SEPTEMBER 2010

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BARRISTERS & SOLICITORS LLP

Employment Notes

Labour and Employment Group

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"In this decision, the court has further clarified the duties that employers have towards their employees."

COURT OF APPEAL CLARIFIES THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL SUFFERING

Elizabeth Forster

At our last client seminar, we told you of the decision of the Ontario Superior Court of Justice in *Piresferreira v. Ayotte*. This case involved a claim by Ms. Piresferreira, an Account Manager of Bell Mobility. Piresferreira had always received excellent performance reviews until 2004, when her sales declined through no fault of her own. Piresferreira's supervisor, Richard Ayotte, held Piresferreira responsible for the declining sales and he asked her to set up some client meetings. Piresferreira sent emails to the clients in an attempt to set up the meetings, but the clients did not respond to her invitation. When she advised Ayotte of this he became extremely angry and accused her of not doing her job. She attempted to show him the invitations on her Blackberry. However, Ayotte pushed her away, telling her to get away from him. The push was strong enough that Piresferreira was pushed back approximately a foot into a filing cabinet.

After the incident, Ayotte placed Piresferreira on a performance improvement plan. Piresferreira suffered extreme upset over this behaviour. She refused to sign the performance improvement plan, and lodged a formal complaint against Ayotte. Following an investigation, Bell Mobility wrote a letter to Piresferreira advising that Ayotte confirmed his inappropriate behaviour, and that they were scheduling a meeting to permit Ayotte to apologize to her, providing him with a written warning, and requiring him to attend courses on effective communication at work. However, Bell Mobility also set up an appointment to review her performance improvement plan with her. Piresferreira was so upset that she never returned to work. She was diagnosed with severe depression and anxiety.

Piresferreira sued Ayotte and Bell Mobility for wrongful dismissal, assault, intentional and negligent infliction of emotional distress, and mental suffering. Her partner sued for damages under the *Family Law Act* for loss of companionship.

Ayotte was found liable for assault and intentional infliction of emotional distress. Bell Mobility was found vicariously liable for Ayotte's misconduct, and directly liable for negligent infliction of emotional suffering.

At trial Piresferreira was awarded a total of $500,955.00 as follows:

(i) General damages for assault, battery, intentional and negligent infliction of emotional

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"The decision has no doubt thwarted what might otherwise have been a large influx of new cases for damages from claims for any distress that an employee might suffer during the course of his or her employment."

Elizabeth Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Elizabeth's work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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distress, mental suffering and psycho-traumatic disability - $45,000.00;

(ii) Loss of past and future income - $450,832.00;

(iii) Special Damages - $5,123.00;

In addition, she was awarded costs of $225,000.00; and her partner was awarded $15,000.00 for loss of guidance, care and companionship.

On May 28, 2010, the Court of Appeal allowed the appeal in part.

The Court of Appeal found that the trial judge erred in her finding that the tort of negligent infliction of emotional suffering was available against the employer, and in her finding that the tort of intentional infliction of mental suffering by Ayotte had been made out.

The Court of Appeal found that the trial judge had based her finding of negligent infliction of mental suffering upon Ayotte's breach of Bell Mobility's Code of Business Conduct. The court held that a breach of this policy was a breach of a contractual duty, but it could not be the basis for the common law tort of negligent infliction of mental suffering. The court recognized that an employer had a duty to act fairly and in good faith during the termination process, but held that an employer had no general duty to take care to shield an employee during the "entire course of his or her employment from acts in the workplace that might cause mental suffering". Piresferreira's claim for damages for mental distress was better determined by way of damages for mental distress in the context of the termination.

The Court of Appeal also rejected the claim for damages for intentional infliction of mental suffering by Ayotte, finding that one of the elements of the tort, namely, that the conduct be calculated to produce harm was not established. In short, the court found that there was no evidence to support any inference that Ayotte intended or knew that Piresferreira's depression would result from his behaviour.

