

BC COURT OF APPEAL CONFIRMS HIGH STANDARD FOR MENTAL DISTRESS DAMAGES

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An employee who believes they have been wrongfully dismissed from their employment can seek damages in court for both the fact of their dismissal and the manner in which they were dismissed. This later form of damages, known in legal terms as aggravated damages and sometimes referred to as “mental distress” damages, is available to the dismissed employee if they can establish that the way the employer dismissed them resulted in mental distress, over and above the general upset caused by the fact of the dismissal itself. Courts recognize that dismissal, in and of itself, will usually cause hurt feelings which are not compensable.

In *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383, the Court of Appeal affirmed that there remains a high threshold in British Columbia for plaintiffs seeking mental distress damages.

The Trial Judgement

Ms. Cottrill had worked as a skincare therapist for Utopia Day Spas and Salons for over a decade when her employer became concerned with her performance. She was given three months to improve or risk losing her employment. Despite significant improvement over that time period, Ms. Cottrill’s employment was still terminated and she sued her employer for wrongful dismissal as well as seeking aggravated and punitive damages.

The trial judge found that Ms. Cottrill had been wrongfully dismissed, as she had essentially been set up to fail the performance improvement plan implemented by her employer. The employer had ignored her improvement and did not give her enough information or support to be successful.

Ms. Cottrill had signed an employment contract which limited her wrongful dismissal damages to eight weeks’ of severance pay, which she was awarded.

The trial judge then went on to consider the question of aggravated and punitive damages. She concluded that the employer was in breach of its duty of good faith to Ms. Cottrill for the manner in which they dismissed her, and noted the “profound effect” of the termination on Ms. Cottrill. The trial judge referred to Ms. Cottrill’s testimony regarding her emotional distress, including crying after receiving notice of the performance concerns and going “numb” after the termination. The trial judge awarded \$15,000 in aggravated damages and concluded that punitive damages were not appropriate.

The Court of Appeal Decision

The employer appealed the decision to the BC Court of Appeal, solely on the question of whether the trial judge erred in awarding the \$15,000 in aggravated damages. The employer submitted that there was no evidence that Ms. Cottrill had suffered any actual harm as a result of the manner of her dismissal. The employer argued that the degree of mental suffering caused

by the termination was not sufficient to warrant compensation. Ms. Cottrill argued that the “unfairness” in the manner of dismissal warranted aggravated damages.

The Court reviewed the well-established law on aggravated damages, noting that while losing a job can result in hurt feelings and emotional upset, the normal distress and hurt feelings resulting from dismissal are not “compensable”. The Court then reviewed the recent decision in *Lau v. Royal Bank of Canada*, 2017 BCCA 253, which confirmed that there must be an “evidentiary foundation” for an award of mental distress.

The Court of Appeal concluded that, similar to the *Lau* case, there was no evidence from Ms. Cottrill, her family members, friends or even third parties about the impact of the termination on Ms. Cottrill and her mental state. The Court of Appeal emphasized that while a plaintiff does not require expert evidence (e.g. a psychologist), there must be some evidence of mental distress beyond normal hurt feelings. Ms. Cottrill’s evidence had established, at best, a “transient upset” that fell well short of the legal standard required for aggravated damages. The \$15,000 aggravated damages award was set aside.

Takeaways for Employers

Employers can avoid issues around aggravated damages by conducting terminations respectfully and with particular consideration to the manner in which the termination is carried out. If an employee seeks to establish a claim for aggravated (‘mental distress’) damages, he or she will need to provide some evidence of mental distress that goes beyond ordinary hurt feelings.



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