

Superior Court Recognizes Tort of Harassment

Merrifield v The Attorney General, 2017 ONSC 1333



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In *Merrifield v The Attorney General of Canada*, 2017 ONSC 1333, the Ontario Superior Court of Justice recognized harassment as a tenable cause of action.

In this case, the Plaintiff is employed by the Royal Canadian Mounted Police ("RCMP"). He alleged that after participating in a Barrie nomination meeting for the Progressive Conservative Party in 2005 his superiors made certain unjustified and unwarranted decisions about him based on allegations that had no merit. The RCMP accused him of committing criminal offences and subjected him to a groundless internal investigation. He further pleaded and testified that his superiors harassed and bullied him; they had damaged his reputation, impaired his career advancement, and caused him to suffer severe emotional distress including depression. The Plaintiff claimed damages for harassment, among other heads of damages.

Of note, the Plaintiff did not allege a violation of the *Human Rights Code* when claiming damages for

harassment. His claim was against the defendants for committing the common law tort of harassment.

After analyzing past case law, Vallee J. determined that the tort of harassment *does* exist and has been recognized as a cause of action in Ontario. Vallee J. determined that the appropriate test for the tort of harassment is found in *McHale v Ontario*, 2014 ONSC 5179, and *McIntomney v Evangelista Estate*, 2015 ONSC 1419:

- (a) Was the conduct of the defendants toward the Plaintiff outrageous?
- (b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing the Plaintiff to suffer from emotional stress?
- (c) Did the Plaintiff suffer from severe or extreme emotional distress?
- (d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

The Definition of “Outrageous” conduct

Vallee J. analogized the requirement for “outrageous” conduct with the requirement that the conduct be “outrageous and flagrant” in establishing intentional infliction of mental suffering. Vallee J. referenced the decision in *Boucher v Wal-Mart Canada Corp.*, 2014 ONCA 419, in which the court found flagrant and outrageous conduct when the plaintiff’s supervisor “belittled, humiliated and demeaned the plaintiff continuously and unrelentingly, often in front of co-workers, for nearly six months”.

The Definition of “Reckless Disregard”

Vallee J. adopted the definition of “reckless” from *Piresferriera v. Ayotte*, 2010 ONCA 384: “proceeding in the face of subjective awareness that harm of the kind that resulted was substantially certain to follow . . . [the] consequences **must be known by the actor** to be substantially certain to follow”. Vallee J. further stated that “intention does not necessarily stem from or follow foreseeability” and that there remains a high threshold for constructive intention.

The Definition of “Severe or Extreme Emotional Distress”

Vallee J. adopted the definition of “severe or extreme emotional distress” which was established in *Mainland Sawmills Ltd. v IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195: “[s]evere emotional distress of such

substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it”.

The Facts of the Case and the Court’s Analysis

The Plaintiff in this case alleged that he was unjustifiably and punitively transferred out of a position with the RCMP which resulted “in a permanent stain on [his] reputation and career”. Vallee J. determined that “[b]ecause of the transfer, other officers took a predictably negative view of [him] based on incorrect assumptions. The repercussions of this transfer followed [him] for years to come”.

As a result of the deemed unjustifiable and punitive transfer and the failure of RCMP officers to set the record straight when they had the opportunity to do so, the Plaintiff’s fellow RCMP officers assumed the worst of him; he was removed from working national security matters, no longer trusted to work in high-stakes emergency situations. Because of this, Vallee J. determined that the RCMP officers involved were “recklessly indifferent to the effect of the kind of harm that [the Plaintiff] suffered, which they knew was substantially certain to follow”.

The RCMP’s actions had a significant effect on the Plaintiff. He took a six month sick leave. He became depressed and suffered from stress, dizziness, and nausea. He was scared that he would lose his job. Vallee J.

determined that he was suffering from severe or extreme emotional distress.

Within six months of returning to work following his sick leave, the Plaintiff was subjected to an allegation that he had stolen from the RCMP and an internal investigation was conducted. Vallee J. determined that this allegation and subsequent investigation was disingenuous and could have been explained and resolved had the Plaintiff been consulted about the matter.

The RCMP officer involved in the allegations and investigation “had a reckless disregard of causing [the Plaintiff] emotional distress. He knew that [the Plaintiff] being subjected to these very serious allegations would cause him significant further emotional distress. [He] knew that the kind of harm that [the Plaintiff] suffered was substantially certain to follow”. The Plaintiff subsequently was off work again for 11 months.

The actions of the RCMP regarding the investigation into the Plaintiff were deemed to be the actual and proximate cause of the Plaintiff’s severe emotional distress.

Additionally, the Plaintiff sent emails to commanding officers attempting to resolve the harassment he was being subjected to. His emails did not elicit appropriate responses from the RCMP; they were ignored. Vallee J. found that this was one of the actual and proximate causes of the Plaintiff’s severe emotional distress.

Overall, Vallee J. concluded that “the defendants’ conduct toward the plaintiff was outrageous. The defendants had a reckless disregard of causing the plaintiff to suffer emotional distress. His emotional distress was severe. The defendants’ outrageous conduct was the actual and proximate cause of the plaintiff’s emotional distress. The plaintiff has proven the tort of harassment.”

The official recognition of this tort in Ontario is something that Plaintiff personal injury lawyers and employers should make themselves aware of. This tort could potentially apply in situations of extreme bullying and clients should be advised that harassment is a tenable cause of action.