

大成 DENTONS

Breakfast for the Mind: Employment and Labour Spring 2023

Grow | Protect | Operate | Finance

Speakers



Adrian Elmslie
Partner
D + 1 780 423 7364
adrian.elmslie@dentons.com



Cristina Wendel
Partner
D + 1 780 423 7353
cristina.wendel@dentons.com



Alison Walsh
Partner
D + 1 780 423 7147
alison.walsh@dentons.com



Taylor Holland
Senior Associate
D + 1 780 423 7160
taylor.holland@dentons.com



Jenny Xinyi Wang
Associate
D + 1 780 423 7311
jenny.wang@dentons.com

Beyond bullying - understanding the new tort of harassment

Taylor Holland, Senior Associate

Development of the Tort in Alberta

Al-Ghamdi v Alberta, 2017 ABQB 684

- This case expressed a willingness to consider the new tort, but held this was not the appropriate case for it.
- The Court suggested that if harassment were to be recognized in Alberta, the following 4 elements should be present:
 - 1) Outrageous conduct by the defendant;
 - 2) The defendant's intention of causing or reckless disregard of causing emotional distress;
 - 3) The plaintiff suffered severe or extreme emotional distress; and
 - 4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.
- The plaintiff filed 13 claims overall, which included a claim against the hospital for failing to deal with other doctors intimidating, targeting and injuring him. There were also claims against a superior doctor for failing to deal with the harassment and abuse in the workplace, failing to ensure he had a workplace free from harassment and abuse, and promoting harassment against him.
- All of the plaintiff's claims were ultimately unsuccessful.
- The Court cited a need for greater clarity, particulars and specificity in this case to warrant consideration of a new tort of harassment.

Development of the Tort in Alberta

Benison v McKinnon, 2021 ABQB 843

- **The Court considered recognizing the tort but stated it overlapped too much to be an independent tort.**
- **Facts:** The defendants made several complaints against the plaintiff, each to harass and pressure him into quitting the RCMP or to render him medically incapable of performing his duties.
- The tort of harassment was not recognized because the facts were entirely encompassed by the tort of intentional infliction of mental suffering (also known as intentional infliction of emotional distress) and courts will not consider a novel tort if there is an existing legal remedy to redress the conduct (See *Merrifield v Canada*, 2019 ONCA; *Nevsun Resources v Araya*, 2020 SCC 5).
- The criteria for intentional infliction of mental suffering is met where the plaintiff establishes conduct that is:
 - a) Flagrant and outrageous;
 - b) Calculated to harm; and
 - c) Results in visible and provable illness.

Development of the Tort in Alberta

Sun v Huang, 2021 ABQB 782

- Facts: The plaintiff experienced psychological upset after he and his family received harassing messages, phone calls and a confrontation from the defendant.
- This was not a case where the development of a new tort of harassment was discussed. It was a claim seeking damages for intentional infliction of emotional distress and demonstrates a gap in the law based on that cause of action.
- The plaintiff did not meet the requirements for the tort of intentional infliction of emotional distress as he did not put forward sufficient evidence of a visible and provable illness, mental or otherwise, attributable to the actions of the defendants. As such, his claim for damages arising from the defendant's conduct failed.
- If the new tort of harassment had been recognized at that time, the result may have been different. The new tort includes a less onerous injury requirement that does not require a plaintiff to establish a provable illness.

The New Tort of Harassment

Alberta Health Services v Johnston, 2023 ABKB 209.

Facts:

- The defendant repeatedly spoke about Alberta Health Services (“AHS”) and its employee, Ms. Nunn, in a harassing manner on his online talk show.
- On his show, the defendant called AHS health inspectors fascists. He also allowed guests on his show to refer to AHS health inspectors as “villains, Nazis, Gestapo, Communists, [and] Fascists”.
- The defendant, on more than one occasion, stated that AHS and its employees were criminals and guilty of various crimes, including criminal trespass, harassment, extortion, intimidation and terrorism.
- The defendant repeatedly referred to Ms. Nunn as a “terrorist” and “alcoholic”.
- The defendant also mocked Ms. Nunn and her family while using pictures of them taken from Ms. Nunn’s social media accounts.
- Altogether, the Court found that his statements could reasonably be interpreted as inciting his followers to enact violence against Ms. Nunn and her family.

