



## Aggravated and punitive damages refused for employee denied disability benefits

July 1, 1999

The vexing problem of damages for mental distress arising out of a termination of employment has once again been at the centre of a legal battle in the courts. Readers of *FOCUS* will recall from our January 1998 issue (see “[Fairly, reasonably and decently: Employers obliged to deal in good faith with dismissed employees, Supreme Court rules](#)” on our Publications page) that, in *Wallace v. United Grain Growers Ltd.*, the Supreme Court of Canada sustained an earlier ruling that such damages must flow from an “independently actionable wrong”, that is, a wrong which by itself, independent of any primary cause of action, can give rise to a court action. This position has been restated in a decision by the Ontario Court of Appeal that overturned a trial award of both aggravated and punitive damages.

*Beird v. Westinghouse Canada Inc.* (March 29, 1999) concerned an employee terminated from his position two and a half years after sustaining a workplace injury. Both before and after his termination, Beird had tried to return to Westinghouse in some capacity. However, he eventually changed his position, and demanded that Westinghouse pay his long term disability benefits on the ground that he was permanently disabled at the time of his termination.

Westinghouse’s disability benefits plan provided that the company would pay short term benefits during the first two years of absence if an employee could not perform his or her normal duties. After that, the insurer, Mutual Life, was obliged to pay if the employee was incapable of performing any gainful occupation for which he or she was reasonably fitted. As Beird’s dismissal occurred more than two years after his injury, it was his entitlement to benefits from Mutual Life that was at issue.

### **TRIAL JUDGE: MENTAL DISTRESS A FORESEEABLE CONSEQUENCE OF EMPLOYER’S ACTIONS**

At the trial, Mutual Life had settled and acknowledged its responsibility to pay Beird long term benefits, and Beird had previously dropped his request for a declaration that he had been wrongfully dismissed. Other issues remained outstanding, however, including his demand for aggravated and punitive damages for Westinghouse’s failure to apply to Mutual Life for long term benefits on his behalf.

Westinghouse claimed that it had not submitted the application because it believed that Beird was capable of gainful employment. The judge found that, while that this belief may have been understandable, it was wrong and that, by persisting in not applying to Mutual Life, Westinghouse had breached its duty to Beird and was liable to him for the foreseeable consequences of its actions.



The judge went on to hold that Beaird's mental suffering was the direct consequence of Westinghouse's refusal to pursue his claim, and awarded him aggravated damages of \$15,000. The judge then awarded \$32,000 in punitive damages, reasoning that, despite the fact she found that Westinghouse had not acted out of malice, it had behaved in an increasingly reprehensible manner when it ignored its own medical reports that indicated that Beaird was permanently disabled. Both awards were appealed.

### **APPEAL COURT: NO INDEPENDENT, ACTIONABLE WRONG**

The Court of Appeal ruled that the judge had erred in holding that damages for mental distress could be awarded if they were the foreseeable consequence of a wrongful dismissal. Rather, mental distress damages were available only if they arose from a separate, actionable wrong.

Before the trial, Beaird had dropped his wrongful dismissal action, but maintained his claim that Westinghouse had failed in its duty to support his benefits entitlement. This breach of duty became the new primary claim before the trial judge, a claim whose compensatory element was settled when Mutual Life acknowledged its liability. As the Court of Appeal put it, "[t]here was but one cause of action and that was for failure to acknowledge and support [Beaird's] claim for long term disability payments. I am not sure that there is such a cause of action, but if there is, it is necessary to find an additional actionable wrong to support claims for aggravated damages."

Even if one were to accept that Beaird's new primary action against Westinghouse was still alive, despite Mutual Life's having settled, there was clearly no further separate action existing on which to base an award of aggravated damages.

An award of punitive damages also requires the finding of a separate actionable wrong against the plaintiff, the Court noted. As well, such damages are intended to punish; they are not imposed merely because a court disapproves of the defendant's actions. Rather, the conduct must be sufficiently "harsh, vindictive, reprehensible and malicious" for such an award to be made. Here, the Court ruled, the judge had not even attempted to find that Westinghouse had acted in this manner.

### **In Our View**

The courts are clear that damages in a wrongful dismissal action will be restricted to those flowing from the failure to give reasonable notice, unless there is a separate, actionable wrong, such as slander. However, the notice period can be lengthened by callous or insensitive treatment in connection with the termination.

The Court did not have to decide in this case whether a wrongful failure to pursue a dismissed employee's benefit claim constituted such a separate "actionable wrong", as this failure was the very issue being litigated, not a separate one. However, it is worth noting that the Court has ruled in



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another case that, in an action on an insurance policy for damages for an insurance loss, a claim that the insurer dealt with the insurance claim in bad faith does constitute a separate actionable wrong.

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