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ONTARIO PROPOSES FAMILY MEDICAL LEAVE AND BEWARE HUMAN RIGHTS CLAIMS LARGER THAN \$10,000

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PROVINCIAL GOVERNMENT PROPOSES FAMILY MEDICAL LEAVE

On April 13, 2004, the provincial government announced proposed amendments to the *Employment Standards Act 2000*, that, if passed, would permit employees up to eight-weeks of job-protected, unpaid time off work to take care of a gravely ill family member who is at risk of dying within 26 weeks. The leave would be referred to as a "family medical leave".

To be eligible, an employee must, if requested, provide a certificate from a qualified medical practitioner stating that the family member has a serious medical condition with a significant risk of death within 26 weeks from the day the certificate is issued.

An employee may only take a leave in periods of entire weeks; no partial week leaves are permitted. The leave commences on the date the certificate is issued and ends on either the last day of the week when the family member dies, or when the 26-week period has expired, whichever occurs earlier.

For the purposes of the family medical leave, a family member is defined as:

- The employee's spouse;
- A parent, step-parent, or foster parent of the employee;
- A child, step-child or foster child of the employee or the employee's spouse; and
- Any other person prescribed by the *Employment Standards Act 2000*.

Note that for the purposes of the family medical leave provision, "spouse" means two persons who are married to one another or live together in a conjugal relationship outside marriage.

An employee's entitlement to family medical leave is in addition to any entitlement to emergency leave. A ten-day emergency medical leave is available to employees whose employer regularly employs 50 or more employees, and who requires a leave for personal illness, injury, or medical reasons or to attend to a family member for the same reasons.

The proposed provincial amendment virtually mirrors the existing federal compassionate care benefits for employees covered by the *Canada Labour Code*. In our December 18, 2003 newsletter (accessible at our website www.millerthomson.ca) we reviewed the introduction of compassionate leave by the federal government.

We will keep you informed of the proposed amendment and its anticipated approval by the provincial legislature.

EMPLOYERS BEWARE: EMPLOYEES CAN GET MORE THAN \$10,000 FROM THE HUMAN RIGHTS COMMISSION

There is a common misperception that in Ontario, the Human Rights Commission cannot award more than \$10,000 to a complainant. While The *Human Rights Code* refers to a \$10,000 limit, that is only a limit on the damages for mental anguish. General damages for each violation are theoretically unlimited, although the Commission has kept awards relatively low.

According to the case law that has emerged, a complainant is entitled to two distinct types of damages for non-pecuniary losses:

1. damages for mental anguish, and
2. general damages arising out of the loss of dignity and self-respect resulting from a breach of the right to be free from discrimination and harassment.

Damages for mental anguish are capped by the *Code* at \$10,000. However, the Commission can and does award \$10,000 *for each violation*. As a result, the total value of a decision can be several times that amount. Furthermore, the *Code* does not cap the amount of damages that can be awarded as general damages, and awards of \$15,000 and \$25,000 have been made in recent years.

As a result, there are two ways in which the Commission can make an award over \$10,000:

1. by finding multiple violations of the *Code*, and awarding mental anguish damages up to \$10,000 for each; and
2. by awarding general damages, which are not capped, for each violation.

In the recent case of *L.L.G. v. Sport Medic Inc.*, two complainants brought forward allegations of sexual harassment. The Board of Inquiry awarded one of the complainants \$10,000 in general damages, plus a further \$15,000 for mental anguish. Combined with her loss of income of \$70, the total value of the award was \$25,070.

What is particularly interesting is the passage, in the reasons of D.F. O'Leary, in which he comments on the fact that he would have interpreted the *Code*. He would have thought that it provided a cumulative maximum of \$10,000 for all forms of damages. However, in light of the decision of the Divisional Court of Ontario in *The Shelter Corporation et al. v. Ontario Human Rights Commission*, he concludes that he can make a larger award, and chooses to do so in the case before him.

The *Shelter Corporation* case referred to by Mr. O'Leary rejected the previous line of cases, which accepted a \$10,000 cap on general damages for Human Rights violations. Justice O'Driscoll held that general damages were to compensate individuals for the loss of the right to free from discrimination and for the victimization they have suffered. He found that there should be no arbitrary maximum placed on such damages.

Other cases where damages greater than \$10,000 have been awarded include *Naraine v. Ford Motor Company of Canada* and *Arias v. Desai*. In each of those cases, the complainant was awarded \$30,000 for combined general damages and mental anguish. In *Curling v. Torimiro*, a Board of Inquiry awarded the victim a total of \$41,000. This amount included an award for mental anguish, as well as separate awards of general damages for each violation of the claimant's rights. To my knowledge, this is the largest award to date in a human rights claim, although it is closely

followed by *Ketola v. Value Propane Inc.*, in which \$40,000 was awarded for a violation of the *Code* and a subsequent reprisal by the employer for the bringing of a claim.

Although human rights awards are still relatively small compared to damages in civil claims, violators should be aware that they are no longer facing a penalty of no more than \$10,000 if they lose. Rather, their exposure could be two, three or four times that amount. Presumably, future cases will involve even larger awards.

ABOUT THE AUTHORS :

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Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com or contact:

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