The New Tort of Harassment

Alberta Health Services v Johnston, 2023 ABKB 209.

- Alberta courts previously rejected the notion of harassment being an independent cause of action for civil claims.
- However, the Court, in this case, noted that
 - restraining orders are regularly granted by our courts to address harassment;
 - harassment is a crime;
 - judicial creation of a new tort does not preclude the legislature from enacting statutory rights; and
 - the tort of harassment fills a gap in the law.

The New Tort of Harassment

Alberta Health Services v Johnston, 2023 ABKB 209.

The Court defined the tort of harassment as follows:

- The defendant has engaged in repeated communications, threats, insults, stalking, or other harassing behaviors in person or through other means;
- That they knew or ought to have known was unwelcome;
- Which impugn the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and
- Caused harm.

Available damages for the tort of harassment:

- General damages;
- Special damages; and
- Aggravated or punitive damages.

The New Tort of Harassment

Alberta Health Services v Johnston, 2023 ABKB 209.

Employee's Recourse Options Before:

- Through the Alberta Human Rights Commission;
- File a workers' compensation claim if they were in a covered industry and occupation under the *Alberta Workers' Compensation Act*; or
- Quit due to a toxic work environment and commence a constructive dismissal claim.

Employee's Recourse Options Now:

- Employees now have the additional option to file a claim against their employer alleging vicarious liability for harassment within the workplace.

Employer's Defences:

- The employer conducted a thorough and proper investigation once they were aware of any alleged harassment in the workplace.
- Employers may also have a jurisdictional defence to tortious harassment claims if their employees are covered by workers' compensation legislation.

State of the Law in Ontario

Merrifield v Canada (Attorney General), 2019 ONCA 205.

- Facts: The plaintiff, a member of the RCMP, brought a civil claim alleging the tort of harassment based on allegations of harassment and bullying in the workplace.
- The ONCA found the trial judge erred in recognizing the novel tort of harassment and overturned the decision. Therefore, no tort of harassment was established. This case did not support the creation of the new tort and instead put forward evidence to the contrary.
- The ONCA found the proposed tort to be a very similar, but less onerous version of the tort of intentional infliction of mental suffering. This finding was largely due to intentional infliction of mental suffering operating as an intentional tort, whereas the proposed tort of harassment would operate as a negligence-based tort.
- “While we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case.”

Ontario Tort of Internet Harassment

Caplan v Atas, 2021 ONSC 670

- While the general tort of harassment does not exist in Ontario, the tort of internet harassment has been recognized.
- Facts: The Defendant engaged in vicious harassment campaigns emanating from multiple perceived grievances. Her targets included her former employer, her own lawyers, adverse litigants, and even journalists. Vicious harassment campaigns included hate mail and internet posting alleging completely unfounded and heinous misconduct to anyone who she had a grudge against.
- The tort is made out “where the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm”.
- The Ontario tort of internet harassment was recently affirmed in *40 Days of Life v Dietrich et. Al.*, 2022 ONSC 5588, wherein the Court noted that the plaintiff had a real prospect of success in their claim of internet harassment if it were to make it to trial.

State of the Law in British Columbia

Ilic v British Columbia (Justice), 2023 BCSC 167

- Facts: This case includes more than 20 alleged breaches by members of the RCMP. These breaches are claimed to constitute harassment, which goes against the Administration Manual of the RCMP.
- The Court noted that there is no recognized tort of harassment in Canada so there cannot be a legal duty of care to protect against the commission it. As such, the harassment claims were not successful.
- *Ilic* was released in February 2023, whereas *Johnson* was released in April 2023. It is unknown whether the analysis in *Ilic* would have been different if *Johnson* pre-dated the decision.
- Further, the British Columbia Supreme Court, in *Skutnik v British Columbia (Attorney General)*, 2021 BCSC 2408, previously held there is no tort of harassment in British Columbia and, therefore, dismissed the claim.

