

July 30, 2010

Labour and Employment Law Bulletin

NEGLIGENT INFLICTION OF MENTAL SUFFERING IN THE EMPLOYMENT CONTEXT

This summary provides an update of a case reviewed at our recent client seminar. The Ontario Court of Appeal has overturned a lower court's decision awarding damages for the negligent infliction of mental suffering in employment. Contrary to the trial level judgment, the court found that an employer does not have a duty to protect employees throughout the course of their employment from actions which might cause them mental distress.

The facts of this case were that the employee, Marta Piresferreira, had been an account manager for Bell Mobility Inc. for about 10 years. She had an excellent performance record up to the most recent year when her results had declined. Her supervisor was described as being loud, aggressive and verbally abusive. He had ongoing disagreements with the employee about her performance.

On one particular occasion, the supervisor and the employee had an argument about the employee's supposed failure to arrange a customer meeting. The supervisor pushed the employee about one foot into a filing cabinet. After the incident, the supervisor proceeded with putting in place performance improvement measures against the employee. The employee complained to human resources about the supervisor's conduct.

Although the employee briefly returned to work, the employee soon went on long term sick leave. Her condition deteriorated and she was diagnosed with post traumatic stress syndrome and a major depressive condition. She was unable to seek new employment and commenced legal action against her former employer and the supervisor.

The trial judge awarded the employee total damages of more than \$500,000 finding Bell Mobility and the supervisor jointly and severally liable for the torts of battery and for negligent and intentional infliction of mental suffering. Given these findings, no additional damages were awarded for constructive dismissal. Costs were awarded against the defendants in total of \$225,000.

Contrary to the trial level decision, the Court of Appeal found that the tort of negligent infliction of mental suffering was not available in this case. The court found that there were policy reasons to foreclose against recognizing a general duty of an employer to shield an employee during the entire course of her employment from acts in the workplace which might cause mental suffering. The court found that in the dismissal context, the law already provided a remedy in respect of the loss complained of and recognition of the tort of negligent infliction of mental suffering was not necessary.

In regards to the tort of intentional infliction of mental suffering, the court found that although this tort is available in the employment context, the claim was not made out on the evidence and the trial judge's findings were overturned.

In the result, the court allowed the appeal in part and found that the employee was entitled to total damages of \$147,855 comprised of: \$15,000 for the battery, that is, the push by the supervisor; \$87,855 for the constructive dismissal; and \$45,000 for mental suffering due to the manner of the dismissal.

Unlike Ontario, the current law in British Columbia allows for the tort of negligent infliction of mental suffering in employment. In 2006, the B.C. Court of Appeal upheld the judgment of the trial judge in *Sulz v. Attorney General et al*, 2006 BCSC 99. In that case, an RCMP constable complained of harassment by her commanding officer and was awarded damages of \$950,000 for negligent infliction of mental suffering. The Provincial Crown was held to be vicariously liable for the damages. Although the applicability of the tort of negligent infliction of mental suffering in the employment context was not one of the grounds of the appeal, the appeal court did not question the lower court's findings in this regard.



Therefore, the law in B.C. and Ontario appears to differ on whether an employer has a general duty to protect employees from acts which might cause mental suffering during the course of employment. That difference may be resolved if the Supreme Court of Canada grants leave to appeal the decision of the Ontario Court of Appeal, which we understand is being sought by counsel for Ms. Piresferreira.

Piresferreira v. Ayotte, 2010 ONCA 384

If you have any questions regarding this Law Bulletin, please contact a member of the Labour and Employment Group.

Key Contacts

- **Patricia Gallivan, Q.C.**
P: 604.631.6718
E: pgallivan@lawsonlundell.com
- **Rob Sider**
P: 604.631.6722
E: rsider@lawsonlundell.com
- **Paul Smith**
P: 867.669.5532
E: psmith@lawsonlundell.com

Team Members

Name	Phone	Email
Deborah Cushing	604.631.9282	dcushing@lawsonlundell.com
Patricia Gallivan, Q.C.	604.631.6718	pgallivan@lawsonlundell.com
Sarah Kay	867.669.5523	skay@lawsonlundell.com
(M.J.) Peggy O'Brien	604.631.9201	pobrien@lawsonlundell.com
Walter Rilkoﬀ	604.631.6719	wrilkoﬀ@lawsonlundell.com
Rob Sider	604.631.6722	rsider@lawsonlundell.com
Nicole Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com
Paul Smith	867.669.5532	psmith@lawsonlundell.com

©2010, Lawson Lundell LLP. All rights reserved. The information provided in this publication is for general information purposes only and should not be relied on as legal advice or opinion. For more information, please phone 604.685.3456 and ask to speak with a member of our Labour and Employment group. To be removed from this mailing list, please send an e-mail to genmail@lawsonlundell.com or phone the Marketing Department at 604.685.3456.