BIRD RICHARD
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In this Issue

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Constructive Dismissal for Hiring a New Employee

The Court of Appeal of Ontario has recently affirmed the *Colistro v. Tbaytel* decision from the Superior Court. This case involved allegations by an employee who commenced an action for constructive dismissal, intentional infliction of mental suffering, and wrongful dismissal.

Colistro worked for Tbaytel, and its predecessor, the City of Thunder Bay, for nearly 20 years. Tbaytel announced the hiring of a new employee as the Vice-President of Business Consumer Markets. Before Tbaytel had taken over from the City of Thunder Bay, the new employee was Colistro's supervisor at the City of Thunder Bay. Before the new employee commenced his employment with Tbaytel, Colistro advised Tbaytel that she had been sexually harassed approximately 11 years earlier in her former employment by the potential new hire. Tbaytel made inquiries, and it was informed by the previous employer that the individual had not been interviewed regarding the allegations, and his employment was not terminated for cause, but the complaints against him were part of the reason of termination.

Tbaytel decided to hire the employee despite the concerns being expressed by Colistro. Tbaytel offered to provide accommodations to Colistro by transferring her to an equivalent position in a different building but this offer was refused. Colistro would not accept anything other than Tbaytel not hiring the new employee. Colistro went off work on stress leave and never returned to work. She was diagnosed with post-traumatic stress disorder and depression. She commenced a claim seeking damages for constructive dismissal and intentional infliction of mental suffering.

Constructive Dismissal

Constructive dismissal arises when an employer's conduct demonstrates an intention to no longer be bound by the employment contract. A constructive dismissal can arise

either (a) when a specific term of employment (e.g. salary, hours of work) is unilaterally and fundamentally altered or (b) where the employer's treatment of the employee makes continued employment intolerable, which typically arises when there is a failure to address harassment, bullying or violence in the workplace. In this case, the Court determined that continued employment was intolerable because of the employer's decision to hire the new employee.

The trial judge found that Tbaytel's actions made continued employment intolerable such that the decision to hire the employee amounted to constructive dismissal. The trial judge found that Tbaytel's decision re-victimized Colistro and minimized the past conduct. The Court found that the employer's decision to move forward with the hiring was demeaning and dismissive, and found that the employer decided to proceed with the hiring of an individual "*whom they knew had previously sexually assaulted one of their apparently valuable employees, who had an unblemished 20-year history with the company*" and who was vehemently opposed to her "*abuser*" being hired. She was awarded 12 months' notice and $100,000 in compensatory damages arising from the manner of dismissal.

The employer appealed the decision. It argued that a single act by the employer cannot amount to constructive dismissal; namely, the communication with the employee that they had elected to proceed forward with the hiring. The employer argued that the subjective feelings of the employee, rather than an objective standard of reasonableness, could also not support the finding of constructive dismissal. The Court of Appeal rejected the appeal and concluded that a single act can determine a finding of constructive dismissal and that a single act can render continued employment intolerable. The Court of Appeal found that the trial judge's conclusions on constructive dismissal were proper. The Court of Appeal also noted the objective reasonable bystander test (what would a reasonable person do in the same circumstances?) was properly applied by the trial judge.

Intentional Infliction of Mental Suffering

The trial judge summarized the three elements of the tort of intentional infliction of mental suffering being the following: (a) flagrant or outrageous conduct; (b) calculated to produce harm; and (c) results in a visible and provable illness. The trial judge found that the first and third elements were established, the second element of the test was not. In order for the second part of the test to be made out, a plaintiff has to show that the defendant "intended to produce the kind of harm suffered or have known that it was almost certain to occur". There was no allegation that the employer's conduct was calculated to produce harm or that the harm (PTSD, or depression) was substantially certain to follow from hiring this employee. The Court of Appeal agreed that the damages claimed by the employee were not certain to follow from the decision to hire this employee.

This case indicates that previous history between employees may be a factor to consider when hiring a new employee. A question arises about how far an employer is required to investigate past allegations of harassment before hiring an individual. In this case, a factor was the existing relationship between the predecessor employer and the current employer. The current employer was in a unique position to make inquiries about what transpired 11 years ago, including having access to documents related to that harassment complaint. This may not be possible in the typical hiring scenario but the case does stand as a caution to employers to take complaints from existing employees about new hires seriously and to properly consider past allegations of harassment about individuals before making hiring decisions.

