environment. The employer's liability arises from this failure to act.

The union sought damages in the amount of $50,000. The employer argued that the appropriate range of damages was between $2500 and $3500.

Although the grievor testified extensively about the negative physical and psychological impact of the poisoned work environment on her well being (including a panic attack that sent her to hospital), and testified about having seen various medical specialists for treatment, none of her attending physicians were called to testify. This prompted the arbitrator to make the following observation at paragraph 30:

> While it is reasonable to accept that being the subject of a poisoned work environment is stressful, I am unable to draw more specific conclusions regarding the medical impact of the work environment on the grievor based on the evidence before me. I do accept the grievor's evidence as to the impact on her confidence, self-esteem, and withdrawal in the community. The rumour demeaned the grievor both professionally and personally. She did continue to work throughout the period with the only exception being her absence due to the unrelated motor vehicle accident.

The arbitrator went on to review carefully the case law on damages in circumstances involving Human Rights Code violations and poisoned work environments. What she found generally (although not in every case) was that damage awards exceeding $20,000 "involved conduct wherein the employer owner or principal, in a position of control or authority over the applicant, was also the perpetrator of the sexual harassment and/or discrimination. That conduct typically involved significant unwanted physical contact including sexual assault or criminal harassment."

The arbitrator went on to examine several cases involving, in the main, co-worker induced poisoned work environments that the employer failed to remedy. Of those, the arbitrator was guided by three decisions, the circumstances of which were either somewhat more or less egregious than the facts before her: *Farris v. Staubach Ontario Inc.*, 2011 HRTO 979 (CanLII); *Heintz v. Christian Horizons*, 2008 HRTO 22 (CanLII); and *Xu v. Quality Meat Packers Limited et al.*, 2013 HRTO 533 (CanLII)

The grievor in in *Quality Meat Packers* was a male sanitation worker of about six years seniority. The conduct of which he complained involved one act of harassment by a co-worker on the basis of both sex and race (showing another co-worker a photo indicating that it was of the applicant's penis while making a demeaning sexualized and racialized comment about the applicant) and a finding of a poisoned work environment arising from generalized sexually explicit shop talk among co-workers. There was little evidence of impact in *Quality Meat Packers*

other than an expression of some anger and resentment and hurt feelings by the applicant towards the co-worker who had engaged in much of the impugned conduct (see paragraph 143). The applicant appears to have continued working throughout. The employer had acted reasonably in conducting an investigation and sharing the results of that investigation promptly with the applicant. That employer had also indicated an interest and willingness to engage with the applicant to continue the investigation, an offer the applicant was found to have declined. There was a cumulative award of $9000 for injury to the applicant's dignity, feelings and self-respect and for the employer's failure to meet its duty to investigate and failure to address the poisoned work environment. Part of that award ($4000) was ordered on a joint and several basis against the co-worker and the employer.

In *Heintz v. Christian Horizons*, *supra*, the applicant, a support worker at a community living residence, was gay, having come to understand her sexuality only as an adult and while employed by the respondent. Among other issues, a co-worker alleged that the applicant had abused a resident, mis-used employer funds, and was using a workplace computer to view gay and child pornography. None of these allegations were made out but a rumour concerning the alleged resident abuse did circulate in the workplace and the applicant was suspended with pay pending an inquiry. The Human Rights Tribunal of Ontario (prior to the 2008 Code amendments) ordered the employer to pay $10,000 in general damages in respect of the poisoned work environment and a further $5000 in damages for the willful and reckless infliction of mental anguish arising from the poisoned work environment. A further order of $8000 in damages arose from a finding that the employer had applied a discriminatory employment policy. The employer had required all employees to sign and conform to a "Lifestyle and Morality Statement" that imposed a discriminatory condition of employment on the applicant and which ultimately resulted in the loss of her employment.

In *Staubach Ontario Inc., supra*, the applicant, a female real estate agent, was subjected to a poisoned work environment for a period of about two years until her employment was terminated contrary to the Human Rights Code. The applicant, a real estate agent, had been disparaged on the basis of her sex by other agents working with her and a rumour had circulated that she was engaged in a sexual relationship with her manager. The employer failed to adequately respond and then terminated her employment ostensibly because of her behaviour. An order of $30,000 in damages was made. The Tribunal expressly noted that in cases of larger damage awards, there had been physical touching or assault and the applicants had objectively been more vulnerable than the applicant in that case. The Tribunal's reconsideration decision clarifiedthat, of the total amount of damages, $15,000 was allocated to the termination from employment and its impact on the applicant. The

remaining $15,000 was attributed to the employer's responsibility regarding the poisoned work environment.

Beginning at paragraph 48 of the award, the arbitrator stated:

> ...In my view, the circumstances in this case are more compelling than those in *Quality Meat Packers.* In this case the conduct leading to the poisoned work environment was specifically directed at the grievor (rumour mongering rather than generalized sexually explicit shop talk). It also continued for a significantly longer period without adequate intervention from the employer. The co-worker's conduct in demeaning the applicant in *Quality Meat Packers* was limited to another co-worker whereas the rumour here was more widely spread among the grievor's co-workers in CSU. The impact on the grievor in this case also appears to have been more significant even though the Tribunal took into account both prohibited grounds of race and sex in assessing impact in *Quality Meat Packers.*
>
> 49. However the circumstances here are less compelling than those in *Christian Horizons.* That employer was involved in creating and perpetuating the poisoned work environment. The applicant resigned as a result of having been both disciplined and newly subjected to poor performance appraisals based on information from her co-workers and assessments by her employer that were steeped in a homophobic perspective. The Tribunal in that case did note that it would have awarded higher damages but for the fact that the applicant originally agreed to and accepted the employer's lifestyle statement and that part of the stress suffered arose from the applicant's own crisis of faith and internal spiritual struggle.
>
> 50. The circumstances in *Staubach Ontario Inc.* reflect the ongoing impact of a poisoned work environment, where, like here, the applicant was unwelcome in the workplace based, at least in part, on an inappropriate sexual rumour being spread about her. That applicant was also pilloried for being difficult, loud, and aggressive, descriptions that were found to be inappropriately based on "gendered behavioural expectations" (para. 58). In that case the poisoned work environment stemmed from the circulation of the sexual rumour as well as the continued and repeated use of significantly offensive and sexualized comments. That latter factor is not evident in this case. By the end of the two-year period of being subjected to the poisoned work environment, there existed a campaign to build a record against the applicant and an environment wherein the employer encouraged the active disparagement of the applicant. These circumstances also go beyond those

