

# A ROAD MAP FOR WRONGFUL DISMISSAL DAMAGES FROM THE ONTARIO COURT OF APPEAL: MALTREATMENT OF DEAF EMPLOYEE REQUIRES APPELLATE INTERVENTION

Posted on July 6, 2016

**Categories:** [Insights](#), [Publications](#)

This is a case of bad facts make clearer law. Rarely have the underlying facts leading to a wrongful dismissal reached the depths of the employer's "deemed" misconduct as set out by the Ontario Court of Appeal in its just released judgment in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.* 2016 ONCA 520.

## Background

Vicky Strudwick was a 15 year employee who suddenly became deaf in 2010, likely due to a virus. She was subsequently subjected to an abusive, humiliating and malicious course of conduct carried out by her supervisor and the employer's general manager, designed to force her resignation. When Strudwick did not resign, Applied Consumer terminated her employment in May, 2011 in an extremely heavy-handed fashion. At least those are the deemed facts contained in Strudwick's statement of claim and her evidence in the hearing to assess damages, such facts and evidence uncontested as a result of the employer's failure to set aside it having been noted in default after Strudwick commenced her legal action. In addition to this misconduct, Strudwick's various requests for "*the most basic accommodation of her disability*" were refused. The "facts" are summarized in the Court of Appeal's decision.

At the time of her dismissal, Strudwick was 56 years old and had been acting as an internal instructor earning \$12.65 per hour. In 2010 her income was \$21,800. In her claim, Strudwick sought damages for wrongful dismissal and related claims arising out of the abuse. The motion judge awarded damages based on a 20 month notice period, plus four months for the manner of the dismissal (the "*Wallace*" factor). He also awarded \$20,000 for the employer's Human Rights Code violation, \$18,984 for the intentional infliction of emotional distress (based on post-employment medical treatment arising out of the dismissal) and punitive damages of \$15,000. The award totaled \$109,940 plus interest and costs of \$40,000. Strudwick appealed the quantum of damages, while Applied Consumer sought leave to appeal the award of costs.

## Court of Appeal

Before examining the various heads of damages, the Court had to deal with the preliminary issue as to whether the amount of \$240,000 in damages claimed in Strudwick's statement of claim limited her ability to recover the more than \$1 million she was seeking on the appeal. Because Strudwick never moved to amend her claim, the Court held that it did not have the jurisdiction to award damages in excess of the amount claimed.

The Court then went on to examine each head of damages, as follows:

1. The Court found the base award of 20 months to be within an acceptable range, rejecting Strudwick's claim for notice to age 65. It reinforced the notion that "*only exceptional circumstances will support a base notice period in excess of 24 months*". While troubled by the Wallace factor arbitrarily extending the notice period by four months, the Court noted that there was no cross-appeal on this issue and therefore no challenge with which to deal.
2. As for the Human Rights Code violation, the Court found the motion judge's analysis flawed in two respects: he erred in (i) not considering the profound and prolonged impact of the discrimination on the particularly vulnerable victim, and in (ii) not taking into account that the employer's misconduct went beyond a failure to accommodate but in fact was designed to increase Strudwick's difficulties. After considering the range of compensation in similar cases, this award was increased to \$40,000.
3. Once the tort of intentional infliction of mental suffering has been established, the Court stated that "*the ordinary principles of assessment for damages relating to personal injuries applies*", meaning recovery is available for both pecuniary losses including medical expenses and non-pecuniary losses including pain and suffering. The Court held that the motion judge had neglected to consider the increased cost of therapy resulting from the plaintiff's deafness (\$11,310) and also awarded an additional \$5,000 for pain and suffering.
4. The motion judge had elected not to grant aggravated damages arising out of the employer's unfair and bad faith conduct, on the basis that such an award would overlap with his four month *Wallace* award, the breach of the Code and the intentional infliction of mental suffering. While recognizing the danger of overlap, the Court was of the view that the employer's actions both leading up to the dismissal and post dismissal (initially withholding outstanding wages and issuing a Record of Employment indicating dismissal for willful misconduct) were so egregious as to warrant aggravated damages of \$70,000, less the award of \$8,400 for the *Wallace* factor.
5. Finally, the Court noted the distinction between damages for conduct in the manner of dismissal, which are compensatory, and punitive damages for "*wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own*" as highlighted by the Supreme Court of Canada in *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362. In this case, the Court felt that Applied Consumer's

conduct was significantly more egregious than that which had occurred in *Boucher v. Wal-Mart Canada Corp.* 2014 ONCA 419 in which the Court of Appeal reduced a jury's award of punitive damages from \$200,000 to \$110,000. However, it recognized that Applied Consumer is a relatively small, family-held business of some 80 employees. Accordingly, punitive damages were set at \$55,000.

Taking into account the amount claimed in the statement of claim, the Court reduced its award marginally to \$246,049 plus another \$20,000 in costs, dismissing the employer's cross-appeal on costs.

### **What Employers Should Know**

Applied Consumer was fortunate that the extent of its liability was limited to the amount claimed. The Court made it clear that it determined the amounts it awarded under the various heads in light of the aggregate amount it could award. Had the employee claimed more, she no doubt would have received more.

It should be noted that the employer's misconduct was carried out by two employees left in charge while the owner/manager was absent due to medical issues. Nonetheless the company was vicariously liable for the acts of its employees. The lesson would appear to be: know who is running your business and be sure you can trust them to behave in a professional and lawful manner.

Finally, don't ever ignore a legal action. It will not go away without at least bringing forward a minimum defence. Applied Consumer's failure to avoid being noted in default and lengthy delay thereafter left it unable to challenge any part of Strudwick's story. And what a sad story it was.

by David Elenbaas

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016