

---

## **COURT AWARDS HUMAN RIGHTS DAMAGES IN WRONGFUL DISMISSAL LAWSUIT**

---

*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

In 2008, the Ontario government amended the *Human Rights Code* (the “Code”) to allow a court to award human rights damages in civil proceedings, such as in actions for wrongful dismissal. The recent decision in *Wilson v Solis Mexican Foods Inc.*<sup>1</sup> (“*Wilson*”) is noteworthy as it is the first time that the Ontario Superior Court of Justice has awarded damages for the infringement of human rights under the *Code*.

The *Wilson* decision highlights the legal risks of terminating an employee because of his or her ongoing health problems. As will be discussed in this Bulletin, employers, including charities and not-for-profits, which terminate an employee on a ground prohibited by the *Code* will face increased risks of liability in the event the termination is challenged in a civil action.

### **B. THE FACTS**

Patricia Wilson, the plaintiff, was a certified general accountant (C.G.A.) and had worked for the defendant, Solis Mexican Foods Inc. (“Solis”), for just over sixteen months before being terminated on May 19, 2011. Ms. Wilson was employed by Solis first as an Assistant Controller and then as a Business Analyst. In November 2010, Ms. Wilson received a rating of “satisfactory or better” for her attendance and performance.

---

\* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters’ Ottawa office and would like to thank Dianne T. Hajdasz, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

<sup>1</sup> *Wilson v Solis Mexican Foods Inc.*, 2013 ONSC 5799, available online at: <http://canlii.ca/t/gOnkm>

In December 2010, Ms. Wilson met with the Human Resource Manager to discuss an ongoing back ailment. In March and April 2011, there were frequent communications between Ms. Wilson, her doctor, and Solis concerning her back pain issues. In early March 2011, Ms. Wilson stopped attending work because of her back and provided a note from her doctor stating that she would be unable to work “until further notice due to medical reasons.”<sup>2</sup> However, at the end of March, she provided an updated doctor’s note that stated she would be able start a gradual return to work, increasing the hours each week. Solis did not accept the proposal to gradually increase her hours and instead required that Ms. Wilson return for full-time hours.

In mid-April, Ms. Wilson’s physician agreed that she could attend work full-time, but she would require accommodations, such as a combination of sitting, standing and walking during the course of the work day. Solis was concerned with these restrictions and reiterated that Ms. Wilson must be able to return to work full-time and to full duties. At the end of April, Ms. Wilson’s doctor altered her note, stating that she not attend work until June 15, 2011. On May 19, 2011, Solis terminated Ms. Wilson, claiming that her employment was no longer required as a result of organizational changes resulting from the sale of the defendant’s New Orleans Pizza division.

Ms. Wilson sued for wrongful dismissal. The action was heard before Justice Grace as a “summary trial”, pursuant to the *Rules of Civil Procedure*. Unusually, at trial neither party called oral evidence, so the action was decided based on affidavit evidence. As Justice Grace noted, the action was required to be decided with a limited evidentiary record.<sup>3</sup>

## C. ANALYSIS

Solis conceded that Ms. Wilson had not received adequate pay in lieu of notice at termination. Justice Grace ruled that the appropriate pay in lieu of notice period was three months. In deciding upon the three month notice period, Justice Grace considered that Ms. Wilson was 54 years old, had worked for Solis for approximately 16.5 months, worked in a middle management position with modest responsibility, and had medical issues which had impacted her ability to obtain new employment.

---

<sup>2</sup> *Ibid* at para 11.

<sup>3</sup> *Ibid* at para 27.

Importantly, this lawsuit also included a human rights claim, as Ms. Wilson alleged that the termination was directly related to her back problems. The court agreed, and assessed the human rights damages at \$20,000.00, for the reasons discussed below.

Section 5 of the *Code* states that every person has the “right to equal treatment with respect to employment without discrimination because of...disability.”<sup>4</sup> Solis argued that it did not terminate Ms. Wilson because of her back ailment, but instead terminated her because of the sale of the New Orleans Pizza division. Justice Grace explained that unlawful discrimination may be found even if the disability is only one factor leading to the termination and stated “a decision to terminate an employee based on whole or in part – on the fact that employee has a disability is discriminatory and contrary to the *Code*.”<sup>5</sup> After examining the evidence, Justice Grace concluded that Ms. Wilson’s ongoing back issue was a significant factor in Solis’ decision to terminate her.

The court noted that it was only after Ms. Wilson raised the issue of her sore back that Solis’ management met and concluded that she was no longer suitable for her position. Justice Grace also pointed out that although Solis claimed that Ms. Wilson was terminated because of the sale of the New Orleans Pizza division, why then did Solis not mention that transaction in any communications with Ms. Wilson prior to the termination, since it is unlikely that the sale of the division was unexpected and a last minute decision. Justice Grace determined that Solis “had the excuse it needed to rid itself of the plaintiff once and for all”<sup>6</sup> and the decision to terminate followed her complaints about her back. The court concluded that Ms. Wilson had in fact been “terminated in whole or significant part because of her disability.”<sup>7</sup>

The court then addressed the amount of compensation for the discriminatory conduct, referencing section 46.1 of the *Code*, which allows a court to order the infringed party “to pay monetary compensation to the party whose right was infringed...including compensation for injury to dignity, feelings and self-respect.”<sup>8</sup> Ms. Wilson expressed that she had felt a loss of her dignity and self-worth when she received the termination

---

<sup>4</sup> *Human Rights Code*, RSO 1990, c H-19, s 5(1).

<sup>5</sup> *Supra* note 1 at para 56.

<sup>6</sup> *Ibid* at para 74.

<sup>7</sup> *Ibid* at para 80.

<sup>8</sup> *Supra* note 4 at s 46.1(1).

letter. Justice Grace cited the Divisional Court's conclusion in *ADGA Group Consultants Inc v Lane*,<sup>9</sup> which stated that the wording of the *Code* is broad to permit "compensation for the loss of the right to be free from discrimination and the experience of victimization."<sup>10</sup> The court ruled Ms. Wilson had experienced this type of loss as a result of Solis' discriminatory conduct, and awarded Ms. Wilson \$20,000 under section 46.1(1)1 of the *Code*.

## D. CONCLUSION

Employers, including charities and not-for-profits, need to be aware of their obligations as employers pursuant to the *Code*. While this decision focused on the ground of disability, the *Code* contains numerous other grounds upon which employers may not discriminate. These other prohibited grounds are: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status and family status.<sup>11</sup> The term "disability" is defined broadly in the *Code* to include not only physical injuries, limitations or illnesses, but also mental illnesses.<sup>12</sup> Further, employers need to be very careful in any decision to terminate an employee who may be suffering from an illness or disability. Employers have a duty under the *Code* to reasonably accommodate an employee with an illness or disability to the point of "undue hardship."<sup>13</sup> As employees gain an awareness of their rights under the *Code*, more of these types of claims will be advanced as part of wrongful dismissal lawsuits.

---

<sup>9</sup> *ADGA Group Consultants Inc v Lane* (2008), 91 OR (3d) 649 (Div Ct)

<sup>10</sup> *Supra* note 1 at para 86.

<sup>11</sup> *Supra* note 4 at s 5(1).

<sup>12</sup> *Ibid* at s 10(1).

<sup>13</sup> *Ibid* at s 17(2).