> considered here, and relate in large measure to the ultimate decision to terminate the applicant's employment, a matter that the Tribunal separately identifies and addresses in its reconsideration decision.
>
> 51. In *Staubach Ontario Inc.* (see para. 70), the employer did investigate the rumour and was able to confirm its origins, learning at the same time that the instigator of the rumour was another agent who was also receiving illegal kickbacks from a vendor. That agent was disciplined for starting the rumour (and was required to repay the kickback) and was also required to make a donation to a women's shelter or not-for-profit organization having a mandate to assist women. That agent resigned soon afterward. However, the impact of the rumour continued.
>
> 52. The evidence of impact on the applicant in *Staubach Ontario Inc.* is also similar, including a hospital visit as a result of a 'panic attack'.

Ultimately, the arbitrator ordered the employer to pay $10,500 in general damages within 60 days of the decision, and declined to award pre-judgment or post-judgment interest (and further declined to order an apology by the employer or any "systemic" remedies such as workplace training in workplace human rights).

Tank Truck Transport Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 2020-70, 2016 CanLII 66673 (ON LA) (Tremayne)

The grievor was employed as a full-time Driver with the employer. He resigned because the employer had shown him a falsified letter stating that he was no longer permitted to work on the employer's contracts with Vale, a local mine operator.

The arbitrator noted that the Supreme Court of Canada has held that employers are under an obligation of good faith and fair dealing when it comes to the manner in which they dismiss employees.

In addition to reinstating the grievor and awarding back pay, the arbitrator found that Mr. Savoie's mental distress, about which he gave evidence at the hearing, was entirely the product of the employer's actions and completely unnecessary. As a result, the arbitrator considered the range and circumstances of previous similar

awards and concluded that an award in the mid-range of $10,000 was appropriate, noting that mental distress damages should only be awarded in "extraordinary and exceptional circumstances."

Ontario Nurses' Association v North York General Hospital, *2016 CanLII 5033 (ON LA) (Jesin)*

Denial of sick benefits to a full-time female nurse of approximately 8 years service found to be a breach of the Code and the collective agreement (disability). However, the claim for mental distress damages was not granted as the denial of benefits covered a relatively short period as compared to the situation in *Ontario Power Generations Inc.,* [2014] O.L.A.A. No. 132 (O'Neil) where damages were ordered for the failure to pay sick benefits for six months.

Canadian Union of Public Employees, Local 4400 v Toronto District School, 2015 CanLII 36308 (ON LA) (Waczyk)

Delay by the employer in permitting the return to work of the injured female worker was found to be a violation of the Code (disability) and the collective agreement. The arbitrator awarded compensatory (lost wage/benefits) damages, but nothing in respect of general damages for humiliation, pain and suffering claimed by the union.

Ontario Public Service Employees Union, Local 548 v Cota Health, 2016 CanLII 81970 (ON LA) (Rodgers)

Although the arbitrator found that the employer failed to take every reasonable precaution to ensure the safety of the female Case Manager in her dealings with two threatening clients of the agency, contrary to the Occupational Health and Safety Act, nevertheless he refused to make any award in general damages because of the lack of any evidence linking the employer's failure to the grievor's pain and suffering, and because the grievor herself contributed to the risk to her safety.

Compass Minerals Canada Corp v Unifor, Local 16-O, 2016 CanLII 51286 (ON LA) (Surdykowski)

The arbitrator awarded the grievor, a male miner, $200 general damages to the grievor as compensation for the unwarranted, albeit *de minimus*, interference with his privacy and bodily integrity in connection with an alcohol test.

Canadian Union of Public Employees, Local 4400 v Toronto District School Board, 2016 CanLII 26730 (ON LA) (Waczyk)

The grievor was a female Special Needs Analyst of 15 years seniority who became disabled and was physically restricted from performing certain functions. The employer accommodated those restrictions for two years. Subsequently, the grievor required further accommodation to deal with increasing physical restrictions. The school principal contended that the grievor could no longer be accommodated safely, and imposed a sick leave.

The arbitrator determined that the employer's efforts to determine if the new restrictions could be accommodated in some other way were woefully inadequate. Moreover, the principal was found to have been resistant to considering other alternatives. This constituted a breach of the Code (disability) and the collective agreement.

The arbitrator awarded damages for humiliation, pain and suffering in the amount of $5,000, with no order regarding interest, as a result of the breach of the Code. It is not clear from the award whether that was the amount claimed by the union, nor why the arbitrator settled on that amount.

Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2015 CanLII 104696 (ON LA) (Sheehan)

The arbitrator found that the Employer failed to fully satisfy its obligations pertaining to the procedural obligations associated with the duty to accommodate in respect of the male custodian, including a failure to consult with the union and the grievor regarding accommodation options before placing the grievor in lower paid job. However, the arbitrator declined an award of general damages because the employer acted in good faith, and its actions were neither egregious nor, in any manner, malicious in nature.

Kingston (City) v Canadian Union of Public Employees, Local 109, 2015 CanLII 103813 (ON LA) (Knopf)

The grievor returned to the workplace without physical restrictions after 5 years absence dealing with incurable cancer. Due to reorganization, his old job of Senior Development Technologist in the City's Engineering Dept. no longer existed.