Employer Liable for Employees Assaulting Each Other

In a recent 2019 decision, *Bassanese v. German Canadian News Company Limited et al.,* the Court has concluded that an employer can be held vicariously liable where one employee assaults another employee.

This case involved two employees who did not like each other. Dhanani was employed as an accounts receivable clerk. Bassanese worked in an administrative position. The two employees did not get along. Bassanese, who was 73 years of age and had worked for the company for 19 years, alleged that Dhanani was abusive, unprofessional and harassing towards her over a prolonged period of time. She repeatedly complained to the President about incidents of harassment, yelling, screaming and derogatory insults by Dhanani directed at her. In addition to the harassment, and abuse, Dhanani slapped Bassanese across the face three times. Bassanese complained again to the President and she filed a police report, her employment was terminated the same day.

Bassanese sued the company for wrongful dismissal and sought, in part, $100,000 in damages for assault and battery, $100,000 for intentional infliction of mental suffering and other damages against the company on the basis that it was vicariously liable for the acts of Dhanani. She also made claims against Dhanani personally, but those claims were settled.

The Court considered whether the employer should be vicariously liable for failing to provide an employee with a safe work environment. In *Piresferreira v Ayotte,* the Court determined that a corporation was vicariously liable for assault and battery after a supervisor shoved an employee,

in the course of discharging their supervisory role. The employee was a supervisor of the employee who had been physically assaulted. In making the determination that the employer was vicariously liable, the judge determined that the interactions relating to the assault and battery were integral to the supervisory role that the abuser held because of his employment. This same analysis was not done in the case of *Bassanese,* as neither employee was in a supervisory role to the other. Nonetheless, Bassanese was awarded the same $15,000 in damages against the company for the assault and battery of its employee.

This decision represents a reaffirmation that an employer can be held vicariously liable for the actions of its employees against other employees, including assault. For vicarious liability to be imposed against an employer for the actions of an employee, there must be an employment relationship and the act must be committed within the scope of the employment relationship. If the employee's conduct is sufficiently connected to his or her employer, whether the act is authorized or not, the employer will often be liable. If the employee engages in an independent act outside of the employment relationship, the employer may escape liability.

It is notable that the case was not defended, so it is difficult to determine how this decision will be applied going forward and if any assault of an employee against another employee could result in automatic liability for an employer. In each case, the Court will consider the following factors: the employee's position, scope of duties, and instructions and directions that may have been provided to the employee about proper or improper conduct. The Court will interpret the notion of "acting within the scope of employment" very broadly so it is very important for the employer to be proactive in controlling the conduct of its employees through workplace policies, training and if necessary, appropriate disciplinary actions when misconduct occurs.

The Court rejected the claim against the Company for intentional infliction of mental suffering as there was no evidence of a visible and provable illness resulting from the harassment or assault. Although she was awarded $50,000 for aggravated damages arising from the manner in which she was terminated (ignoring her complaint and failing to investigate or take any steps to remedy the misconduct) and damages equivalent to 19 months of reasonable notice. In total, this employee was awarded damages totalling $194,433.17 arising in large measure from the employer's failure to properly address a complaint of harassment between two employees. Employers should be aware that they have a statutory obligation pursuant to the *Occupational Health and Safety Act* to investigate any "*incidents or complaints of workplace harassment*". This obligation is triggered as soon as an employer is aware of any possible harassment in the workplace and does not require a formal written complaint. As can be observed from this case, an employer can face significant liability if this responsibility is not taken seriously.

No Tort of Harassment in Ontario: Ontario Court of Appeal

The Ontario Court of Appeal has concluded that there is no the tort of harassment in Ontario.

By way of background, the employee was a junior RCMP constable when he began and had been promoted to sergeant. The relationship between management and the employee became tense when the employee ran for a nomination for a political party without reporting it to the RCMP, for making public statements contrary to RCMP's procedures in respect of media appearances, and improper use of the corporate credit card. He claimed that as a result of his political affiliations, he was harassed and bullied. He commenced a claim against the RCMP and several managers for damages for mental distress caused by the bullying and harassment.

