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EXPECT THE BEST

Can Employers Be Sued For Inflicting Mental Distress?

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As a Workers' Compensation practitioner, I have for years been troubled by the 2002 decision of the Ontario Court of Appeal, in the case of *Prinzo v. Baycrest Centre for Geriatric Care*, a wrongful dismissal case that awarded damages, not only for 12 months' pay in lieu of notice, but for aggravated damages in the amount of $15,000 for the tort of "intentional infliction of mental suffering". While I could never disagree with the Court's ruling based upon the arguments set out in the decision, I was troubled by the point that was NOT apparently raised, of a defense to that aspect of the claim under the *Workplace Safety and Insurance Act* – Ontario's Workers' Compensation legislation.

Since the original Ontario *Workmen's Compensation Act* came into effect in 1915, Ontario workers covered by the Act, in exchange for gaining the right to obtain no-fault benefits for their injuries, lost the right to sue their own employers for injuries suffered as a result of accidents arising out of and in the course of their employment. In fairness, it is unlikely that, in 1915, too many people thought that the *intentional* infliction of mental suffering could constitute a work-related accident, nor for that matter, that mental suffering, however caused, could warrant compensation.

But times change.

From the beginning in 1915, the definition of an "accident" under the legislation (whatever its changing name) has included a somewhat expansive, if not outright counterintuitive definition of an "accident," as including "a wilful and intentional act, not being the act of the worker". In other words, the workers' compensation concept of an accident includes something quite deliberate; something that in any other context would not be an accident at all. The intent of this is to allow for compensation for injuries resulting from the actions of others, that are not the fault of the injured person. This, therefore, would seem to include the intentional infliction of mental suffering as part of this specialized concept of "accident".

But as recently as 30 years ago, compensation was not something one would have expected to be available on the basis of a psychological injury. While psychiatric claims could always be allowed in cases of head injuries, and more recently as a *reaction* to a physical injury, it was only in the mid-1980s that the Workers' Compensation Appeals Tribunal (now the Workplace Safety and Insurance Appeals Tribunal) began to recognize entitlement for workplace mental stress. In response, the Harris Government significantly curtailed such entitlement when it brought in the current legislation in 1997, although the door was not completely shut. As things now stand, mental stress claims, while not allowable for ordinary workplace stressors, are in fact allowable where they constitute an acute reaction to a sudden and unexpected traumatic event. Moreover, WSIB policy includes in this notion some forms of harassment, provided that the stressor is not an ordinary employer function such as discipline. In

short, there is at minimum a strong argument to be made in favor of allowing WSIB entitlement for traumatic mental stress in a situation such as Ms. Prinzo's. If this is the case, then an employee should be limited to the recovery of WSIB benefits that might be payable for such an injury, and precluded from making a claim for this in the courts, whether as part of a wrongful dismissal lawsuit, or otherwise.

Nevertheless, in Ontario, the *Prinzo* case has stood for a decade as a precedent for making such an award in a wrongful dismissal case. Quite recently, however, the Alberta Court of Queen's Bench addressed the very question that was not argued in the Ontario case.

In the February 2013 case of *Ashraf v. SNC Lavalin*, the Alberta Court dealt with the situation of an engineer's claim that the employer permitted other employees to bully and harass him, causing him mental anguish, which in turn caused him a number of physical ailments. Rather than file an ordinary defence, however, the employer sought to have the entire case thrown out on the basis that the right to sue had been taken away by the Alberta *Workers' Compensation Act* (which has near identical language to the Ontario law regarding both the loss of the right to sue and willful and intentional acts). The Court found that the worker was in fact entitled to claim workers' compensation for the conduct at issue, and that accordingly, his right of action was taken away.

While in Ontario, there are some limitations, as mentioned above, on the ability to obtain compensation benefits in mental stress cases, it would appear that an employer who is sued for any form of mental stress by one of its employees should certainly consider whether or not the claim is one that might be compensable under the *Workplace Safety and Insurance Act*. If so, the application would not be made to the Court, as in Alberta, but to the Workplace Safety and Insurance Appeals Tribunal, which has exclusive jurisdiction to decide such matters under section 31 of the legislation. In making that determination, it would now appear that the *Prinzo* case may not in fact pose a barrier to the employer's argument. ■