The arbitrator concluded that, in respect of one of the jobs that the employer considered placing the grievor into, the employer did not give full consideration to the grievor's experience and qualifications for the position, although it emerged at the arbitration hearing that, on the evidence, the grievor was not qualified for the position. This amounted to a breach of the procedural requirements of the duty of accommodation, and as a result of the violation of the Code (disability) the arbitrator awarded $2,000 in general damages.

Teranet Inc v OPSEU, Local 507, 2014 CanLII 21572 (ON LA) (Shime)

A board of arbitration under a collective agreement has the authority to award damages for mental distress and punitive damages under (i) the contract principles summarized above and (ii) by virtue of the remedial authority inherent in the just cause provisions found in collective agreements. I turn first to the contractual elements of a collective agreement and whether the principles enunciated in ***Fidler*** and ***Hadley v. Baxendale*** are applicable. Although collective agreements differ from employment contracts, there is a common human element that exists in both types of agreements. The incidents of employment which I have referred to above that both the Supreme Court of Canada and the House of Lords have enunciated in separate and isolated ways when woven together demonstrate the underlying human condition and human element that exists in employment. Thus, references such as "disparity of power", "vulnerability of employees", "sense of identity, self-worth and emotional well-being", "loss of one's job is always a traumatic event" and "psychological welfare of the employee" are phrases and epithets that reflect the emotional / psychological aspects of the employment relationship. This human element and condition inherent in employment motivates and influences the terms of a collective agreement so as to provide employees with what has commonly and historically been referred to as job security. These underlying human elements influence collective agreement language and provisions which provide for compensation; benefits such as, medical, dental, life insurance and pensions; working conditions including the regulation of seniority, layoffs recall and just cause provisions in the case of discipline and discharge. In my view, job security encompasses mental security within the meaning of ***Fidler*** and psychological welfare as described in ***Malik*** (which also dovetails neatly with the similar reference in ***Fidler***). In short, while the parties to a collective agreement bargain about specific terms for inclusion in a collective agreement the psychological/emotional

elements that I have referred to above are intangible benefits which are all part of both job security and mental security; simply put, having a job gives a person mental security There is, consistent with ***Fidler***, a particular and intangible psychological benefit interwoven into the terms of a collective agreement and that is why, as ***Wallace*** stated, that the loss of one's job is always a traumatic event no doubt because the loss, apart from the monetary benefits also includes the loss of the human elements or emotional/psychological aspects of work which are referred to by the Supreme Court of Canada and the House of Lords.

The emotional / psychological aspects of employment or the human condition and elements are within the contemplation of the parties at the time the contract was made, notwithstanding that these aspects may be intangible and not the dominant aspect of the negotiations; they may not be articulated but are ever present. Moreover, as ***Wallace*** puts it, parties to a collective agreement are aware that the loss of one's job is a traumatic event and within the collective bargaining community discharge is often referred to as labour relations capital punishment. The loss may be more traumatic where the loss is the result of egregious breach of the just cause provision. Enhanced trauma may fairly and reasonably be considered to arise naturally from an egregious breach of the just cause provision within the meaning of ***Hadley v. Baxendale***. It is the rupture from the latent emotional/ psychological elements underlying employment which are interwoven with the loss of the patent monetary and other benefits of the collective agreement that is the cause of the trauma. The power imbalance, the vulnerability of employees, the sense of self-worth and emotional well-being and psychological welfare are the societal and human elements that are the intangible wefts that are woven through the language warps of the collective agreement and mental distress may reasonably be considered as arising naturally from the loss of those elements caused by an egregious breach of the collective agreement.

Alternatively, since the loss of one's job is a traumatic event, mental distress damages may reasonably have supposed to be in the contemplation of both parties at the time the contract was made. Or, to put the matter more simply, everyone involved in labour relations or collective bargaining knows and is aware that loss of one's job is an obvious traumatic event and where egregious conduct violates the just cause provision, there is no legal basis for denying damages for mental distress or punitive damages. An egregious breach of the just cause provision, in my view, falls within the tests articulated in both ***Fidler*** and ***Hadley v. Baxendale*** enabling an arbitrator to award both damages for mental distress and punitive damages.

...

Under the rubric or principle of just cause arbitrators historically have examined both the employers and employees conduct. Just cause is a broad and generous term and to that end the arbitration cases have not only examined a wide array of conduct but have, commensurate with that conduct, provided a variety of appropriate relief. All of that is within the collective agreement framework, and, in my view, the concept of what is "just" lies particularly within the arbitrators mandate to determine. There is no reason to limit the arbitrator's discretion under that term when assessing conduct to require the arbitrator to import common law concepts of independent actionable torts or wrongs into an arbitrator's determination. The term just cause says it all and is a broad enough term to encompass all types of conduct and to provide an appropriate remedy where it is warranted. Thus, the broad nature of an arbitrator's remedial authority is governed by "the particular context of labour relations" and as the Court said in ***Nor-Man Regional Health*** "labour arbitrators are not legally bound to apply equitable and common law principles".

Moreover, the just cause provision is a contractual provision in which the parties have agreed to the authority of an arbitrator to interpret the conduct of the parties where an employee is disciplined or discharged and that delegation of that authority falls squarely within the principles enunciated in the decision of the Supreme Court in ***Fidler*** and/or the principles enunciated in ***Hadley* v. *Baxendale***. If the employer unfairly or egregiously breaches the contractual just cause provision there is no reason not to award damages for mental distress or punitive damages based on the just cause provision alone, without requiring an independent actionable wrong, since the parties are aware that "loss of one's job is always a traumatic event". It is the reprehensible or egregious conduct which attracts the principle of mental distress or punitive damages and not the legal category of the wrong. ***Paragon Properties Ltd.***, supra. A breach of the just cause provision constitutes a "proper case" as Lord Denning suggested in which mental distress damages and punitive damages may be awarded.

