

Stressed bank employee wins *Wallace* and mental distress damages

A recent decision by the Ontario Superior Court of Justice once again demonstrates the increased willingness of courts to grant large awards to employees whom the court believes have been unfairly treated in relation to their terminations. Readers of our *FOCUS* e-mail alerts will recall that under the principles established by the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers* (see "[Fairly, reasonably and decently](#)": [Employers obliged to deal in good faith with dismissed employees, Supreme Court rules](#)", and "[Appeal Court denies 'Wallace' damages to unsuccessful candidate of 'sloppy' hiring process](#)") the notice period of a wrongfully dismissed employee may be lengthened if their termination is accompanied by bad faith acts by the employer that cause the employee some form of harm.

Moreover, when certain preconditions are met, the court may decide that the employer's conduct is serious enough to constitute a separate cause of action - the tort of intentional infliction of mental distress or nervous shock. This was the case in *Prinzo v. Baycrest Centre for Geriatric Care*, (see "[Bullying at work: another form of workplace violence](#)") a case in which the Ontario Court of Appeal upheld damages of \$15,000 for nervous shock suffered by the employee.

In *Zorn-Smith v. Bank of Montreal* (December 2, 2003) the Court awarded both *Wallace* and mental distress damages to an Ottawa-area bank employee who had been terminated without notice after 21 years of service, holding that the Bank's "callous disregard" of the employee had been "flagrant and outrageous".

UNDERQUALIFIED AND OVERWORKED

The employee, Susanne Zorn-Smith, had been considered for the position of Financial Services Manager, but told that she was not sufficiently qualified. She had also been told that, if she were placed in the position, the Bank would expect her to take many courses, both on the job and on her own time, and that, because she was the mother of two young children and expecting a third, she would likely be unable to meet the Bank's expectations. Nonetheless, after returning from maternity leave in 1999, Zorn-Smith was asked to take the position of Financial Services Manager. Although she had none of the educational qualifications or credentials specified in the job profile, she accepted the position. The trial judge found that she took the position during a "very busy and chaotic" time for Financial Services Managers in the Bank, that she had to work long hours without lunch breaks, and that she had to return to work in the evenings from 9:00 p.m. to 1:00 a.m. in order to keep up with her work load. The judge also found that, during this time, Zorn-Smith was being pressured to upgrade her qualifications or face losing her job.

Work pressures led to problems in her home life, and Zorn-Smith went on short-term disability leave. Upon her return, she assumed a lower paying and less stressful position. However, she was soon back in the Financial Services Manager position, working long

However, she was soon back in the Financial Services Manager position, working long hours in circumstances of what the trial judge found to be chronic understaffing. By the beginning of 2001, Zorn-Smith was the only employee in her branch with significant Financial Services Manager experience and knowledge. In addition to working some nights during the week, she was also going to the branch on Sunday nights to get ready for the week. At home, her marriage was in significant difficulty. In the trial judge's words, on February 20, 2001, Zorn-Smith "simply stopped functioning". Again, Zorn-Smith took short-term disability leave.

GRADUAL RETURN TO WORK A "DISASTER"

In May 2001, Zorn-Smith's physician filled out a report in which he indicated that her symptoms were severe and included reduced sleep, poor concentration, increased fatigue and increased obsessional thinking. Her degree of impairment was described as total. The report focused on the need for changes in the workplace, and described the idea of Zorn-Smith returning to work on a part-time basis as a "disaster" that would result in her "being paid one half as much to do three times as much". When asked to provide additional comments, the physician responded: "Managers including this patient will continue to burnout until the deficiencies of staff are addressed".

Despite this assessment, the employer took the position that Zorn-Smith was capable of returning to work part-time. It offered her either a part-time or full-time position as a Financial Services Manager or Customer Service Representative, and advised her that she should return to work at the end of May or file an appeal of the Bank's decision. Zorn-Smith did not return to work, did not appeal and did not resign her position. On June 29, 2001, the Bank advised her that her position had been terminated.

DISABILITY CAUSED BY "UNREASONABLE WORK DEMANDS"

At trial, the judge held that Zorn-Smith continued to be disabled on May 28, 2001 and was, therefore, entitled to receive disability benefits beyond that date. Zorn-Smith's refusal to accept one of the positions offered to her did not constitute cause for dismissal. Rather, the trial judge found that at the time of her dismissal, Zorn-Smith had been incapable of performing any bank job requiring a high level of responsibility or the exercise of significant decision-making authority. The judge held that, when the Bank cut off Zorn-Smith's benefits, it had incorrectly applied a test of "total disability" as the threshold for eligibility for benefits, whereas the appropriate test provided in the benefits plan was inability to perform one's regular job.