Parting ways - avoiding common problems when dealing with employee terminations

Jenny Xinyi Wang, Associate

Introduction

- Employee terminations can be a difficult and complex process for both employers and employees and include:
 - Terminations without cause
 - Terminations for Just Cause
- In Alberta, these terminations are governed by specific laws and regulations including the:
 - *Alberta Employment Standards Code*
 - *Alberta Human Rights Act*
 - Common law

Termination without Cause

- Most terminations:
 - Insufficient for just cause but deteriorating employment relationship
 - Business closure
 - Purchase of sale of business
- But not termination for any reason whatsoever: human rights considerations.
- An employee's entitlement to notice upon termination will be dictated by a number of factors, including whether or not they have an enforceable termination clause in their employment contract.

Termination without Cause

- Payment in lieu of notice vs. working notice.
- Common law notice is an assessment based on the *Bardal* factors and other considerations:
 - Character of employment
 - Length of service
 - Age
 - Availability of similar employment
 - Inducement
 - Mitigation

Termination without Cause

Case Law Update

- *Tatebe v Exterran Water Solutions ULC* (ABCJ) – decision filed May 31, 2023
 - The plaintiff sued for wrongful dismissal damages after he was terminated without cause on June 2, 2022, after almost three years of employment. The employment contract limited the plaintiff's entitlement to the *Employment Standards Code*. The employer's application for summary dismissal was granted as the court determined that its termination clause was enforceable.
 - As a result, the plaintiff was only entitled to two weeks' pay in lieu in the amount of \$4,987.50 less deductions, as opposed to the \$53,625.00 he had claimed.
- *Rice v Shell Global Solutions Canada Inc.* (ABCA) – December 10, 2021
 - The employment contract suggested that the plaintiff was to be hired for a fixed term of 4 years, at the end of which her employment term would be of an indefinite duration.
 - Without a termination clause, the employer attempted to terminate the employment based on common law principles, giving the plaintiff 15 months of pay in lieu of reasonable notice. The plaintiff claimed and was awarded 34.5 months, equivalent to the remuneration she would have received had she remained employed to the end of her fixed term.

Termination without Cause

Best Practices

- The employment agreement:
 - No recognition of prior years of services (if applicable)
 - Probationary clause
 - Termination clause
 - Previous Employment clause
 - Agreement remains in effect clause
- Gather information about the availability of similar employment.
- Severance offer in exchange for a release.
- NOTE: if the employer elects to terminate without cause they cannot assert just cause after the fact unless it is after-acquired cause.

Termination with Just Cause

- Just Cause: the employee's misconduct gives rise to a breakdown of the employment relationship:
 - Violates an essential condition of the employment contract.
 - Breaches the trust or faith that is inherent in the working relationship.
 - Is fundamentally or directly inconsistent with the employee's obligations to the employer.
- The test:
 1. Determine the nature and extent of the misconduct.
 2. Consider the surrounding circumstances.
 3. Is summary dismissal warranted as a proportional response.

Termination with Just Cause

- Single incident of misconduct:
 - Employee's misconduct jeopardized the safety of others.
 - Employee in a senior sales position spent work time soliciting business and performing work for another company, rather than working for the employer.
 - Employee violated policies or procedures directly related to their duties and responsibilities.
- Cumulative incidents of misconduct:
 - The evidence must establish that the employee's conduct would have been "such as to interfere with and to prejudice the safe and proper conduct of the business".
 - The past and subsequent misconduct do not need to be similar in nature to amount to just cause.