Having outlined what I consider to be the broad authority of an arbitrator it is important to understand when such remedies for both mental distress and also punitive damages may be awarded. Here again there is a clear distinction between employment contacts and collective agreements. For the most part, the usual remedy for breach of an employment contract concerns the proper length of notice and the resulting compensation. But that is not the usual remedy for breach of the just cause provision in a collective agreement, particularly in discharge cases where the usual remedy is reinstatement to employment. The differing nature of the reinstatement remedy under a collective agreement underscores the importance of

being gainfully employed for vulnerable employees who are covered by a collective agreement.

However, the remedy of reinstatement, in my view, goes a long way to assuage any mental distress suffered by a grievor and reinstatement should be the primary redress for a discharged employee. It is only where the employer's behavior is egregious, unfair, reprehensible or the like and the commensurate mental distress that arises is excessive that mental distress damages or punitive damages should be awarded. Both conditions must be present. Examples of egregious employer conduct include bad faith, unfair dealing, untruthful or misleading conduct or discrimination. In turn, the extent of the employee's mental distress should be medically supported and of a degree sufficient to warrant compensation. Nor every unjust dismissal will result in an award of damages for mental distress or punitive damages. As to punitive damages, the test should be the same or similar to the type of conduct that merits punishment which is described in the ***Pilot*** case - that is, conduct which is "malicious, aggressive and high handed" and offends an arbitrator's sense of decency.

And finally, there is an issue of proportionality. None of the cases dealing with proportionality have dealt with the situation where an award has fully dealt with special damages such as wages and employment benefits as well as damages for mental distress and punitive damages. While I am in agreement with the decided cases that there should be proportionality between damages for mental distress and punitive damages – both are discretionary amounts, I would not include special damages such as wages or employment benefits when considering proportionality, where there is a violation of the just cause provision. Both wages and benefits are non-discretionary and are amounts that were required to have been paid had the employer not unjustly terminated the employee. Special damages are not in the nature of an award that punishes the employer and should not be considered as part of a disproportionate award in the same manner that both compensatory and punitive damages are considered.

Maritime Employers' Association v International Longshoremen's Association, Local 1654, 2013 CanLII 65439 (ON LA) (Hayes)

The grievor, a person of colour, was a full-time longshoreman earning $30 per hour. His foreman, not realizing that the grievor was in the vicinity, referred to him by a vile racial epithet. When the foreman realized that the grievor had overheard his comment, he apologized and offered the grievor time off if he was upset. The

grievor declined the offer and continued working. A grievance alleging harassment was subsequently filed.

Several months later, the grievor became agitated when he overhead a co-worker laughing. He apparently believed that he was the object of the laughter. There was heated confrontation in which another co-worker, Smith, intervened. Nothing further happened. Later that evening, at a union hall meeting, the grievor invited Smith to a fight outside the hall. They and others proceeded outside. The grievor assaulted a co-worker. The grievor was later fired for the incident.

The arbitrator found that the racial remark constituted a breach of the collective agreement and the Canadian Human Rights Act. The union sought a remedy in mental distress, and tendered a doctor's note which the employer argued was inadequate to support the claim for mental distress. The arbitrator felt no need to assess the adequacy of the medical note. He stated that the harm from such a vile remark by the foreman could be presumed. He ordered the employer to pay $1500 to the grievor.

Regarding the discharge grievance, the arbitrator determined that the grievor should be reinstated to work following a suspension, and on other conditions.

***Hamilton (City) v Amalgamated Transit Union, Local 107**, 2013 CanLII 62266 (ON LA)(Waddingham)*

The grievor ("AB"), a woman, was employed in the City's transit department for 23 years, the last 10 as the City's only female transit inspector. She was sexually harassed by her supervisor (or "Richardson") over a period of about two years, including being subject to unwanted touching and to pornographic e-mails sent to her by the supervisor. In addition to making an internal complaint with the City, the grievor filed a human rights complaint with HRTO and a grievance. Both matters were consolidated by agreement before the arbitrator.

The arbitrator upheld the complaint and the grievance. In response to the union's submissions that the grievor should be compensated specific amounts for each incident of harassment and discrimination by her supervisor, and $20,000 for mental distress, the arbitrator stated:

> 170. It is clear from her evidence that Mr. Richardson's conduct left AB feeling humiliated and powerless. It is also clear from her evidence that whenever possible, she made her objections to Mr. Richardson's conduct known to him. This could not have been easy given that Mr. Richardson was her supervisor, and that her experience

> as a woman was not shared in her work environment. AB's isolation and sense of powerlessness was even more acute in the aftermath of her workplace complaint and the investigation. She resumed smoking, and began seeing a therapist. Her attendance at work slipped to the point that she was put on an attendance management program. She switched to the night shift to avoid Mr. Richardson, despite the effect it would have on her family life and her self-worth (she had sufficient seniority to avoid nights). She still dreaded the one hour that her shift overlapped with Mr. Richardson's. AB's April 2011 correspondence to Ms. Strojin clearly illustrates the exasperation (and desperation) AB was feeling about the outcome of her complaint. AB hoped to advance to the position of supervisor, but was afraid to give up the support of her union. Furthermore, as I have stated above, AB was also victimized by the City in the manner that it responded to her workplace complaint, her disclosure of pornographic e-mails, and her circumstances in the workplace from September 2010 forward. I would add that she was also victimized, to some extent, by the manner in which the City dealt with her union in its pursuit of this matter.
>
> 171. On the basis of the foregoing, it is my view that the violation of AB's right to be free from discrimination in her workplace was significant, and the injury to her dignity, feelings and self-respect substantial. The mental anguish to which AB was subject, particularly in the aftermath of her workplace complaint was also substantial. Bearing in mind the ATU's distinct claims for specific violations on AB's behalf, I award AB a total of $25,000.00. While this award does not address the full extent of the discrimination and harassment that AB suffered, it does address the extent to which the City is liable for this discrimination and harassment.

In addition to other remedies, the arbitrator ordered pre-judgment and post-judgment interest on the general damages award.

