

## Court of Appeal Clarifies the Tort of Negligent Infliction of Emotional Suffering

by Elizabeth Forster

Originally published in *Employment Notes* (September 2010) - [Read the entire newsletter](#)



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At our last client seminar, we told you of the decision of the Ontario Superior Court of Justice in *Piresferreira v. Ayotte*. This case involved a claim by Ms. Piresferreira, an Account Manager of Bell Mobility. Piresferreira had always received excellent performance reviews until 2004, when her sales declined through no fault of her own. Piresferreira's supervisor, Richard Ayotte, held Piresferreira responsible for the declining sales and he asked her to set up some client meetings. Piresferreira sent emails to the clients in an attempt to set up the meetings, but the clients did not respond to her invitation. When she advised Ayotte of this he became extremely angry and accused her of not doing her job. She attempted to show him the invitations on her Blackberry. However, Ayotte pushed her away, telling her to get away from him. The push was strong enough that Piresferreira was pushed back approximately a foot into a filing cabinet.

After the incident, Ayotte placed Piresferreira on a performance improvement plan. Piresferreira suffered extreme upset over this behaviour. She refused to sign the performance improvement plan, and lodged a formal complaint against Ayotte. Following an investigation, Bell Mobility wrote a letter to Piresferreira advising that Ayotte confirmed his inappropriate behaviour, and that they were scheduling a meeting to permit Ayotte to apologize to her, providing him with a written warning, and requiring him to attend courses on effective communication at work. However, Bell Mobility also set up an appointment to review her performance improvement plan with her. Piresferreira was so upset that she never returned to work. She was diagnosed with severe depression and anxiety.

Piresferreira sued Ayotte and Bell Mobility for wrongful dismissal, assault, intentional and negligent infliction of emotional distress, and mental suffering. Her partner sued for damages under the *Family Law Act* for loss of companionship.

Ayotte was found liable for assault and intentional infliction of emotional distress. Bell Mobility was found vicariously liable for Ayotte's misconduct, and directly liable for negligent infliction of emotional suffering.

At trial Piresferreira was awarded a total of \$500,955.00 as follows:

- (i) General damages for assault, battery, intentional and negligent infliction of emotional distress, mental suffering and psycho-traumatic disability - \$45,000.00;
- (ii) Loss of past and future income - \$450,832.00;
- (iii) Special Damages - \$5,123.00;

In addition, she was awarded costs of \$225,000.00; and her partner was awarded \$15,000.00 for loss of guidance, care and companionship.

On May 28, 2010, the Court of Appeal allowed the appeal in part.

The Court of Appeal found that the trial judge erred in her finding that the tort of negligent infliction of emotional suffering was available against the employer, and in her finding that the tort of intentional infliction of mental suffering by Ayotte had been made out.

The Court of Appeal found that the trial judge had based her finding of negligent infliction of mental suffering upon Ayotte's breach of Bell Mobility's Code of Business Conduct. The court held that a breach of this policy was a breach of a contractual duty, but it could not be the basis for the common law tort of negligent infliction of mental suffering. The court recognized that an employer had a duty to act fairly and in good faith during the termination process, but held that an employer had no general duty to take care to shield an employee during the "entire course of his or her employment from acts in the workplace that might cause mental suffering". Piresferreira's claim for damages for mental distress was better determined by way of damages for mental distress in the context of the termination.

The Court of Appeal also rejected the claim for damages for intentional infliction of mental suffering by Ayotte, finding that one of the elements of the tort, namely, that the conduct be calculated to produce harm was not established. In short, the court found that there was no evidence to support any inference that Ayotte intended or knew that Piresferreira's depression would result from his behaviour.

Notwithstanding the striking of the award of damages for negligent and intentional infliction of mental distress, the court awarded damages for Ayotte's assault and battery in the amount of \$15,000.00, and for mental distress in the amount of \$45,000.00.

#### **Significance of This Decision**

In this decision, the court has further clarified the duties that employers have towards their employees. The Court of Appeal refused to recognize any overall duty of good faith toward employees, but rather, confirmed that there was a limited duty to act in good faith at the time of termination. The Court expressed the view that any expansion of this duty is best left to the Legislature.

The decision has no doubt thwarted what might otherwise have been a large influx of new cases for damages from claims for any distress that an employee might suffer during the course of his or her employment. For the most part, employees will still have to base their claims on contract law.

An application for leave to appeal this decision to the Supreme Court of Canada has been filed. We will advise you of the outcome. ■