

Ontario, Canada Appeal Court Finds Aggravated Damages Award Can Be Made Without Medical Evidence Of Diagnosable Psychological Injury



- Court of Appeal for Ontario allowed aggravated damages for an employer's bad-faith conduct during an employee's dismissal in the absence of medical evidence identifying a diagnosable psychological injury.
- Court also found medical expert testimony is not required to show an employee is physically incapable of mitigating damages during the reasonable notice period.

The Court of Appeal for Ontario (OCA) recently held that an employee may be awarded aggravated damages for an employer's bad-faith conduct during the employee's dismissal even in the absence of medical evidence identifying a diagnosable psychological injury. In [*Krmpotic v. Thunder Bay Electronics Limited, 2024 ONCA 332*](#), the OCA also rejected the notion that expert medical evidence is required to show whether a terminated employee is physically incapable of mitigating their damages during a reasonable notice period.

Background

In 1987, the employee began working for two businesses in Thunder Bay. For 28.6 of those years, the employee was their Building Maintenance Supervisor, a job that imposed significant physical demands upon him.

In 2016, after 30 years, when the employee was 59, his employment was terminated without notice or cause on the day he returned from a medical leave following back surgery. The surgery was required because the employee suffered workplace injuries while employed by the businesses.

The employee refused the businesses' offer of a severance package of 16 months' salary, and their request that he sign a Memorandum of Settlement and Release. The employee claimed damages for wrongful dismissal, mental distress, and aggravated/moral damages.

In 2017, the employee and his wife moved to Toronto to work at his son's residential renovation company, but never actually started work, as he was unable to meet the job's physical demands.

Since losing his employment, the employee claimed he suffered back pain, knee pain, anxiety, depression, fear, mental distress, confused emotions, anger, disturbed sleep, worry, frustration, helplessness, and defeat.

Trial Decision

The trial judge found the employee was a “loyal, responsible and trusted employee” who did “everything necessary” for his employers. Based on the employee’s “exemplary loyalty and dedication” to his employers, the trial judge awarded him a reasonable notice period of 24 months.

The trial judge rejected the businesses’ argument that the damages for pay in lieu of notice should be reduced because the employee failed to make reasonable efforts to mitigate his damages; he found the evidence indicated that the employee was “unable to perform any meaningful physical labour due to his physical condition” during the reasonable notice period.

The employee’s claim for mental distress damages was rejected because the trial court was not provided with medical evidence confirming that the manner in which his employment was terminated resulted in mental distress.

The employee was awarded \$50,000 for aggravated damages because the manner in which the businesses terminated his employment was “the antithesis of an employer’s duty” to be candid, reasonable, honest and forthright, and to “refrain from engaging in conduct that is unfair or in bad faith by being untruthful, misleading or unduly insensitive.”

The trial judge ordered the businesses jointly and severally liable for the damage awards.

Decision of the Court of Appeal for Ontario

The employers appealed to the OCA where they argued that the trial judge erred in finding the employee was unable to mitigate during the reasonable notice period; awarding aggravated damages; and holding the employers jointly and severally liable.

Reasonable efforts to mitigate

Citing *Lake v. La Presse*, [2022 ONCA 742](#) (discussed in detail [here](#)), the OCA emphasized that whether a terminated employee took reasonable steps to mitigate is largely a question of fact and, absent an error in principle or a palpable and overriding error, a decision respecting mitigation is entitled to deference.

The OCA held that the trial judge made no error in principle or a palpable and overriding error in finding that the employee was physically incapable of comparable work during the reasonable notice period. The trial judge was not persuaded that the employee failed to make reasonable efforts to mitigate during the notice period because he was 59 years old, recovering from back surgery, and was “significantly limited in his ability to perform the physical labour which his occupation demands on a daily basis.” Emphasizing that all three reasons are findings of fact, the OCA refused to interfere with them.

The OCA rejected the employers’ assertion that the trial judge’s finding of physical incapacity was an error in principle because it was made in the absence of medical evidence to that effect; the OCA found the cases the employers relied on did not establish the general principle that physical incapacity can only be established by expert medical evidence, and found it sufficient that the employee’s evidence

regarding his physical limitations was supported by his wife and son's testimonial evidence, and evidence of his failed attempt at re-employment due to his physical incapacity.

The OCA also rejected the businesses' assertion that the trial judge ignored the evidence in a medical report when making his finding of physical incapacity. It found that this report did not clear the employee for return to physical work comparable to that which he performed when he was employed by the businesses, or conflict with the trial judge's finding that, during the notice period, the employee was physically incapable of performing such work.