Association of Management, Administrative and Professional Crown Employees of Ontario (Bokhari) v Ontario (Economic Development, Employment and Infrastructure), 2016 CanLII 51073 (ON GSB) (Dissanayake)

The arbitrator determined that the employer discriminated against the male grievor, a public servant, because of his disability by failing to accommodate him in contravention of the collective agreement and the Code. Furthermore, the

employer contravened the collective agreement by exercising its management rights in bad faith by declaring the grievor's position surplus, thus putting him a less-preferred position, though he suffered no financial loss.

The grievor had depression before the incidents that gave rise to his grievances. The union argued that the employer's violations exacerbated and/or prolonged his condition. The arbitrator found that the medical evidence presented in support of this argument was equivocal and not objective, and declined to award damages under this head. The arbitrator also declined to award "Wallace" damages for the bad faith conduct of the employer, and, though he acknowledged he had jurisdiction to do so, also declined to award punitive damages.

However, in respect of damages for IDFS, the arbitrator awarded $25,000, reasoning that the grievor truly felt victimized by the breaches of his rights, and that this would be magnified where, as here, the victim suffered from a number of health problems. Moreover, the impact on the grievor would have been within the reasonable contemplation of the individuals who made the decisions against him.

The arbitrator made no award of interest in respect of any of the damages awarded, including the damages for IDFS.

Appendix "D"

Damages Awarded by Courts

Court Decision	Position	Violation	Damages*	Aggravating Factors	Mitigating Factors	Notes
Wallace v United Grain Growers, 1997 CanLII 332 (SCC)	Publishing and Printing Sales Representative	Summary dismissal	24 months' salary	Summarily dismissed with no explanation. Plaintiff sought psychiatric help.		11-year employee; No aggravated or punitive damages
Honda Canada v Keays, [2008] 2 SCR 362	Data entry person	Dismissed for failure to report to company physician	24 months' salary	Plaintiff suffered from chronic fatigue syndrome		11-year employee; No aggravated or punitive damages
Boucher v Wal-Mart Canada, 2014 ONCA 419	Assistant Manager	Clash with Manager for failing to adjust internal report	Wal-Mart: $200,000 aggravated and $100,000 punitive; Manager: $100,000 for intentional infliction of mental suffering and $10,000 punitive			10-year employee
Doyle v Zochem, 2017 ONCA 130	Plant supervisor and heath & safety coordinator	Sexual Harassment	10 months' salary; $25,000 for Human Rights Code violation; $60,000 moral damages	Plaintiff sought psychiatric support		9-year employee
Colistro v Tbay Tel, 2017 ONSC 2731	Administrative Assistant to Executive Vice President	Constructive Dismissal when former employee/harasser re-hired	12 months' salary (less salary continuance and LTD); $100,000 "Honda" damages			Utility and Municipality jointly liable for "Honda" damages
Galea v Wal-Mart Canada, 2017 ONSC 245	Vice-President	Flat-lined and constructively dismissed	54 weeks' base salary plus benefits, bonuses, executive retirement plan, deferred profit sharing; $25,000 moral damages; $500,000 punitive damages			
Merrifield v Canada, 2017 ONSC 1333	Royal Canadian Mounted Police Officer	Harassed by Superior	$41,000 salary; $100,000 for harassment and intentional infliction of mental suffering			Court recognizes tort of harassment outside of enumerated grounds in Human Rights Code
Horner v 897469 Ontario Inc o/a Superior Coatings, 2018 ONSC 121		Harassed and belittled by co-worker; sent home; terminated by letter affixed to her back door	3 months' salary ($10,000); $10,000 for employer's "malicious, oppressive and high-handed conduct"; $20,000 aggravated damages for manner of termination			Employer did not investigate complaint of harassment; sent employee home; then terminated her by letter delivered to her back door.
Hampton Securities v Dean, 2018 ONSC 101	Securities trader	Employer tried to unilaterally change term of employment (to require trader to increase her float)	$25,000 for defamation; $25,000 punitive		No "Wallace" damages; no evidence of medical attention provided	

*** Post-judgement interest is available pursuant to section 129 of the *Courts of Justice Act***

APPENDIX D: Comparing General Damages Claims for Injury to Dignity in Employment in Ontario: The Courts, the Human Rights Tribunal of Ontario and Arbitrators

Appendix "E"

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
G.M. v. X Tattoo Parlour, 2018 HRTO 201 (CanLII)	Summer student	Discrimination regarding sex	$75,000	Pre- and post	Sexual conversation; one incident of sexual touching by business owner; owner was a family friend		
McDonald v. CAA South Central Ontario, 2018 HRTO 163 (CanLII)	Technical Service Representative	Discrimination on basis of race; harassment	$5,000	Pre- and post	Evidence of applicant regarding effect of co-worker's comments; frequency of comments; failure of employer to respond promptly	Comments by co-worker, not a supervisor	
A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107 (CanLII)	Retail clerk	Discrimination on basis of race, ethnic origin, gender; sexual harassment/assault over much of 28 years employment	$200,000	Pre-judgment of 2.5% over preceding 10 years; post-judgment after 30 days	Sustained mistreatment over many years		
Titze v. O.I. International Inc., 2018 HRTO 77 (CanLII)	Labourer/Assembler	Discrimination re disability	$15,000	Pre- and post	Termination	Depression/mood swings attributable to injuries not discrimination	
Williams v. 2234101 Ontario Inc. o/a York Regional Collision Centre, 2018 HRTO 2 (CanLII)	Car Detailer	Discrimination on basis of disability and race	$5,000	Post only	Serious threat		
Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256, 2017 HRTO 886 (CanLII)	Trades Apprentice	Discrimination on basis of disability/accommodation	$8,000	Pre- and post	Layoff; strong adverse impact		
Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing, 2017 HRTO 1694 (CanLII)	Undisclosed	Discrimination on basis of disability	$5,000	Post only		Complainant breached alcohol policy	

