
Ontario Court awards \$500,000 damages for manager's assault on employee

In December 2008, the Ontario Superior Court of Justice awarded Marta Piresferreira, a former employee of Bell Mobility Inc., more than \$500,000 in damages arising from an assault that she suffered in the workplace at the hands of her supervisor. In *Piresferreira v. Ayotte* (2008) the Court found Bell Mobility Inc. and supervisor Richard Ayotte jointly liable for Piresferreira's damages.

Piresferreira had worked as an account manager for Bell Mobility Inc. (Bell) since 1996. Beginning in 1997 she worked under the supervision of Richard Ayotte, a self-acknowledged "hands-on" manager. Ayotte was known in the Bell office to intimidate, yell, and even swear at his staff, and in particular at Piresferreira. In May 2005, an incident at the workplace occurred in which Ayotte berated the 60 year-old Piresferreira for failing to arrange a meeting for her clients. Attempting to vindicate herself, Piresferreira held her Blackberry out to Ayotte to show him an e-mail which she felt would absolve her. Ayotte yelled at Piresferreira and physically pushed her away. He threatened her with a Performance Improvement Plan (PIP) and told her to "get the hell out" of his office. Piresferreira returned to her desk and broke down. Overcome with distress, she left for the day.

When she returned to work the following week, Ayotte met with her and, instead of apologizing, presented her with the PIP. The PIP listed several aspects of Piresferreira's performance that were below expectations. The PIP also included an onerous action plan that would require Piresferreira to report in person to Ayotte twice weekly. Piresferreira disagreed with the PIP and refused to sign it. She contacted Human Resources and lodged a formal complaint against Ayotte for the assault and abusive conduct. Bell took little action against Ayotte and moved forward with Piresferreira's PIP.

Piresferreira went on sick leave and eventually long-term disability. She was diagnosed with major depression, anxiety, and post-traumatic stress disorder (PTSD). She was therefore unable to handle the normal stressors inherent in any work environment. She never returned to work. She sued Ayotte and Bell in August 2005. She claimed damages for assault and battery, negligent and intentional infliction of emotional distress, past and future loss of income, and wrongful dismissal.

AT TRIAL – ASSAULT AND BATTERY

The torts of assault and battery are meant to preserve a person from harmful or offensive contact. Assault is the act of intending to cause such contact, or an imminent apprehension of such contact, while battery goes further than assault because the offensive contact actually occurs. The Court found no dispute that Ayotte had committed these torts. He had intended to, and did cause, offensive contact with Piresferreira, and he was reckless and negligent about the possibility of injury being caused by his actions.

It made no difference that Ayotte did not intend, or foresee, the harmful effects of his actions. The liability from assault and battery is not limited to intended or foreseeable consequences, but to the actual results of the contact. For Piresferreira, these results included the debilitating symptoms of PTSD, anxiety, and depression, all of which rendered her incapable of pursuing gainful employment and of carrying on her personal life.

The Court also had little difficulty in holding Bell vicariously liable for Ayotte's assault and battery. Employers are vicariously liable for their agents' unauthorized acts if those acts are connected with authorized acts. Ayotte had almost complete supervision over the account managers in his office. The Court stated that in entrusting this level of control to Ayotte, Bell had to assume responsibility for Ayotte's actions.

INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Ayotte's yelling and swearing at Piresferreira, his assault and battery, and the issuing of the PIP, were all found to amount to flagrant and outrageous conduct. The Court found Ayotte had shown reckless disregard for Piresferreira's emotional well-being. Ayotte was found liable for intentionally inflicting emotional distress on Piresferreira. The Court found that Bell's conduct was not intentionally designed to inflict emotional distress. However, under the same principles of vicarious liability that applied to the assault and battery, Bell was nevertheless liable for Ayotte's intentional infliction of emotional distress.

In terms of the negligent infliction of emotional distress, Bell and Ayotte both had a duty of care to their employees to ensure that the workplace was safe and free from harassment. Ayotte's abusive conduct was a clear breach of that duty. Bell was found to have breached its duty by failing to properly supervise Ayotte, and by failing to properly respond to Ayotte's assault on Piresferreira. The Court noted that Bell's case against Ayotte for the conduct was summarily closed, and that Bell's disciplinary measures were "inappropriately mild". The Court found that instead of responding to the assault, Bell moved aggressively against Piresferreira with the PIP, causing her further emotional distress. Both Bell and Ayotte were found liable for negligent infliction of emotional distress.

CONSTRUCTIVE DISMISSAL

Piresferreira also claimed damages for wrongful dismissal. She argued that Ayotte's abusive treatment and Bell's failure to adequately deal with the abuse amounted to a constructive dismissal. Constructive dismissal occurs when management's conduct is calculated to cause an employee to withdraw from the employment relationship. The test for constructive dismissal was stated in *Shaw v. Xerox Canada Ltd.* (1998):

"It is whether the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts."

In applying this test, the Court found that Piresferreira's continued employment in the Bell office was no longer possible. Bell was in breach of implied terms present in every employment contract: to treat every employee with civility, decency and respect; and, to ensure that the employee would not be subjected to physical or verbal abuse. Bell's failure to ensure that Piresferreira's work environment would not be hostile or intimidating meant that Bell had constructively dismissed Piresferreira.

The Court went on to calculate the reasonable notice period by applying the *Bardal* factors from the seminal decision in *Bardal v. Globe and Mail Ltd.* (1960). Some of these factors were: the character of the employment; the length of service; the age of the employee; and the availability of similar employment. Based on these factors the Court found that a reasonable notice period for Piresferreira would have been 12 months.

DAMAGES

The Court awarded Piresferreira \$50,000 general damages for the torts of assault and battery, and negligent and intentional infliction of emotional distress. Damages for the loss of past and future income were based on the amounts Piresferreira would have earned between 2005 and 2009, the year in which Piresferreira would turn 65. This was assessed at \$500,924. The Court then reduced both sets of damages to take into account certain contingent factors that were independent of the action against Bell and Ayotte:

- Piresferreira's pre-existing health concerns;
- An accident her partner suffered that resulted in Piresferreira devoting time and energy to her partner's recovery;
- Piresferreira's challenges adjusting to changes in the industry.

Due to these factors, the Court concluded that Piresferreira might not have continued working until the age of 65. Therefore the Court reduced by 10% her general damages and damages for the loss of income. She was awarded \$5,122 special damages for psychotherapy and medications.

Although the Court did hold that Piresferreira had been constructively dismissed, it did not award damages for the wrongful dismissal. The Court stated that the damages that Piresferreira suffered as a result of the manner of her dismissal had already been compensated by her tort damages, and that "damages payable under both the contract and tort claims would amount to double recovery by Piresferreira." The total award was \$500,955. Bell is currently appealing this decision, and we will inform Focus readers about future developments in this case.

In Our View

It is interesting to note that in addition to Piresferreira's main action, her same-sex partner, Judy Scott, brought an action against Bell under s. 61 of the *Family Law Act* (Ontario). This provision permits a spouse to recover amounts to compensate for "the loss of guidance, care and companionship that the claimant might reasonably have expected to receive...if the injury or death had not occurred". The Court found that as a result of Ayotte's and Bell's conduct, Piresferreira was less able to participate in the social, recreational, and companionship activities in her life with Scott. As a result, Scott was awarded \$15,000 to compensate her for the loss of Piresferreira's care and companionship.

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