

Ontario Court of Appeal Upholds Significant Costs Award against Former Employee in *Colistro v. Tbaytel*

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In *Colistro v. Tbaytel*,¹ the Ontario Court of Appeal considered the consequences of an employer's decision to rehire an employee who had been dismissed from his employment years earlier amidst sexual harassment allegations. Although the decision highlights the risks of placing business interests ahead of the obligation to maintain a harassment-free workplace, it also provides guidance on the potential cost consequences of pursuing inflated damage awards in wrongful dismissal litigation.

Background

Linda Colistro was a long-term employee of Tbaytel and its predecessor, the Corporation of the City of Thunder Bay (the City). When Tbaytel announced that it was rehiring Ms. Colistro's former supervisor, Steve Benoit, Ms. Colistro experienced significant emotional distress. Eleven years earlier, the City had dismissed Mr. Benoit from his employment in part due to allegations of sexual harassment brought forward by Ms. Colistro. Ms. Colistro told the hiring manager about her experience with Mr. Benoit and asked that he not be rehired.

By letter to Ms. Colistro, Tbaytel confirmed that it would be hiring Mr. Benoit despite her objections, but offered to accommodate Ms. Colistro by transferring her to an equivalent position in an adjacent building. Ms. Colistro refused the offer and did not return to work. She was ultimately diagnosed with Post-Traumatic Stress Disorder and depression, and commenced an action against both Tbaytel and the City, claiming over \$3 million in damages for constructive dismissal, intentional infliction of mental suffering, and moral damages.

At trial, the Court found that Ms. Colistro had been constructively dismissed and ordered Tbaytel and the City to jointly pay damages equal to 12 months' notice, less short-term salary continuance and long-term disability payments Ms. Colistro had received over that period, leaving a net award to Ms. Colistro of just over \$14,000. The court also awarded moral damages of \$100,000, but dismissed Ms. Colistro's claim for intentional infliction of mental suffering. In light of the disparity between the amount Ms. Colistro had claimed and the amount awarded, the trial judge held that the defendants were the substantially successful parties and ordered Ms. Colistro to pay costs of \$150,000 to Tbaytel and \$50,000 to the City.

Ms. Colistro appealed the dismissal of her claim for intentional infliction of mental suffering and sought leave to appeal the costs order. Tbaytel and the City cross-appealed the Court's constructive dismissal finding

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and moral damages award.

Court of Appeal Decision

The Court of Appeal dismissed Ms. Colistro's appeal and the defendants' cross-appeals, and denied Ms. Colistro leave to appeal the costs award.

(i) Intentional Infliction of Mental Suffering

The Court confirmed that the tort of intentional infliction of mental suffering has three elements: (1) flagrant or outrageous conduct, that is (2) calculated to produce harm, and that (3) results in a visible and provable illness.

Although it agreed with the trial judge's findings, the Court held that the trial judge had erred in applying the second element of the tort. The second element of this tort has two branches:

- The employer must intend to produce the consequences that follow from its action; or
- The consequences must be known by the employer to be substantially certain to follow.

The trial judge had concluded that there was insufficient evidence that Tbaytel knew that it was substantially certain that Ms. Colistro would suffer PTSD and depression from its hiring of Mr. Benoit. However, to establish "substantial certainty," an employee need only show that that the employer could foresee psychological injury of *some* kind, and not necessarily the specific psychiatric disorder from which the employee later suffered.

Nevertheless, the Court of Appeal agreed that the second element of the tort had not been made out. "Substantial certainty" required Ms. Colistro to establish that Tbaytel had subjective knowledge that serious psychological injury was substantially certain to follow from its decision to hire Mr. Benoit, and the evidence at trial did not support this conclusion.

(ii) Constructive Dismissal

The Court of Appeal agreed that Ms. Colistro had been constructively dismissed. It specifically rejected Tbaytel's argument that a single act cannot ground a finding of constructive dismissal, concluding that such a rigid approach would be contrary to the Supreme Court of Canada's guiding principles on constructive dismissal as outlined in *Potter v. New Brunswick Legal Aid Services*. In any event, the trial judge's finding that Ms. Colistro had been constructively dismissed was rooted in a series of key factual findings, not a single event.

(iii) Moral Damages

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The Court of Appeal upheld the moral damages award. While acknowledging that the assessment of moral damages under the *Honda Canada Inc. v. Keays* framework is an imprecise and fact-specific exercise, the award of \$100,000 was in line with amounts recently awarded to other employees who had been mistreated in the manner of dismissal.

(iv) Costs

Significantly, the Court denied Ms. Colistro's application for leave to appeal the costs order. Leave to appeal a costs order is only granted if there are strong grounds to suggest that the judge erred in exercising his or her discretion. Because Ms. Colistro had claimed more than \$3 million in damages and was awarded just over \$114,000 at trial, the trial judge had correctly determined that the defendants were the substantially successful parties and entitled to costs.

Takeaways

In the #MeToo era, the *Colistro* decision is yet another reminder of the importance of providing a safe, harassment-free workplace to all employees. A failure to adequately respond to and investigate complaints of harassment, particularly when those complaints involve managerial or executive-level employees, could make continued employment intolerable for the employees subjected to harassment and give rise to constructive dismissal claims.

At the same time, *Colistro* highlights the risks of overzealous pleading in wrongful dismissal litigation. It is an all too common practice for employees to commence wrongful dismissal actions seeking far more in damages than they could realistically expect to recover at trial. This approach is not conducive to settlement and often prolongs litigation unnecessarily. The Court of Appeal's decision in *Colistro* will hopefully serve to deter this tactic in future cases.

For more information, please contact Maria Constantine or any other member of the Employment & Labour Group.

¹ 2019 ONCA 197.