Fidler Sticks: Employee Awarded Damages for Loss of a "Psychological Benefit"

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Since the mid-nineteenth century, the law has been clear that damages are not available to a party for mental distress flowing from a breach of contract unless the events giving rise to the mental distress form the basis for an independent cause of action separate from the breach of contract. That rule came under attack in 2006 when the Supreme Court of Canada released its decision in the *Fidler* case[1] and found that damages were available for mental distress resulting from an insurance company's denial of disability benefits. A very recent Ontario case – *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)*[2] – has now gone farther, awarding damages for mental distress flowing from an employer's breach of a term in the contract of employment.

The Facts of the Case

Soon after she started in her new position at the Toronto Jail, Cassandra Charlton, a correctional officer of African descent employed by the Ontario government, received a letter containing numerous threats of violence and racial slurs. The letter was one of a series of anonymous, threatening letters received by a total of eight correctional officers working at the Toronto Jail, all of whom belonged to racial or ethnic minorities. The employer – the Ministry of Community Safety and Correctional Services – contacted the Toronto Police, who conducted an extensive investigation. The employer also initiated an investigation of its own; however, neither the police nor the Ministry was ever able to uncover the identity of the letters' author.

Charlton claimed to have been so traumatized by the letter that she could not continue working. She went on paid medical leave and received her full salary for a period of six months, after which she applied for and received a weekly allowance from Ontario's Workplace Safety and Insurance Board. While discussions followed between Charlton and the employer concerning a possible return to work, she ultimately filed a grievance against the government, claiming damages for lost wages and mental distress.

The Decision

The grievance was heard by the Ontario Public Service Grievance Board, a panel empowered to hear complaints from non-unionized employees of the Ontario government who, like Charlton, alleged a breach of a working condition or term of employment. For its part, the employer did not argue that there had, in fact, been racial harassment in Charlton's case. Nor did the Ministry dispute that it had an obligation to attempt to reintegrate her into a harassment-free workplace. The only debate was over damages: Charlton and the Ministry argued about the amount of damages payable, and the basis for their award.

Charlton argued for, and won, damages for economic loss in an amount equivalent to the difference between her WSIB benefits and the amount she

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would have earned at her regular salary during the leave period. This aspect of the ruling is not surprising. What is surprising is the Board's response to Charlton's claim for damages for mental distress. On this front, the employer had argued that the amount for mental distress flowing from racial harassment should be limited to $10,000, the maximum amount available under the province's human rights legislation.

The Board disagreed. First, the Board made it clear that its remedial jurisdiction did not stem from human rights legislation. The Board held, rather, that freedom from racial harassment in the workplace was an implicit term of Charlton's employment contract, and the Board had the inherent jurisdiction to remedy the breach of that term. Next – and most notably – the Board invoked *Fidler* for the notion that, even in the absence of bad faith or an independent actionable wrong on an employer's part, damages for mental distress will be available for the breach of a contractual term that creates an expectation of a "psychological benefit". In the Board's words,

...mental distress damages are not dependent on some form of egregious conduct on the part of the person in breach of the contract but flow directly from the breach of certain types of contractual terms, compensating for the mental distress that flows from the breach.

The Board held that the guarantee of freedom from racial harassment in the workplace was a "psychological benefit" of Charlton's contract, and its breach was compensable in damages. In the end, the Board awarded $20,000 to Charlton for mental distress.

The Implications for Employers

Charlton makes it clear that "certain types of contractual terms" provide employees with a "psychological benefit", and that the breach of those kinds of terms will justify an award of damages for mental distress. The ruling is an unhelpful one for employers, not only because it expands their range of potential liabilities, but also because it does not offer any guidance to employers in identifying those types of terms – implicit or express – that bestow a psychological benefit. Arguably, any of the consideration flowing from employer to employee pursuant to an employment agreement carries with it as a corollary a positive psychological benefit, the loss of which might be actionable under the *Charlton* formula.

It is likely, in the wake of *Charlton*, that we will see a surge in claims from employees for the loss of a "psychological benefit", and until the Courts provide a test for the identification of terms that carry such a benefit, it will be necessary for employers to apply heightened vigilance in the creation, performance, and termination of employment agreements.

(Footnotes)

[1] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3.

[2] [2007] O.P.S.G.B.A. No. 4.