

Member's Quarterly

Fall 2020 Edition

Feature

Tort of Harassment Continues to be Quashed in Ontario

Employers still obligated to ensure a harassment-free workplace

Harassment in the workplace is something that most employers will have to deal with at one point or another, be it developing and implementing a workplace harassment policy or actually addressing workplace harassment complaints from their employees.

Despite an arguable increase in the prevalence of harassment complaints in the workplace, the Ontario Court of Appeal ("ONCA") has recently confirmed that the tort of harassment does not exist. In *Merrifield v Canada (Attorney General)*, 2019 ONCA 205, the ONCA confirmed that employees ought to seek remedies under the tort of intentional infliction of mental suffering ("IIMS").

The Facts

The employee, Peter Merrifield, was an RCMP Constable who, at the time, was involved in the unit responsible for protecting federal politicians. Mr. Merrifield's superiors discovered that he had run for the nomination to be the candidate for the Conservative Party in his riding without complying with the applicable RCMP regulations. It was determined that he was potentially in a conflict of interest with respect to his current position, and as a result, he was removed from the unit and reassigned elsewhere.

Later in his career, the RCMP conducted a formal investigation into Mr. Merrifield regarding the use of his corporate credit card. It was determined that his use contravened the RCMP's Code of Conduct.

Mr. Merrifield commenced an action against the Crown seeking damages for mental distress/extreme emotional distress he allegedly suffered as a result of managerial bullying and harassment.

The trial judge held that the tort of harassment exists in Ontario and also noted that Mr. Merrifield met the conditions for the tort of IIMS.

The Appeal

In reviewing the trial judge's findings, the ONCA held that there is no basis for recognizing the tort of harassment as a new tort in Ontario. The Court did not agree with Mr. Merrifield's argument that the increased social recognition that harassment is wrongful conduct constitutes a compelling reason to recognize the new tort. In reviewing whether the case was one deserving of a novel legal remedy, such as a new tort, the Court held that there were other legal remedies available to Mr. Merrifield to redress conduct alleged to constitute harassment, such as the tort of IIMS.

In coming to this conclusion, the ONCA compared the elements of the tort of IIMS and the proposed tort of harassment. The Court found that there were significant similarities in the elements, the difference being that the tort of IIMS is more difficult to establish as it is an intentional tort and requires proof of causation, whereas the proposed tort of harassment is based in negligence.

The ONCA reiterated the test for the tort of IIMS and outlined that the employee must establish that the conduct of the accused is:

1. flagrant and outrageous,
2. calculated to produce harm, and which



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3. results in visible and provable illness.

The ONCA also overturned the trial judge's findings that Mr. Merrifield met the requirements for the tort of IIMS. Specifically, the ONCA held that the trial judge made repeated legal errors in applying the facts to the test. Ultimately, regardless of the fact that there were multiple findings regarding flagrant and outrageous conduct, there was no evidence to establish that the conduct was intended to cause harm, or that the accused knew that harm was substantially certain to follow from the decision to order the investigation into Mr. Merrifield's corporate credit card use. The ONCA also noted that the emotional distress alleged was insufficient to meet the conditions. Therefore, the trial judge erred in finding that the causal connection required to meet the conditions for IIMS was present.

The Supreme Court of Canada denied the appeal.

Takeaways for Employers

Although the ONCA noted that the tort of harassment would not be recognized in this particular case, it did not eliminate the possibility of there ever being a case where it would be appropriate to recognize the tort of harassment.

While the tort of harassment does not exist currently in Ontario, employers are still required under workplace health and safety legislation to provide a harassment free workplace. Further, the tort of IIMS is still available to employees as a legal remedy to redress actions amounting to harassment. However, in order to do so, we know that there must be clear causal evidence in order to make out the tort of IIMS.

Employers conducting investigations, which they are authorized to conduct, and having satisfied themselves that it is appropriate to do so in the circumstances, would not be exposing themselves to litigation under the tort of IIMS unless their conduct contained the required causal and intentional elements.

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