Notwithstanding the striking of the award of damages for negligent and intentional infliction of mental distress, the court awarded damages for Ayotte's assault and battery in the amount of $15,000.00, and for mental distress in the amount of $45,000.00.

Significance of This Decision

In this decision, the court has further clarified the duties that employers have towards their employees. The Court of Appeal refused to recognize any overall duty of good faith toward employees, but rather, confirmed that there was a limited duty to act in good faith at the time of termination. The Court expressed the view that any expansion of this duty is best left to the Legislature.

The decision has no doubt thwarted what might otherwise have been a large influx of new cases for damages from claims for any distress that an employee might suffer during the course of his or her employment. For the most part, employees will still have to base their claims on contract law.

An application for leave to appeal this decision to the Supreme Court of Canada has been filed. We will advise you of the outcome. ■

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"The arbitrator found that the employer, Greater Toroto Airport Authority... failed to take reasonable steps to seek more in-depth information about the employee's medical condition or consider past seniority and employment record before discharge."

John-Edward Hyde provides legal services to clients in both provincially and federally regulated industries. He advises management on all aspects of employment and labour law matters including representation before administrative tribunals, collective agreement negotiation, arbitrations and human rights.

John also assists clients in providing strategic legal and human resources advice on labour and employment matters arising out of complex mergers, acquisitions and the sale of businesses. John's background is in operations and human resources management. This experience provides him with the unique opportunity to assist clients in the formulation of practical legal solutions, specifically tailored to their needs.

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YOUR BROTHER'S KEEPER... AND MORE
Arbitrator awards unionized employee $500,000 + for dismissal

John-Edward C. Hyde

On February 12, 2010, arbitrator Owen Shime rendered a surprise decision in *Greater Toronto Airports Authority Public Service Alliance Canada Local 0004,* in which he awarded an employee in excess of $500,000 in damages. Why? The arbitrator found that the employer, Greater Toronto Airport Authority ("GTAA") came to improper and erroneous conclusions in reviewing video evidence of the employee outside of work hours and failed to take reasonable steps to seek more in-depth information about the employee's medical condition or consider past seniority and employment record before discharge.

Facts

The grievor was a twenty-three year employee, with a clean employment record. On February 19, 2004, she underwent arthroscopic surgery as a result of a knee injury sustained in the workplace. A few days later, the grievor's surgeon wrote a note authorizing her to be off work for four weeks for recuperation. It was observed by her surgeon and physiotherapist that such injuries generally required four to six weeks of recuperation time. During the last week of February, the GTAA had placed another employee, Mr. Townshend, who was also off work due to an alleged sick leave, under video surveillance. The company testified that there had been problems with employees defrauding the sick leave plan in the past, and that it had a Code of Conduct which placed a premium on honesty. During video surveillance of Mr. Townshend on February 27, 2004, the grievor was also seen walking around normally, standing for more than ten minutes and not limping. Prior to this time, the GTAA did not suspect the grievor of sick leave abuse nor did it have any knowledge that she was involved in a relationship with Mr. Townshend. Further surveillance followed on March 9 and 10, 2004.

The arbitrator concluded that the GTAA had come to the preconceived decision that the grievor was guilty by association, as a result of her relationship with Mr. Townshend.

The subsequent surveillance of the grievor showed her attending physiotherapy sessions, stopping to perform errands on her way home, standing on her toes to reach items in a store, driving to the airport and, for the most part, walking normally. Experts called to testify by the GTAA and the union did not agree with each other's testimony as to whether the grievor was, or was not, having difficulty walking. Based upon the video surveillance, the GTAA concluded that the grievor could return to work. The GTAA requested that the grievor provide further information from her doctor as to why she required four weeks of recuperation, and whether she could return one week earlier. The grievor testified that she feared that her job was in jeopardy and in fact believed that the employer (and co-workers) had been treating her differently since January, although there was no evidence that the employer had any reason to question the authenticity of her injury claim prior to the February 27, 2004 surveillance of Mr. Townshend.

