

# BC COURT OF APPEAL CONFIRMS DISMISSED EMPLOYEES DO NOT REQUIRE EXPERT EVIDENCE TO PROVE COMPENSABLE MENTAL INJURY

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An award of aggravated damages based on mental distress to a dismissed employee in *Lau v Royal Bank of Canada* [1] presented the British Columbia Court of Appeal with its first opportunity to apply the Supreme Court of Canada's decision in *Saadati v Moorhead* [2].

In a previous [bulletin](#), we discussed the 2017 Supreme Court of Canada decision in *Saadati v Moorhead*. In *Saadati*, the Supreme Court of Canada ruled in the context of a tort claim that a finding of legally compensable mental injury does not need to be supported by expert evidence demonstrating a medically recognized psychiatric injury. Foreshadowing the British Columbia Court of Appeal's decision in *Lau v Royal Bank of Canada*, we predicted that *Saadati* would have implications for employees looking to claim damages for mental injury against their employers.

## Background

Mr. Lau worked as an account manager and sold mutual funds at a bank. His employer terminated him on the grounds that he falsified bank records and lied during the course of an internal investigation into a client complaint. At trial, the judge found that the investigation into Mr. Lau's misconduct was flawed and he had been wrongfully dismissed. Mr. Lau was awarded damages in lieu of nine months' notice.

The judge further awarded aggravated damages in the amount of \$30,000 based on mental distress arising from the manner of his dismissal. The award of aggravated damages was based on the judge's impression that Mr. Lau's "slow, quiet and monotone manner in which he testified" meant he was depressed. There was no evidence from family members, friends, or third parties concerning Mr. Lau's mental state and no expert evidence, medical or otherwise.

The employer appealed only the award of aggravated damages.

## British Columbia Court of Appeal

On appeal, the trial judge's award of aggravated damages was overturned.

First, the Court of Appeal found that there had been no bad faith or unfairness in the manner of Mr. Lau's dismissal. After an investigative process, Mr. Lau was advised of the reasons for his termination in writing at an in-person interview. He was not harassed, scolded, or otherwise mistreated. There was no suggestion of any ulterior motive.

Second, the Court of Appeal overturned the trial judge's award of aggravated damages for mental distress. While the employer argued on appeal that there must be medical evidence of a psychological condition to substantiate an award of aggravated damages for mental distress, this was rejected by the Court of Appeal. Citing *Saadati*, the Court of Appeal held that expert evidence proving a recognized psychiatric illness is not required to show compensable mental injury. The Court of Appeal also confirmed that the test for mental distress, in principle, is the same in both contract and in tort.

However, in Mr. Lau's case the Court of Appeal held that there was insufficient evidence to support a finding of compensable mental injury. The trial judge had concluded that Mr. Lau was depressed because of the slow, quiet and monotone manner in which he testified. There was no third party evidence concerning the impact of the dismissal on Mr. Lau and his mental state. A finding of compensable mental injury cannot be based solely on the demeanor of a plaintiff at trial. There must be an evidentiary foundation for such an award. That evidentiary foundation may be testimony demonstrating a serious and prolonged disruption that transcends ordinary emotional upset or distress.

As Mr. Lau presented no such evidence, the Court of Appeal set aside the award for aggravated damages.

### **Takeaways**

The Court of Appeal's decision in *Lau* confirms that the principles from *Saadati* regarding mental injury claims apply in the employment context. Although *Saadati* and *Lau* make clear that professional expert evidence is not required to support a finding of compensable mental injury, a plaintiff will not succeed in the absence of some reliable evidence for such a finding. Employers worried that *Saadati* unduly expands their liability for claims of mental distress will welcome the decision in *Lau* as it reaffirms that courts will not award damages for the normal distress and bad feelings resulting from the loss of employment.

by Melanie Harmer, Natalie Cuthill and Colin Cheng, Temporary Articled Student

[1] 2017 BCCA 253, overturning 2015 BCSC 1639.[ps2id id='1' target='']

[2] 2017 SCC 28.[ps2id id='2' target='']

### **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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