On February 28, 2017, the trial judge determined that the *tort of harassment* exists in Ontario. The Court determined that there were four questions that needed to be addressed in order to establish the tort of harassment:

1. Was the conduct of the defendants toward the plaintiff outrageous?
2. Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
3. Did Merrifield suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

The trial judge determined that each of the elements had been established by Merrifield. The trial judge determined that Merrifield suffered from depression and post-traumatic stress disorder as a result of the RCMP's actions, and also concluded that the elements of a separate tort, *intentional infliction of mental suffering*, were also established, being conduct that is (1) flagrant and outrageous; (2) calculated to produce harm; and (3) results in a visible and provable illness. Merrifield was awarded $100,000 in general damages and $41,000 in special damages along with $825,000 for legal costs. As a result of the decision, a new tort of harassment was available for employees.

The RCMP appealed the decision to the Ontario Court of Appeal. The Court of Appeal rejected the establishment of a new tort of harassment in Ontario. The Court noted the

importance of incremental changes to the common law consistent with the changing needs of society, and ultimately concluded that there was insufficient judicial support or legal precedent for the creation of a new tort of harassment in Ontario. At the same time, the Court recognized that the well-established tort of intentional infliction of mental suffering was more difficult to establish requiring subjective intent to cause harm (opposed to reckless disregard) and a visible and provable illness (opposed to "extreme mental distress"). The Court of Appeal concluded that the tort of intentional infliction of mental suffering was sufficient to address claims of harassment and bullying in the workplace and rejected the need for a separate, new tort of harassment.

The Court of Appeal also rejected the trial judge's conclusion that intentional infliction of mental suffering had been established. Importantly, the Court of Appeal rejected the finding that the initiation of a Code of Conduct investigation by the manager constituted flagrant and outrageous conduct. She made palpable and overriding errors in rendering her judgement. As a result, the appeal was allowed and the trial judgment was set aside.

For employers, the Court of Appeal has narrowed the scope of potential claims about harassment in the workplace. The established tort of intentional infliction of mental suffering remains available to employees if there is outrageous and flagrant conduct in the workplace, which is calculated to produce harm and which results in a visible and provable illness. While employers still need to be cognizant of statutory obligations in respect of harassment and violence in the workplace, and must ensure that there is a safe workplace for its employees free from harassment, the expansion of a new common law tort of harassment was rejected by a majority of the Court of Appeal.

Ontario Government Places Restrictions on Wage Increases

On June 5, 2019, the Ontario government introduced Bill 124 – the *Protecting Sustainable Public Sector for Future Generations Act, 2019* – which imposes restrictions on wage increases and compensation for a variety of unionized and non-unionized workers in Ontario over the next 3 years.

The Bill establishes a series of 3-year "*modernization periods*" depending on whether an employer is unionized or non-unionized and the status of any collective agreement that may be in place. It applies to a wide range of employers, including every agency of the Crown, school boards, universities and colleges, public hospitals, non-profits, long-term care homes, children's aid societies, the Ontario Power Generation and any not-for-for profit organization that receives more than $1 million in funding from the government. It does not apply to municipalities or for-profit entities.

The legislation provides that no collective agreement, arbitration award or employer may provide employees with an increase in salary rate that is greater than 1% per year during the 3-year modernization period. The legislation also imposes limits on incremental or new increases to overall compensation (1%), which is defined very broadly to include salary, benefits, perquisites and all forms of non-discretionary and discretionary payments to employees. Certain increases are exempt from the cap. The legislation does not prohibit an employee's salary rate from increasing in recognition of an employee's length of time in employment, an assessment of performance or the successful completion of a program or course of professional or technical education.

There are oversight mechanisms in the proposed legislation to ensure compliance such as the power for the Management Board of Cabinet to issue directives to employers to provide information related to collective bargaining or compensation for the purposes of ensuring compliance with the *Act*. Under the *Act*, the Minister may make an order declaring a collective agreement or any arbitration award is inconsistent with the *Act*. The legislation also imposes limits on the Ontario Labour Relations Board and arbitrators to inquire into the constitutional validity of the legislation or whether the legislation is contrary to the Ontario *Human Rights Code*. The legislation also protects employers against allegations related to constructive dismissal under the Ontario *Employment Standards Act, 2000* or under the common law for compliance with the legislation.

The legislation is not yet proclaimed into law. In fact, the legislation will not likely be passed into law until October 2019 at the earliest. However, employers impacted by this legislation should be aware of this legislation as it will apply retroactively to June 5, 2019, meaning that any agreements, decisions or arbitration awards made after June 5, 2019, would be subject to the restrictions contained in the legislation. Please contact us if you have any questions about this proposed legislation or the potential impact that it may have upon your workplace.