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"The arbitrator found that... the GTAA's 'misconceived' notion of the grievor's guilt [was] formulated without an in-depth assessment of medical evidence."

Given the grievor's alleged fears, she asked her doctor to authorize her return to work and on March 16th he provided her a note that indicated that she could return with restrictions. The doctor called the GTAA to discuss his conclusion, but the GTAA did not return his call. The grievor returned to work on March 17th, however no effort was made to provide modified duties to the grievor.

The GTAA believed that the doctor's notes were untrustworthy, given the surveillance evidence collected, and it was also not prepared to rely upon a note from the grievor's physiotherapist. The collective agreement provided that the employer could seek a "statement from the employee's attending physician (or specialist if required by the employer) verifying the medical diagnoses, including the need for re-occurring periods of absences…" where there was a legal duty on the employer to accommodate an employee due to illness, injury or disability. The collective agreement also provided that a mere signed statement by an employee as to the illness or injury would not be acceptable if the employer had reasonable cause to suspect abuse of the sick leave policy, or if the absence was for an extended period. The arbitrator found that the employer's refusal of the physiotherapist's note was also inappropriate and that such refusal was borne out of the GTAA's "misconceived" notion of the grievor's guilt, formulated without an in-depth assessment of medical evidence.

A few days later, the grievor was asked to attend an investigative meeting along with her union representative, where the GTAA put to her their findings from the video surveillance. In her notes, the union representative described this meeting as an "investigative meeting" and in evidence stated that it was "tense", not like any other meeting she had been to before. On the other hand, the arbitrator held that the meeting was an "interrogation" and that the employer had a preconceived notion of the grievor's guilt without consideration of medical evidence, her twenty-three years of past service or her overall work record.

On August 24, 2004, the GTAA terminated the grievor's employment by written letter, claiming that she had been dishonest in reporting her absence, and that she had not responded truthfully at the investigative meeting. Throughout the hearing the evidence of the grievor and experts testifying on her behalf established that she was suffering from post-traumatic stress disorder. In the past the grievor had been physically and sexually abused by her estranged husband and the termination itself led to a "betrayal trauma". As the grievor's psychotherapist testified "the way in which the grievor had been treated by the GTAA was to her a tremendous betrayal which brought about all the symptoms of her past and it was damaging to her".

The arbitrator found,

> as a result of the termination by the GTAA, the grievor suffered from anxiety and depression…she felt betrayed by the GTAA and its managers, … after so many years of loyal and diligent service in the employ of the GTAA, its harsh and unfair treatment traumatized and broke her.

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"The arbitrator also found that the GTAA's breach of trust gave rise to damages for future economic loss."

The Arbitrator's Remedy

Relying upon the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro,* the arbitrator found that he had jurisdiction and discretion to award appropriate remedies for the employer's wrongdoing. He also found that because the *Canada Labour Code* (the GTAA is federally regulated for labour and employment purposes in this case) requires that employers must bargain in "good faith", such duty extended to an implied obligation on the employer to administer the collective agreement in good faith. The arbitrator concluded that the GTAA had acted in bad faith when it terminated the grievor because:

1. It relied on her association with Townshend [note: evidence in this regard was limited to the finding that the employer had a preconceived notion of guilt at the investigative meeting and grievor's immediate supervisor had referred to his discussion with the grievor in an email entitled "re: Townshend investigation"];
2. It failed to verify its assumptions regarding the grievor's medical condition, its representative abrogating to the position of the medical expert;
3. It failed to consider the grievor's lengthy seniority and loyal service, the grievor's apology, and whether a lesser penalty would have been appropriate under the circumstances.

The arbitrator also found that the GTAA's breach of trust gave rise to damages for future economic loss. And, he noted that under the Supreme Court of Canada's 1989 decision of *Vorvis v. Insurance Corporation of British Columbia*, a board of arbitration had broad remedial authority to fashion a remedy "which involves consideration of the modern labour law regime".