Aggravated damages

The OCA rejected the businesses' argument that the trial judge erred in awarding the employee aggravated damages due to the manner of his dismissal from his employment.

The businesses contended that following *Honda Canada Inc. v. Keays*, [2008 SCC 39](#), [2008] 2 SCR 362, aggravated damages could be awarded only if there is evidence of both:

- mental distress, *i.e.*, distress beyond the normal distress and hurt feelings resulting from dismissal, and
- the fact that the mental distress was caused by the manner of dismissal.

The OCA made the following observations about the concept of "mental distress":

Mental distress is a broad concept. It includes a diagnosable psychological condition arising from the manner of dismissal but is not limited to that. There is a spectrum along which a person can suffer mental distress as a result of the manner of dismissal. At one end is the person who suffers the normal distress and hurt feelings resulting from dismissal, which are not compensable in damages. At the other end of the spectrum is the person who suffers from a diagnosable psychological condition as a result of the manner of dismissal. In between those two end points, there is a spectrum along which the manner of dismissal has caused mental distress that does not reach the level of a diagnosable psychological injury.

The OCA held that it is not the end of the consideration of the issue of aggravated damages in wrongful dismissal cases when an employee has not established, through medical evidence, that he had suffered a diagnosable psychological injury. One must go further and determine whether the employer's conduct during the course of termination amounted to a breach of their duty of honest performance; and, if so, whether, as a consequence of that breach, the employee "suffer[ed] harm beyond the normal distress and hurt feelings arising from dismissal." The OCA found that the trial judge approached the subject of mental distress in that manner, and agreed with his determination that the individual who was both the Vice-President and General Manager of one of the businesses and the President of the other, engaged in conduct that amounted to bad faith during the process of dismissing the employee. The OCA found that such conduct included this individual's:

- claim that the employee had been dismissed for financial reasons while refusing to produce the financial statements that he stated would support this claim.
- behaviour that was "neither candid nor forthright": the employee was dismissed because of the physical limitations that would prevent him from continuing to perform his job duties.
- termination of the employee two hours after returning to work following his back

surgery.

- engagement during the termination meeting in “conduct that was untruthful, misleading, and unduly insensitive.”

The OCA also agreed with the trial judge’s finding that, as a result of his dismissal, the employee suffered from anxiety, depression, fear, poor sleep, frustration, and feelings of helplessness, which constituted “harm beyond the normal distress and hurt feelings resulting from dismissal.”

Joint and several liability

The OCA rejected the employers’ argument that the trial judge erred in making them jointly and severally liable for the damage awards. It pointed to the Settlement Memorandum drafted by the employers, which defined the “Employer” as both employers together. It also noted that the first preamble of the Settlement Memorandum stated, “WHEREAS the Employee has been employed by [Employer 1 and Employer 2] since on or about Feb. 24, 1987” and concluded with the statement that the “Employer” is signing on behalf of both employers.

Bottom Line for Employers

As *Thunder Bay Electronics* provides that employees do not require medical evidence to establish that they were unable to make reasonable efforts to mitigate their damages during the reasonable notice period due to their physical incapacity, employers should be prepared to refute testimonial evidence of physical incapacity and evidence of a failed attempt at re-employment due to physical incapacity.

Though employees may not be required to produce medical evidence at trial to establish physical inability to mitigate damages, employers may, in some circumstances, require an employee to undergo an independent medical examination during discovery before trial. In the recent Ontario case of *Marshall v. Mercantile Exchange Corp*, 2024 CanLII 71128 (ONSC), the Court ordered a plaintiff to undergo an independent medical examination because the plaintiff claimed that they were or would be incapable of mitigation for over 12 months. When employees claim inability to mitigate for lengthy periods of time (over 12 months), employers should seek supporting medical evidence during discovery, or risk a court accepting incapacity on the basis of non-medical evidence.

The OCA’s easing of an employee’s ability to obtain aggravated damages with the removal of the requirement for medical evidence of a diagnosable psychological injury provides significant incentive for employers to take steps to avoid such awards. Employers should perform employee dismissals in good faith, honestly and sensitively to prevent employees from experiencing harm beyond the normal distress and hurt feelings arising from dismissal. If an employer chooses to explain to an employee the reason for their dismissal, they should do so in a candid and forthright manner that is not untruthful, misleading, or unduly insensitive. Employers should also be mindful of the timing of an employee’s dismissal.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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