

Doyle v. Zochem Inc.: A good example of an employer's many overlapping duties and obligations in the workplace

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Doyle v. Zochem Inc., 2017 ONCA 130, a recent decision of the Ontario Court of Appeal, is a good example of how courts are supervising conduct and slapping offending employers with multiple statutory and common law offences and claims. Employers must navigate a web of overlapping obligations - human rights, occupational health and safety, employment standards and common law. These obligations can converge and create liability under separate heads of damages. The Court in *Zochem* found that the same conduct of the employer served as the basis for several types of damages under a human rights statute and under the common law. The Court went on to explain how moral damages are distinct from human rights damages.

Facts

The facts in *Zochem* represent a wish list for how not to treat an employee. The plaintiff worked for the employer for nine years, and was a plant supervisor and health and safety coordinator at the time that her employment was terminated. She was the only female employee at the plant. Another plant maintenance manager, whom the employer considered to be “irreplaceable”, sexually harassed the plaintiff. He made references to sexual activity, and generally objectified her in the workplace. The manager became aware that the plaintiff was to be terminated, and belittled her during a meeting with coworkers. Unaware of her upcoming termination, she made a sexual harassment complaint to her employer.

The employer conducted a cursory investigation without input from the plaintiff. The plaintiff was then terminated on a without cause basis. Her termination was described by the Court as “cold and brusque”. The employer stated “we don't need you here anymore”, and she was told that she was “being irresponsible” by complaining about the harasser, as his reputation was at stake. Also, during the termination meeting, the plaintiff's car keys were taken from her purse and her car was brought around without her permission. The trial judge stated that the employer had “mangled the termination process”. Among other things, it recruited employees to “dig up dirt” to discredit the plaintiff in order to justify her termination, and created performance reviews to bootstrap the pre-existing determination to terminate her employment.

Trial Decision

The trial judge found that the plaintiff's employment was terminated due to her gender and a sexual harassment complaint that she made against her manager. The plaintiff was awarded the following:

- ten months' pay in lieu of notice;
- \$25,000 for sexual harassment under the *Human Rights Code*; and
- \$60,000 in moral damages for the defendant's breach of its implied contractual obligation of good faith in the manner of dismissal.

Appeal: Damages Issue

The defendant appealed the moral damages award, taking the position that awarding both moral damages (taking into consideration sexual harassment), and human rights damages (for infringing the plaintiff's right to be free from harassment) was double recovery.

1. Awarding both moral damages and human rights damages for sexual harassment is not double recovery

The Court dismissed the employer's appeal on the damages award. It found that the award of moral damages did not constitute double recovery alongside the *Human Rights Code* damages for sexual harassment. The Court provided some clarity on this issue:

- Human rights damages are remedial rather than punitive.
- Moral damages addressed unfair or bad faith conduct that caused mental distress.

In *Zochem*, there was a clear factual overlap in the employer's conduct underlying these damage awards; very similar but perhaps not identical. The Court found no basis for reducing the moral damages because of the overlap.

2. Factors considered for awarding moral damages

The Court also commented that moral damages depend on the facts, but certain principles emerge:

- A significant factor in a moral damages award is evidence of untruthful, misleading and unduly insensitive conduct by the employer. For example, the employer in *Zochem* misrepresented to the plaintiff that her job was secure and that she would be given a chance to improve. This, coupled with the employer's sudden termination of the plaintiff's employment, and the further representation that her services were no longer needed, were not improper considerations by the trial judge in the context of the case.
- It is not just conduct at the moment of termination that may be considered for moral damages, but also pre- and post- termination conduct. Because the termination decision had already been made, the employer's cursory investigation was a proper consideration for moral damages.

- A breach of the obligation to treat employees with good faith could lead to moral damages. The Court held that the employer's denial of short term disability benefits without adequate evidence was a breach of its good faith obligation.

Take Aways from *Zochem*

The two key points from *Zochem* are:

- (1) An employer's conduct may justify an award for both human rights damages and moral damages based on the same conduct - the two remedies do not amount to double recovery.
- (2) Both pre- and post- employment conduct by an employer can be considered as factors in an award for moral damages so long as such conduct is related to the manner of dismissal.

The implications of *Zochem* may be even broader. Although not addressed by the Court of Appeal, the logic of the case likely applies equally to other statutory liabilities of employers, such as under the the Ontario *Occupational Health and Safety Act* ("OHSA"). In particular, the employer's cursory investigation into the plaintiff's complaint of sexual harassment may well also raise issues under the OHSA, which bolster employee protection from workplace harassment. As of September 8, 2016 employers are required to:

- Review (and if necessary, amend) their workplace harassment policy to ensure it includes workplace sexual harassment;
- Promptly investigate incidents and complaints of workplace harassment;
- Inform the parties to a workplace harassment complaint of the results of the investigation and any corrective action that will occur; and
- Involve the Joint Health and Safety Committee in developing written programs and procedures, regarding workplace harassment.

These OHSA employer obligations, and attendant liabilities that can flow from failing to comply with the OHSA, are in addition to all the existing other statutory and common law obligations. And what we know from *Zochem* is they can all be triggered by the same workplace fact pattern, and yield separate claims of relief which we might have once called double recovery.