The arbitrator considered the remedy of re-instatement. He determined that because of the GTAA's breach of its obligation of trust, and the resultant impact upon the grievor, re-instatement was not appropriate. Rather, he granted the grievor compensation for future economic loss until the employee's expected retirement at the age of 55, when she would have been eligible for a full pension. He awarded her damages to compensate her for the $30,000 drop in earning potential (and lost pension) and additional damages for the loss of earning over the six years it took to hear the case.

Damages for Mental Distress and Punitive Damages

In addition to the other heads of damages, the arbitrator also took the further step of awarding the grievor $50,000 for mental distress based upon the employer's breach of the collective agreement. In his view, the object of such collective agreement is to provide "a psychological benefit and mental security". Accordingly, because the evidence disclosed that approximately three years prior to the dismissal, the grievor was subject to abuse by her husband at which time the employer took steps to keep the husband away from the employer's property and showed compassion by allowing the grievor time off, the employer knew or ought to have known, that damages for mental distress were foreseeable.

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"Punitive damage awards are a relatively new remedy in employment law."

David Greenwood has represented clients in files involving wrongful dismissals, constructive dismissals, human rights complaints, pension issues, disability claims, allegations of employee fraud, theft of confidential and proprietary information, breach of fiduciary duties and misappropriation of corporate opportunities. Additionally, David is frequently consulted in respect of reorganizations and mass terminations and is routinely retained to draft or to negotiate employment agreements, employee policy manuals and other employment related contracts.

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Additionally, given that the GTAA's treatment of the grievor according to the arbitrator was "a marked departure from the ordinary standards of decent behaviour", she was awarded punitive damages of $50,000.

In the final analysis, it would appear that this case has set new standards for employers, not only with respect to the termination of employment, but with respect to how employers come to the decision to terminate, assess an appropriate penalty and treat the employee at the time of termination.

The GTAA is seeking judicial review of the arbitrator's decision before the courts. The final outcome is anyone's guess. However, as the standard of a court's review of an arbitrator's decision is based upon the threshold of "reasonableness," arbitration decisions are difficult to overturn.

Indeed, if this is the direction in which the law of wrongful discharge has now moved, employers must be extremely careful in their decisions to terminate and in reviewing the bases for these decisions. In the meantime, employers are well advised to ensure they have properly and fully reviewed the evidence prior to discipline, particularly in the case of discipline for alleged abuse of sick leave as they have been elevated to the position of "Your Brother's Keeper… and More". ■

WHO'S AFRAID OF PUNITIVE DAMAGES?

David Greenwood

Punitive damage awards in the U.S. can make even those in Bill Gates' tax bracket lay awake at night: $3 million for a spilled cup of McDonalds' coffee; $5 billion for the Exxon Valdez oil spill and $250 million for employment discrimination. But should employers in Canada worry about punitive damage claims in wrongful dismissal actions?

Punitive damage awards are a relatively new remedy in employment law. Historically, an employee was only entitled to damages arising from the employer's failure to provide proper notice of the termination of the employee's employment. This was cemented by the decision in *Addis v. Gramaphone Co.*, [1909] A.C. 488 (H.L.) where the House of Lords held that no damages were available to an employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This remained the law in Canada for over 70 years.

Starting in the early 1980's, courts in Canada began to recognize that other heads of damages may be appropriate in wrongful dismissal actions. Thus, the grounds for recovery began to expand: aggravated damages; damages for mental distress; punitive damages and consequential damages all became accepted forms of damages.

Punitive damages, however, are the form of damages employers fear the most, largely

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"...should employers worry about punitive damages in wrongful dismissal cases? Based on how rare punitive awards are, the answer is: not really."

because of the media attention they receive. However, for the most part that fear is not warranted. Punitive damage awards remain very rare in Canadian employment cases. This was highlighted by a decision of the B.C. Court of Appeal in January of this year. In *Marchen v. Dams Ford Lincoln Sales Ltd.* (2010) B.C.C.A 29 the B.C. Court of Appeal reversed the trial judge's $100,000 award of punitive damages. In particular, the trial judge found that the employer had attempted to cover up the real reason for the termination of the employee's employment. The trial judge did not believe that the employee was let go because of "lack of work" as claimed by the employer. Instead, he found that the employer had misled the court and that the real reason for the termination was because the employer, without any justification, suspected the employee may be involved in criminal activity.