The judge also faulted the Bank for blaming Zorn-Smith's problems on her allegedly poor time-management skills and marital problems. In the judge's view, the problem lay with the workplace environment itself:

"[T]here was nothing in the evidence to suggest that Ms. Zorn-Smith could not cope with everything, had her work demands been within some reasonable parameters. They simply were not. Expectations were placed on her that required her availability for banking business well beyond normal working hours. Those demands quite understandably butted up against the legitimate demands on the home front that Ms. Zorn-Smith have some time and energy in the evenings and on the weekends for her children and husband. Having a spouse and children, and needing or wanting to spend non-working hours with them is a normal part of life. Although occasional long hours to cover special circumstances can arise in most jobs, long-term understaffing resulting in chronic, unreasonable demands being placed on

term understaffing resulting in chronic, unreasonable demands being placed on employees, especially those not in the higher-income earning echelons, is unreasonable. I find that Ms. Zorn-Smith's adjustment disorder with depressed and anxious mood was caused predominantly by unreasonable work demands, and not by family stresses."

The judge also disagreed that Zorn-Smith's failure to avail herself of the Bank's appeal process invalidated her wrongful dismissal claim. The Bank had not provided her with any specific information about the appeal process, or offered her any assistance in pursuing an appeal, which would have been reasonable given that the Bank was aware of Zorn-Smith's poor concentration and inability to think clearly.

WALLACE DAMAGES

The judge awarded Zorn-Smith 16 months of damages in lieu of notice, an award extended by the addition of *Wallace* damages for the Bank's bad faith and unfair treatment of the terminated employee. The judge gave the following examples of this conduct:

- The Bank had allowed the workplace to become damaging to Zorn-Smith's health and, instead of taking responsibility for this state of affairs, blamed the employee.
- It applied a higher standard for "disability" than the one in the policy itself.
- The Bank did not contact Zorn-Smith's physician, despite his request that he be contacted for further information.
- The Bank failed to advise Zorn-Smith about how to appeal its termination decision, or what further medical information it required of her.

Concluding her findings on this factor in the notice period, the trial judge stated:

"I consider the Bank's treatment of Ms. Zorn-Smith at the time of her dismissal to be conduct amounting to bad faith and unfair dealing that justifies a longer notice period. I have no doubt that the way in which Ms. Zorn-Smith was treated at the time of her dismissal worsened her psychological state and lengthened the time it took for her to get back on her feet and to be able to consider other employment. That must be compensated through a lengthening of the notice period."

DAMAGES FOR MENTAL SHOCK

The trial judge also held that the preconditions for an award of damages for the intentional infliction of mental suffering were present in this case. Those preconditions are:

- flagrant or outrageous conduct
- that is calculated to produce harm, and
- that results in a visible and provable illness.

According to the judge, the Bank knew that Zorn-Smith was exhausted as a result of chronic under-staffing yet, rather than taking action to alleviate the situation, took advantage of her commitment to the Bank in total disregard of the toll this was taking on her health and family life. In awarding Zorn-Smith \$15,000 damages as compensation for mental suffering, the judge concluded:

"This callous disregard for the health of an employee was flagrant and outrageous. That Susanne Zorn-Smith would suffer a further burnout was predictable - the only question was when it would come. It was foreseeable that such a burnout would cause her mental suffering. I find that the Bank's conduct was the primary cause of Susanne Zorn-Smith's adjustment disorder with depressed and anxious mood."

In Our View

This decision suggests that, if an employer knowingly maintains work conditions marked by chronic understaffing and an employee suffers stress-related illnesses as a result, the employer could be liable for damages for infliction of mental distress. Particularly damaging to the employer's case was the fact that Zorn-Smith's supervisor, in correspondence with the Bank's Occupational Health Services, acknowledged that Zorn-Smith's branch was short-staffed by five persons, and that Zorn-Smith had been doing the work of three employees. In these circumstances, and without a concrete plan to address the short-staffing, the Bank's offer to accommodate Zorn-Smith with a part-time job in a less stressful position or face dismissal was seen as insufficient.

It should be emphasized that the second part of the test for intentional infliction of mental distress - conduct that is calculated to produce harm - will be met even though the wrongdoer does not have the actual malicious purpose of causing harm. All that is required is that the consequences of the conduct are known to be substantially certain to follow.

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