Termination with Just Cause

Case Law Update

- *Baker v Weyerhaeuser Company Limited* (ABCA) – March 16, 2022
 - The plaintiff was with the company for about 14 years until he was terminated for just cause.
 - The timeline is as follows:
 - November 16, 2015: the plaintiff received and read a "Written Warning as a result of continued poor performance as a supervisor and overall shift results in 2015".
 - November 22, 2015: an employee on the plaintiff's shift pulled a 600-volt breaker in error.
 - November 25, 2015: a machine sustained damage in the log yard on the plaintiff's shift.
 - November 30, 2015: the plaintiff met with his supervisor at the time, Mr. Snow, to discuss the incidents of November 22 and 25, 2015; at trial, the plaintiff agreed he could have handled both incidents better.
 - December 14, 2015: a "hot work" and small fire incident occurred on the plaintiff's shift.
 - December 21, 2015: Weyerhaeuser terminated the plaintiff's employment.
 - The employer contends that it had sufficient grounds to terminate for just cause because the plaintiff received written warnings, and the plaintiff failed to follow health and safety procedures that led to the small fire incident.

Termination with Just Cause

Case Law Update

- *Baker v Weyerhaeuser Company Limited* (ABCA) – March 16, 2022
 - Not just cause because:
 - the plaintiff’s direct supervisor’s real reason for terminating him was because the plaintiff had called him “classless”;
 - the investigation of the fire incident “was not by any means a thorough investigation”
 - there was no comprehensive report
 - no evidence of asking for more details, asking for the plaintiff’s personnel file to be reviewed or considered; or asking about how any other involved employees were disciplined.
 - The employer was “bound by law to determine whether such things as delay in reporting an incident or whether disrespect or any allegation gave rise to a violation of trust rendering a continuing relationship impossible” but did not do so.
 - While discipline was warranted, the actions in terminating the plaintiff were made in bad faith and blown out of proportion considering the plaintiff’s long-time employment and previously unblemished record.

Termination with Just Cause

Best Practices

- Effective workplace investigations
- Discipline Policy
- Gratuitous severance offer in exchange for a release

All Terminations

- Record of Employment and final pay.
- Return of company equipment and property:
 - Security equipment (e.g. key cards)
 - Physical equipment (e.g. laptops and cellphones)
 - Proprietary property (e.g. confidential or intellectual property)
- Reminder of continuing obligations:
 - Confidentiality obligations
 - Non-solicit and/or non-competition obligations

Navigating a workplace investigation - answering common questions and concerns

Adrian Elmslie, Partner

Alison Walsh, Partner

Cristina Wendel, Partner

When to Investigate

- Allegations that can trigger the need to conduct an investigation may come from an employee, a customer, or another third party
- Typical allegations that trigger investigations:
 - Incidents of discrimination/harassment
 - Allegations of abuse/violence
 - Incidents of theft/fraud
 - Breaches of workplace policies
 - Other dishonesty

Why Investigate

- Statutory requirement for harassment and workplace violence under Occupational Health and Safety legislation
- Courts, arbitrators and tribunals recognize that allegations of serious misconduct may have a significant impact on an employee and must be properly investigated by the employer before a decision is made
- Adjudicators have imposed an obligation on the employer to conduct a fair and effective workplace investigation
- There is potential liability if an employer:
 - fails to conduct a workplace investigation;
 - fails to conduct the workplace investigation properly; or
 - fails to discharge its statutory obligations to investigate, if applicable

Navigating a workplace investigation

Q: When does a complaint need to be investigated? Who should conduct the investigation?

Navigating a workplace investigation

Q: Can the complainant or the respondent bring a support person to the investigation interview? For example, a friend, co-worker or lawyer?

Navigating a workplace investigation

Q: How do you conclude an investigation where the parties have conflicting stories and there are no other witnesses?

Navigating a workplace investigation

Q: How do you navigate a complaint where a complainant wants to remain anonymous? How do you address maintaining confidentiality during the investigation process?

Navigating a workplace investigation

Q: If you find during an investigation that a complaint was fabricated, how do you address this matter with the complainant?

Questions?



大成 DENTONS

Thank you

Dentons is designed to be different. As the world's largest global law firm with 21,000 professionals in over 200 locations in more than 80 countries, we can help you grow, protect, operate and finance your business. Our polycentric and purpose-driven approach, together with our commitment to inclusion, diversity, equity and ESG, ensures we challenge the status quo to stay focused on what matters most to you. www.dentons.com.

© 2023 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal advice and you should not take, or refrain from taking, action based on its content. Please see dentons.com for Legal Notices.