Although the B.C. Court of Appeal agreed that there had been a cover up, it found that the employer's conduct was not unfair, in bad faith, misleading or unduly insensitive at the time of termination. The B.C. Court of Appeal followed the existing case law which held that punitive damages are only appropriate to express approbation and to punish in circumstances where the award of damages is insufficient. In essence the B.C. Court of Appeal found that the employer's misguided and unsupported belief of impropriety was not sufficient to justify an award of punitive damages.[1]

So, should employers worry about punitive damages in wrongful dismissal cases? Based on how rare punitive awards are, the answer is: not really. However, if an employer crosses the proverbial "line", it can be held accountable for its conduct.

There are a number of ways that employers can minimize the risk of being on the wrong side of a punitive damage award. These include:

- Be fair and truthful when dealing with employees;
- Take reasonable measures to investigate allegations of misconduct;
- Be careful when communicating information relating to employees, such as the reason for termination;
- Consider each employee's circumstances when making dismissal decisions. Be careful that an employee is not being selected for an unfair or unlawful reason or that a particular group is over-represented;
- Don't do anything that will have an unfair impact on the employee's future or ability to re-employ; and
- Consider whether there are special circumstances that may result in additional forms of damages being awarded to the employee.

These considerations may be most relevant when dismissal decisions are being made, but employers must be sure that regard is given to these factors any time an employee issue arises. Punitive damages can arise from workplace conduct as well as dismissals.

As with all aspects of the employer-employee relationship, employers should be vigilant and fair in their dealings with employees. If an employer is concerned that its conduct or the

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conduct of people for which it is responsible (such as other employees) may cross the line, it should contact its legal counsel. That call may be much less expensive than a trial or award of punitive damages. ■

[1] And despite the finding of the B.C. Court of Appeal in *Marchen*, there are cases in which punitive damages have been awarded in other cases where employers persisted with misguided and/or unsupported allegations of wrongdoing.

Labour/Employment Law Seminar

On **Thursday November 18, 2010** (9:00am to 12:00pm), Blaney McMurtry will host its annual Labour/Employment Law Seminar.

Lawyers from Blaney McMurtry's Labour and Employment Group will discuss a wide range of topics covering both unionized and non-unionized work-places. Question and answer sessions will follow the presentations and there will be an opportunity to speak directly with our lawyers during the informal light lunch that will follow the seminar. This is a great opportunity to hear leading experts speak about current issues in workplace law.

If you are interested in attending, please contact Chris Jones at (416) 593-1221 ext.3030 or cjones@blaney.com by November 4, 2010 as space is limited.

Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

Blaney McMurtry welcomes our newest Associate

Melanie I. Francis

Melanie I. Francis, BA (Hons.), L.L.B., has joined the firm's Labour and Employment Group where she will be practicing all aspects of Labour and Employment Law.

Melanie graduated from the English Common Law program at the University of Ottawa and was called to the Bar in 2010. While attending the University of Ottawa she worked as a Student Caseworker at the University's Community Legal Clinic and as a Teaching Assistant to first year law students. She also had the opportunity to spend a semester studying abroad in the United Kingdom.

Prior to entering the legal field Melanie spent time working with the Government of Ontario, first as a Legislative Intern and then as a Press Assistant to a Minister. In addition to her Labour and Employment work, Melanie will also be practicing in the unique field of Election Law.

Melanie earned her Honours degree in Political Science and Psychology from Wilfrid Laurier University where she was also a varsity athlete. Sports have always been an important part of her life and when not in the office she can be found on the soccer field or cheering on her beloved Toronto Maple Leafs.

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