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Tavares v. Mistura Restaurant & Hang Out Inc., 2017 HRTO 1553 (CanLII)	Server/bartender	Discrimination on basis of disability	$6,000	Post only	Termination	Would have been fired soon after	
Sheldon v. St-Marys Ford Sales Ltd., 2017 HRTO 497 (CanLII)	Receptionist	Discrimination on basis of gender and sexual harassment	$5,000 with respect to co-worker; $15,000 with respect to employer	Pre- and post	Failure to reinstate to pre-pregnancy leave job, failure to investigate		
Groh v. Waterloo (Regional Municipality), 2017 HRTO 1460 (CanLII)	Undisclosed	Discrimination on basis of disability	$10,500	No order	None apparent	None apparent	
Bonnici v. Loblaws Inc., 2017 HRTO 1456 (CanLII)	Part-time Grocery Clerk	Failure to accommodate	$500	Post only	None apparent	Employee knowingly working outside scope of physical limitations	
Qiu v. 2076831 Ontario Ltd., 2017 HRTO 1432 (CanLII)	Bookkeeper	Discrimination on basis of sex	$30,000	Pre- and post	Repeated touching by supervisor over extended period, despite employee's objections; termination as a result of objecting	None	
Puniani v. Rakesh Majithia CA Professional Corporation, 2017 HRTO 1335 (CanLII)	Accounting	Discrimination on basis of sex	$12,000	Pre- and post	Termination; threat to employment	None	
Sellner v. Canadian Cab Ltd., 2017 HRTO 1060 (CanLII	Taxi driver	Discrimination on basis of sex	$20,000	Post only	Termination following request for accommodation regarding pregnancy; timing of termination affecting EI eligibility and forcing employee's return to workforce earlier than would be normal, thus reducing time with new infant	None	

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Campbell v. Paradigm Sports, Inc., 2017 HRTO 1683 (CanLII)	Warehouse labourers	Discrimination on basis of disability with respect to female and on basis of marital status with respect to male	$20,000 for female; $15,000 for male		Layoff related to prohibited grounds	None	
Hayes v. R.J. Burnside & Associates Ltd., 2017 HRTO 790 (CanLII)	Environmental Planner	Failure to accommodate	$7,500	Post-only	Employer's attempt at accommodation resulted in alienation of employee		
Carter v. Chrysler Canada Inc., 2017 HRTO 168 (CanLII)	Paint Shop Worker	Failure to accommodate	$5,000	Pre- and post	Employer's attempt at accommodation did not consider the full scope of available alternative employment		
George v. 1735475 Ontario Limited, 2017 HRTO 761 (CanLII)	Labourer	Discrimination on basis of race and colour	$20,000	Pre- and post	Employee was young; racial slurs serious and had clear adverse impact on employee's psyche	Racial slurs occurring over several weeks, not months	
Trinh v. CS Wind Canada Inc., 2017 HRTO 755 (CanLII)	Production Technology Specialist	Discrimination on basis of sex, ethnic origin, family status	$25,000	Pre- and post	Serious harassment and discrimination with negative financial impact upon employee; poisoned work environment		
Conklin v. Ron Joyce Jr. Enterprises Ltd. (Tim Horton's), 2017 HRTO 723 (CanLII)	Tim Hortons server	Discrimination on basis of disability	$10,000	Post only	Discriminatory termination	Employee did not experience long-lasting anxiety or stress following termination or exacerbation of her existing mental health problem	
E.T. v. Dress Code Express Inc., 2017 HRTO 595 (CanLII)	Retail clerk	Discrimination on basis of sex	$15,000	Pre- and post	Age of employee; subject to sexual harassment by, and racist views of, 65-year old owner over several months	No long=lasting emotional impact as result of harassment	

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Valle v. Faema Corporation 2000 Ltd., 2017 HRTO 588 (CanLII)	Undisclosed	Discrimination on basis of religion and ethnic origin	$25,000	Pre- and post	Owner aware of employee's heritage and strong religious conviction, continuous swearing and blasphemous comments over several months despite employee's objections; termination for refusing to fire racialized employees		
Nwagbo v. Li, 2017 HRTO 458 (CanLII)	Client Service Representative	Discrimination on basis of race, ethnic origin, colour	$2,500	Post only		Isolated occurrence or racial stereotyping, termination due in part to race, but would have occurred in any event due to performance	
Dix v. The Twenty Theatre Company, 2017 HRTO 394 (CanLII)	Undisclosed	Discrimination on basis of sex; reprisal	$6,500.00	Post-only	Discriminatory termination		
Crete v. Aqua-Drain Sewer Services Inc., 2017 HRTO 354 (CanLII)	Undisclosed	Discrimination on basis of sex; reprisal	$20,000	Pre- and post	Ongoing harassment over period of one year; Not properly investigated; Poisoned work environment; Discriminatory termination		
Graff v. Jones Lang LaSalle Real Estate Services, Inc., 2017 HRTO 331 (CanLII)	Financial Analyst	Discrimination on basis of disability	$10,000	Post only	Employee experienced distress partly attributable to discriminatory termination		
Insang v. 2249191 o/a Innovative Content Solutions Inc., 2017 HRTO 208 (CanLII)	Undisclosed	Discrimination on basis of creed and race	$20,000	Pre-and post with respect to corporate respondent; post only with respect to personal respondent	Repeated touching by supervisor; Employee sought psychological treatment and was prescribed medication; Loss of self-worth and confidence		

