May 02, 2019

ARTICLE

Employer Ordered to Pay Aggravated Damages for Failure to Properly Investigate and Discipline Workplace Harassment

On February 22, 2019, Justice Sossin of the Ontario Superior Court ordered an employer to pay $50,000 in aggravated damages because the employer ignored the plaintiff's workplace harassment complaints, failed to conduct an investigation, and failed to take steps to discipline an abusive co-worker.

The Facts

In *Bassanese v German Canadian News Company Limited et al*,[1] the plaintiff, a 73-year old female clerk with 19 years of service, was verbally harassed by a male co-worker on a number of occasions. On April 17, 2018, the plaintiff made a formal written complaint to the president of the company about her co-worker's conduct. She wrote about "being constantly harassed by [the co-worker] yelling and screaming at me ... telling me that I am an idiot and that I should be fired, etc, etc." She added, "I am sorry Chris. I have never ever filed a complaint but I want you to step in and make sure this never happens again." The president wrote back on the same day, stating, "Sorry to hear that. We're a little short-staffed this week (2 illnesses, 1 sick child and a vacation) but I'll run it by Anne Marie, she's our HR person."

The plaintiff followed up with the president on May 7, 2018 and May 8, 2018. On May 8, 2018, the president responded to indicate that the issue had been brought to human resources and that he would take further steps. No further steps were taken by the president or human resources. Thus, on May 15, 2018, the plaintiff wrote to the president again to complain about the co-worker's ongoing, inappropriate conduct, concluding:

"I am writing to you again to let you know that I am at my wit's end and would like some sort of action to take place. I do not deserve to work in an environment where people are allowed to constantly yell and say inappropriate insults to me. Please look into this matter."

No further action was taken by the employer following the plaintiff's April and May complaints.

On June 21, 2018, the plaintiff alleged that the co-worker slapped her across the face three times. On this occasion, the plaintiff complained to the managing director and a police report was filed. In response, the employer terminated her employment on that same day. The plaintiff was not provided with notice or compensation for the loss of her employment benefits.

On August 24, 2018, the plaintiff brought a claim against her former employer and the co-worker for wrongful dismissal, assault and battery, intentional infliction of mental suffering, aggravated damages, and punitive damages. While the claim against the co-worker was settled out of court, Justice Sossin ordered the employer to pay the plaintiff $194,433.17 for compensation in lieu of notice, aggravated damages, and damages for assault and battery based on the employer's vicarious liability.

Decision Analysis

This decision is noteworthy because Justice Sossin awarded aggravated damages for the employer's failure to investigate harassment or take steps to discipline an abusive co-worker. The plaintiff submitted that a series of actions taken in "bad faith" cumulatively justified aggravated damages. These included:

1. The employer's failure to remit the plaintiff's statutory benefits under s.57 of the *Employment Standards Act, 2000* (ESA);
2. The employer's failure to launch an investigation on the plaintiff's complaint;
3. The employer's termination of employment as a reprisal within the meaning of s.50 of the *Occupational Health and Safety Act* (OHSA);
4. The employer's failure to provide the plaintiff with a letter of reference or assist in obtaining alternative employment; and
5. The employer's failure to provide a subsidy for relocation/retraining counselling.[2]

In *Whiten v. Pilot Insurance Co.*,[3] the Supreme Court of Canada held that aggravated damages are designed to compensate the plaintiff specifically for the "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant."[4]

In *Honda Canada Inc v Keays*,[5] the Supreme Court of Canada affirmed the ability of employees to seek aggravated damages in addition to pay in lieu of termination notice. The court set out a two part analysis for when aggravated damages are warranted:

1. The employer must engage in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive"; and
2. The employee must prove the "actual damages" caused by the employer's conduct (*e.g.*, damage to reputation, psychological injury, etc.).[6]

In *Boucher v Wal-Mart Canada Corp*,[7] the Ontario Court of Appeal applied *Keays* in a case where an award of substantial aggravated damages in the context of a dismissal were upheld. Justice Laskin, writing for the majority, affirmed aggravated damages of $200,000 against the employer, Wal-Mart, based on the following circumstances:

Wal-Mart took no steps to bring an end to Pinnock's misconduct. It did not take Boucher's complaints seriously, finding them unsubstantiated despite substantial evidence from co-workers that they were well-founded. It failed to enforce its workplace policies, which on their face were designed to protect employees from the kind of treatment Pinnock subjected Boucher to. And it threatened Boucher with retaliation for making her complaints, an especially vindictive act.[8]

Applying *Keays* and *Boucher* to the facts of this case, Justice Sossin held that the allegations plead by the plaintiff were "less egregious than those found against Wal-Mart in *Boucher*."[9] However, the employer "ignored her complaint and neglected to investigate the complaint or take steps to address [the co-worker's] inappropriate conduct."[10] Thus, Justice Sossin concluded that, "this neglect in the face [of the plaintiff's] heightened frustration and anxiety as the work environment became more toxic warrants aggravated damages."[11] The plaintiff was awarded $50,000 in aggravated damages.

Lessons for Employers

This decision demonstrates that it is imperative for employers to conduct a thorough investigation of all workplace harassment and workplace violence complaints. A failure to investigate or take steps to address inappropriate workplace conduct may result in an employer being ordered to pay aggravated damages. This case also serves as a warning to employers that they may be accountable for conduct towards employees that is abusive, unfair, or neglectful.

As a reminder, Ontario's *Occupational Health and Safety Act* requires all employers with more than five employees to have a policy and a procedure for workplace violence and workplace harassment. Adherence and enforcement of these policies and procedures will help an employer defend against possible claims of aggravated damages.

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[1] 2019 ONSC 1343 [*Bassanese*].

[2] *Ibid* at para 40.

[3] 2002 SCC 18.

[4] *Ibid* at para 116.

[5] 2008 SCC 39 [*Keays*].

[6] *Ibid* at paras 57-59

[7] 2014 ONCA 419 [*Boucher*].

[8] *Ibid* at para 72.

[9] *Bassanese*, *supra* note 1at para 44.

[10] *Ibid*.

[11] *Ibid* at para 45.

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