Ontario Court of Appeal: No tort of harassment in Ontario

Date : March 21, 2019

In a landmark decision, the Ontario Court of Appeal set aside a lower court decision and held that there is no freestanding tort of harassment in Ontario. In *Merrifield v. Canada (Attorney General)* (March, 2019) the appellate court was provided its first opportunity to consider the existence of the tort of harassment in Ontario. The resulting decision is very positive for employers and corrects a handful of lower court decisions that recognized harassment as a stand-alone cause of action.

By way of background, in 2005 Mr. Merrifield was employed by the RCMP as a Constable. He was promoted to Corporal in 2009 and then to Sergeant in 2014. The employment relationship was strained between Mr. Merrifield and several of his superiors by a series of events occurring between 2005 and 2007. In 2005, management became aware that Mr. Merrifield failed to comply with RCMP regulations when he sought political office without being on a leave of absence as required by RCMP regulations. Mr. Merrifield's political activities were perceived by management to create a potential conflict of interest with his employment duties. As a result, he was transferred a number of times between units and was refused an assignment that he requested.

Mr. Merrifield was also cautioned by his superiors after they learned that he had given a number of interviews with the media about security issues. Management reminded Mr. Merrifield that he was required to comply with RCMP policies in conducting such interviews. Later, in 2006, the RCMP commenced an investigation into Mr. Merrifield's corporate credit card use. The conclusions of that investigation were that Mr. Merrifield failed to comply with administrative policy by failing to pay balances due on the card, and by making minor unauthorized purchases.

Mr. Merrifield claimed that throughout these events the RCMP's actions amounted to harassment. In 2007 he commenced an action against the RCMP and sought damages for mental distress as a result of managerial bullying and harassment. Mr. Merrifield was very successful at the trial level. The trial judge recognized the freestanding tort of harassment and found that many of the managerial decisions in relation to Mr. Merrifield constituted harassment. She also found that the employer was liable for the intentional infliction of mental suffering. Mr. Merrifield was awarded $100,000 in general damages, $41,000 in special damages, and $825,000 in costs. The employer appealed the decision to the Ontario Court of Appeal.

After a brief discussion of the slow and incremental nature of common law change, the Court of Appeal considered whether a freestanding tort of harassment exists in Ontario. It reviewed the cases relied upon by the trial judge and identified the key case as *Mainland Sawmills Ltd. et al v. IWA Canada et al* (2006), a trial level decision from British Columbia that seemed to underlie all of the subsequent Ontario decisions. The problem with *Mainland Sawmills*, as identified by the Court of Appeal, was that it only *assumed* the existence of the tort of harassment for the purpose of

dealing with an application seeking to dismiss particular claims in an action. The other precedents standing for the existence of the tort of harassment were found to be similarly deficient: “In sum, these cases assume rather than establish the existence of the tort. They are not authority for recognizing the existence of a tort of harassment in Ontario, still less for establishing either a new tort or its requisite elements.”

Having found that there was no legal authority for a freestanding tort of harassment in Ontario, the Court then considered whether it should nevertheless establish one. The Court noted that the creation of a new tort would run contrary to the incremental manner in which the common law evolves over time. In addition to this, there was no academic authority or compelling policy rationale that was put before the Court to support the creation of the tort. Finally, the Court noted that in the case at hand, there were other legal remedies available to Merrifield that would address the alleged impugned conduct of his employer. One such remedy was the tort of intentional infliction of mental suffering.

The Court compared the elements of the tort of intentional infliction of mental suffering with the elements of the proposed tort of harassment. The test for intentional infliction of mental suffering is met where the plaintiff establishes conduct that is:

1. flagrant and outrageous;
2. calculated to produce harm; and
3. results in visible and provable illness.

The test for the tort of harassment, as set out and applied by the trial judge, was:

1. Was the conduct of the defendants toward Merrifield outrageous?
2. Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
3. Did Merrifield suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

The Court discussed the differences between the elements of the two tests and noted that the tort of intentional infliction of mental distress is an intentional tort. This means that there must be an intention to cause the harm, or knowledge that it was almost certain to occur. This is a subjective test. The proposed tort of harassment on the other hand would require either intention or “reckless disregard”; the latter being an objective test and therefore easier to meet by a plaintiff. Similarly, the test for harassment was seen to be less onerous by requiring only “severe or extreme emotional distress” as opposed to “a visible and provable illness” required for intentional infliction of mental distress. The Court of Appeal summarized its comparison by stating:

> “Plainly, the elements of the tort of harassment recognized by the trial judge are similar to,

> but less onerous than, the elements of IIMS [intentional infliction of mental suffering]. Put another way, it is more difficult to establish the tort of IIMS than the proposed tort of harassment, not least because IIMS is an intentional tort, whereas harassment would operate as a negligence-based tort."

In this regard, the Court of Appeal noted that in its previous decision in *Piresferreira v. Ayotte* (2010) it refused to allow negligence to ground a claim for mental suffering in the employment context. Based on this, and the fact that the tort of intentional infliction of mental distress was available in the employment context, the Court refused to recognize a new freestanding tort of harassment.

In addition to setting aside the trial judge's holding relating to the tort of harassment, the Court of Appeal also set aside her judgement as it related to the tort of intentional infliction of mental suffering. The Court of Appeal found that there were palpable and overriding errors in the trial judge's fact-finding, and that the legal test for intentional infliction of mental distress was misapplied. The result was that the employer's appeal was allowed and the trial decision set aside.

In our view

The refusal by the Court of Appeal to recognize a tort of harassment curbs a small but growing body of case law that supported the existence of the tort. While the Court did not rule out the recognition of such a tort in the future, it was clear that the *Merrifield* case did not warrant such a significant legal reform. Although claims based on the tort of intentional infliction of mental suffering remain available in the employment context, employers should not be exposed to freestanding claims based on the tort of harassment. Given the lower threshold for establishing the tort of harassment, this is a very positive development for employers.

For further information please contact Jennifer Birrell at 613-940-2740 or André Champagne at 613-940-2735.