

HANDLE WITH CARE: DAMAGES MAY BE AWARDED FOR UNREASONABLE DISCIPLINARY ACTION

Posted on July 14, 2015

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A recent decision of the Federal Court of Canada has confirmed that employees can be awarded aggravated damages for mental distress as a result of unreasonable disciplinary action that falls short of dismissal.

Background

In *Gatien v. Attorney General of Canada*,^[1] the employee had been employed in the federal public service for over 35 years with a clean disciplinary record. However, following an incident in which she was physically assaulted by one of her colleagues, the employee constructed a barricade in order to prevent her assailant from reentering the workplace. The employee commenced a stress leave as a result of these incidents and, when she returned, received a 10-day disciplinary suspension for having constructed the barricade. The employee returned to work after serving the suspension, but her psychological issues persisted.

The employee subsequently filed a grievance that referenced a letter from her psychologist stating that the major source of the employee's problems was "not the assault itself so much as her employer's refusal to recognize the harm that was done to her and to protect her from further harm in the workplace." The employee sought an appeal of the disciplinary suspension and \$100,000 in damages for mental distress.

Public Service Labour Relations Board

The Public Service Labour Relations Board (the tribunal responsible for administering the collective bargaining and grievance adjudication systems in the federal public service) found that the disciplinary suspension was excessive, and reduced the penalty to an oral reprimand. On the subject of damages, however, the Board opined that damages are not normally awarded for suspensions because there is no permanent loss of employment and lost monies can be recovered. The Board also stated that despite the excessive nature of the discipline, there were no grounds for an award of damages because there was no "separate actionable course of conduct" (i.e., something other than the suspension that warranted damages for mental distress).

Federal Court

On appeal, the Federal Court noted that the jurisprudence regarding damages for mental distress has been in

constant flux. However, since the Supreme Court of Canada's decision in *Honda Canada Inc v. Keays*,^[2] damages for mental distress no longer require an independent actionable wrong. In other words, employees do not need to show that there has been a separate course of conduct – "something extra" – that warrants damages for mental distress in order to be entitled to them. In this regard, damages for mental distress are different than "punitive damages," which generally require the presence of a separate cause of action in order to be awarded (e.g., conducting a dismissal in a manner designed to disparage the employee).

The Federal Court also noted that while *Honda* was decided in the context of a wrongful dismissal complaint, the Supreme Court's reasoning could also be extended to disciplinary actions that fall short of dismissal. Given that the employee had provided medical evidence suggesting that the suspension could have caused her mental suffering and anguish, the Federal Court directed the Board to redetermine the issue of damages for mental distress, this time by using the proper legal test.

Employer takeaways

The ability to discipline employees is a key tool in every employer's toolkit, and can be essential to maintaining a safe and efficient workplace. However, the decision to implement discipline should not be taken lightly. Therefore, employers are well advised to consider the following steps before disciplining employees:

1. **Conduct an investigation.** Hastily drawn conclusions can be the demise of any disciplinary action. Investigate allegations of workplace misconduct in a fair and objective manner, and always give the employee under investigation an opportunity to state his or her side of the case.
2. **Understand the issues.** Workplace misconduct is not always a simple matter of cause and effect. For example, if an employee under investigation provides bona fide evidence of extenuating medical circumstances, consider whether the disciplinary action should be modified as a result.
3. **Be consistent.** Disciplinary action must be measured and consistent. It should not be implemented in a vacuum. In other words, make sure that the punishment fits the crime in every case.

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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.

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[1] *Gatien v. Attorney General of Canada*, 2015 FC 543.

[2] *Honda Canada Inc v. Keays*, 2008 SCC 39.

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