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Perry v. The Centre for Advanced Medicine, 2017 HRTO 191 (CanLII)	Registered Nurse	Discrimination on basis of sex	$25,000	Pre-and post	Ongoing harassment including touching by top executive; Discriminatory discipline and termination after employee objected to treatment		
Demers v. MatchTransact Inc., 2017 HRTO 98 (CanLII)	Manager	Discrimination on basis of family status; employee sought parental leave	$30,000	Post only	Employer pressured employee to dispense with parental leave; Employer spread false rumour that employee resigned; Loss of promotional opportunities, micromanaging employee as result of request for parental leave; Constructive termination		Request for reinstatement denied
Brittain v. 2374855 Ontario Inc. o/a Minden 50s Diner, 2017 HRTO 1688 (CanLII)	Server	Discrimination on basis of disability; failure to accommodate	$15,000	Post only	Discriminatory termination; Employee significantly vulnerable; Mental health issues become publicly known; Employee asked for amount awarded		VC says applicant in best position to assess the injury to dignity, feelings, and self-worth impact
Thompson v. Michele's Italian Ristorante Inc., 2017 HRTO 82 (CanLII)	Sous chef	Discrimination on basis of race	$15,000	Pre- and post	Discriminatory termination; Serious racial comments and stereotyping; Employee evidence of depression and loss of trust		
Ben Saad v. 1544982 Ontario Inc., 2017 HRTO 1 (CanLII)	Undisclosed	Discrimination on basis of disability	$20,000	Pre-and post	Discriminatory termination; Serious financial impact on employee and family; Emotional impact on employee in not being able to bring family to Canada	No medical evidence regarding impact on employee; employed only 7.5 months	

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Anderson v. Law Help Ltd., 2016 HRTO 1683 (CanLII)	Legal Assistant	Discrimination on basis of sex	$22,000	Pre- and post	Harassment; Reprisal regarding pay as a result of employee rejecting sexual advances by manager; Employee particularly vulnerable at this stage in career; Employee evidence regarding mental and physical consequences of mistreatment and employee seeking counselling		
Bobkin v. 2439604 Ontario Inc. o/a Stackhouse Pizza and Sub Co., 2016 HRTO 1677 (CanLII)	Part-time Delivery Driver	Discrimination on basis of ethnic origin	$22,000	Post only	Discriminatory termination; Threat to retaliate if employee filed HRTO complaint as promised	Lack of medical evidence	
Ronquillo v. 2436436 Ontario Inc. o/a Healthplex Medical Services, 2016 HRTO 1640 (CanLII)	Administrator	Discrimination on basis of sex	$10,000	Post-only		No termination, only discriminatory reduction in hours	
Galoglu v. A Wesley Paving Ltd., 2016 HRTO 1525 (CanLII)	Undisclosed	Discrimination on basis of disability	$10,000	Pre-and post	Discriminatory termination (disability, not ethnic origin)		
Prothero v. Ontario (Community Safety and Correctional Services), 2016 HRTO 1481 (CanLII)	IT Professional	Discrimination on basis of disability	$25,000 against employer; $2500 against supervisor	Pre-and post	Harassment; Employee subjected to high level of upset/trauma		Punitive damages declined on jurisdictional grounds
Brillinger v. Edery, 2016 HRTO 1450 (CanLII)	Undisclosed	Discrimination on basis of disability	$10,000	Post only	Employee young, first job; anxiety and medication		
Kerceli v. Massiv Automated Systems, 2016 HRTO 1324 (CanLII)	Saw Operator	Discrimination on basis of sexual orientation	$25,000	Pre- and post	Serious, degrading treatment over 9 months; poisoned work environment	Termination not discriminatory	

APPENDIX E: Comparing General Damages Claims for Injury to Dignity in Employment in Ontario; The Court, the Human Rights Tribunal of Ontario and Arbitrators

Damages Awarded by the Human Rights Tribunal of Ontario

HRTO Decision	Position	Violation	Injury to Dignity, Feelings, and Self-Worth Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Huard v. NCR Leasing Inc. o/a Aaron's Stores, 2016 HRTO 1139 (CanLII)	Manager Trainee	Discrimination on basis of disability	$17,000	Pre- and post	Serrious incident	Single occurrence; Employee evidence regarding impact brief and lacking specificity	
Faghihi v. 2204159 Ontario Inc. c.o.b. The Black Swan, 2016 HRTO 1109 (CanLII)	Sous chef	Discrimination on basis of race	$18,000	Post only	Discriminatory termination/reprisal; Emotional impact upon employee not severe enough to prevent him finding alternative employment soon after		
Maurer v. Pursuit Wellness Inc., 2016 HRTO 999 (CanLII)	Kinesiologist	Discrimination on basis of sex	$10,000	Post-only	Discriminatory termination regarding pregnancy		
Granes v. 2389193 Ontario Inc., 2016 HRTO 821 (CanLII)	Server	Discrimination on basis of sex	$20,000	Pre- and post	Sexual harassment/touching by co-owner; Employee seeks medical attention; Lack of employer action causing employee's resignation		
O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675 (CanLII)	Undisclosed	Discrimination on basis of sex	$150,000/$50,000	Pre- and post	Sexual assault/touching over period of one year; threats to deport; job loss		

Appendix "F"

Damages Awarded by Labour Arbitrators

Arbitration Award	Grievor	Violation	Mental Distress/Aggravated/Bad Faith Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Middlesex London Emergency Medical Services v Ontario Public Service Employees Union, Local 147, 2018 CanLII 1735 (ON LA) (Steinberg)	Primary Care Paramedic	Human Rights Code breach; failure to accommodate	$500 general damages for injury to dignity, feelings and self-respect	No order		No evidence of negative impact; Employer respected employee's request for accommodation	
Ontario Public Service Employees Union (Grievor) v Ontario (Community Safety and Correctional Services), 2017 CanLII 92683 (ON GSB) (Carrier)	Corrections Officer	Failure to maintain a safe workplace	No jurisdiction to award; only WSIB has jurisdiction	NA	NA	NA	
Association of Management, Administrative and Professional Crown Employees of Ontario (Wilson) v Ontario (Natural Resources and Forestry), 2017 CanLII 71789 (ON GSB) (Dissanayake)	Aviation Security & Safety Coordinator	Failure to protect against personal harassment	No jurisdiction to award; only WSIB has jurisdiction	NA	NA	NA	
Hamilton (City) v Canadian Union of Public Employees Local 5167, 2017 CanLII 85727 (ON LA) (Slotnick)	Asphalt Workers	Just cause	None awarded	NA	NA	NA	No element of malice or intent to harm employees, or at least blatant disregard
Yellow Pages Group Co. v Unifor Local 6006, 2017 CanLII 51488 (ON LA) (Luborsky)	Customer Service Representative	Violation of Human Rights Code: age discrimination; breach of collective agreement for denial of voluntary retirement package	$15,000 for injury to dignity, feelings and self-respect for Human Right Code breach	No order	Employer misled the grievor	NA	Collective agreement breach resulting in $102,144 damages award
Toronto District School Board v Local 4400, Canadian Union of Public Employees, 2016 CanLII 85741 (ON LA) (Albertyn)	Caretaker	Violation of the Human Rights Code and collective agreement; failure to accommodate grievor's creed	None awarded	NA	NA	NA	

