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Harassment is Not a Tort - Good News for Employers

By Thomas A. Stefanik

On March 15, 2019, the Ontario Court of Appeal released its decision in *Merrifield v. The Attorney General of Canada*. The Court's decision is an important, and welcome, finding for employers.

The Plaintiff (Peter Merrifield) made claims of harassment and bullying by certain managerial members of the RCMP which resulted in a 40 day trial which ended in 2016. The Trial Judge released a decision in February, 2017 in which she found that there was a new free standing tort of harassment and awarded the Plaintiff \$100,000.00 in general damages as a result of her findings of the RCMP's conduct.

The Attorney General of Canada appealed, and among other arguments, took the position that there is in law no tort of harassment. The Court of Appeal agreed, and overturned the Trial Judge's finding on this issue and others as well. It is the Court of Appeal's finding that there is no tort of harassment that exists in Ontario that is significant.

Many employers are now finding it commonplace for employees to sue them for wrongful dismissal, and include a "grab bag" of other allegations, commonly involving harassment by managers or supervisors, and claiming additional damages over and above damages for wrongful dismissal. These claims have commonly been made despite the fact that the employees have available potential statutory remedies under either or both of the *Human Rights Code* or the *Occupational Health and Safety Act*. There are strategic reasons why employees' lawyers have chosen in many cases to include these in a civil action. Chief among these is that there is an availability to recover legal costs in a civil action, which does not exist under the statutory procedures.

In concluding that courts in Ontario should not recognize the existence of a tort of harassment, the Court of Appeal distinguished this case from its previous decision in *Jones v. Tsige*, in which the Court of Appeal recognized the existence of a tort of intrusion upon seclusion for the first time. In *Tsige*, there was a culmination of a number of related developments. The Court in *Merrifield* acknowledged that the creation of a new tort is a matter of judicial discretion, but rejected the general notion that it should create a new

cause of action any time it considers it appropriate to do so, stating “...that is not how the common law works, nor is it the way the common law should work”.

In essence, the Court found there was no Canadian legal authority, nor in fact any foreign judicial authority that was put before it, that would recognize or support a new tort of harassment. The Court also emphasized that there are legal remedies available to redress conduct that is alleged to constitute harassment, and specifically cited the tort of intentional infliction of mental suffering. Although it was apparently not argued in *Merrifield*, because it was decided in the context of a federally regulated employer, it would appear that the Court might also have noted the statutory remedies available to the Plaintiff had Ontario statutes been applicable.

Employers are well aware that allegations of harassment are difficult, time consuming and expensive to defend. Having the availability to remove those types of allegations in a civil action will be a significant benefit and presumably reduce the costs of litigating allegations by former employees. This is particularly so when the wrongful dismissal allegations may be problematic at best (especially if there is a valid termination clause) or if the employer otherwise provided reasonable notice, and thus being able to bring a motion to strike at first instance the harassment allegations will streamline and reduce an employer’s costs and exposure.

It remains to be seen whether the Plaintiff in *Merrifield* will seek leave to appeal to the Supreme Court of Canada, but if leave is granted, it will be at least another year before we learn the final say on the alleged tort of harassment. In the interim, employers should take note of the current state of the law.

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