Damages Awarded by Labour Arbitrators

Arbitration Award	Grievor	Violation	Mental Distress/Aggravated/Bad Faith Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Toronto Community Housing Corporation v Ontario Public Service Employees Union, 2016 CanLII 21169 (ON LA) (Nairn)	Special Constable	Breach of Human Rights Code (sex) and collective agreement's management rights clause	$10,500	Declined	Ongoing harassment over two years; inadequate employer response; poisoned work environment	NA	Arbitrator accepted grievor's evidence regarding personal impact of mistreatment, but noted lack of medical evidence to support award of damages for impaired health
Tank Truck Transport Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 2020-70, 2016 CanLII 66673 (ON LA) (Tremayne)	Driver	Breach of obligation of good faith and fair dealing regarding discharge	$10,000	No order	NA	NA	Mental distress damages should only be awarded in "extraordinary and exceptional circumstances."
Ontario Nurses' Association v North York General Hospital, 2016 CanLII 5033 (ON LA) (Jesin)	Nurse	Breach of Human Rights Code (disability) and collective agreement (denial of benefits)	None awarded	NA	NA	Denial of benefits covered short period of time	
Ontario Public Service Employees Union, Local 548 v Cota Health, 2016 CanLII 81970 (ON LA) (Rodgers)	Female Case Manager	Occupational Health and Safety Act and collective agreement: failure to take every precaution	None awarded	NA	NA	No evidence to link violation to grievor's pain and suffering; also, grievor contributed to the violation	
Compass Minerals Canada Corp v Unifor, Local 16-O, 2016 CanLII 51286 (ON LA) (Surdykowski)	Miner	Collective agreement: interference with privacy and bodily integrity	$200	None awarded	NA	De minimus violation	
Canadian Union of Public Employees, Local 4400 v Toronto District School Board, 2016 CanLII 26730 (ON LA) (Waczyk)	Special Needs Analyst	Human Rights Code and collective agreement: failure to accommodate disability	$5,000	None awarded	Supervisor resisted considering accommodation options		No analysis regarding injury to dignity, feelings and self-respect damages

Damages Awarded by Labour Arbitrators

Arbitration Award	Grievor	Violation	Mental Distress/Aggravated/Bad Faith Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Association of Management, Administrative and Professional Crown Employees of Ontario (Bokhari) v Ontario (Economic Development, Employment and Infrastructure), 2016 CanLII 51073 (ON GSB) (Dissanayake)	Public Servant	Human Rights Code and collective agreement: failure to accommodate	$25,000 for injury to dignity, feelings and self-respect	No order	Sense of victimization magnified by pre-existing health issues	NA	
Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2015 CanLII 104696 (ON LA) (Sheehan)	Custodian	Human Rights Code and collective agreement: failure to accommodate disability	None awarded	NA	NA	Employer acted in good faith; conduct was not egregious or malicious	
Kingston (City) v Canadian Union of Public Employees, Local 109, 2015 CanLII 103813 (ON LA) (Knopf)	Senior Development Technologist	Human Rights Code and collective agreement: failure to accommodate disability	$2,000	None awarded		Employer seriously searched for viable jobs for grievor, but committed a procedural breach to accommodate	
Canadian Union of Public Employees, Local 4400 v Toronto District School, 2015 CanLII 36308 (ON LA) (Waczyk)	Unspecified	Human Rights Code and collective agreement: failure to accommodate grievor's disability	None awarded	NA	NA	NA	
London Catholic District School Board v Ontario English Catholic Teachers Association (Unreported, July 23, 2015) (Brown)	Teacher/guidance counselor	Harassment and reprisal	$20,000 in general damahes. No punitive damages awarded	NA	Grievor's known psychological and physiological vulnerability	Employer did not contest adverse findings by investigator	
Teranet Inc v OPSEU, Local 507, 2014 CanLII 21572 (ON LA) (Shime)	Title Certification Analyst	No violation; discharge upheld	None awarded	NA	NA	NA	"The remedy of reinstatement, in my view, goes a long way to assuage any mental distress suffered by a grievor and reinstatement should be the primary redress for a discharged employee"

Damages Awarded by Labour Arbitrators

Arbitration Award	Grievor	Violation	Mental Distress/Aggravated/Bad Faith Damages	Interest	Aggravating Factors	Mitigating Factors	Notes
Maritime Employers' Association v International Longshoremen's Association, Local 1654, 2013 CanLII 65439 (ON LA) (Hayes)	Longshoreman	Breach of collective agreement regarding racial insult by supervisor	$1,500	NA	NA	NA	Self-evident that vile racial epithet would cause compensable harm
Hamilton (City) v Amalgamated Transit Union, Local 107, 2013 CanLII 62266 (ON LA)(Waddingham)	Transit Inspector	Human Rights Code and collective agreement; sexual harassment	$25,000for injury to dignity, feelings and self-respect	Pre- and Post	Touching by supervisor; exposure to pornographic materials by supervisor	None	