

Member's Quarterly

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Feature

Bad Faith Termination

Recent Trends in Aggravated Damages



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It is increasingly common, if not inevitable, that most claims for wrongful dismissal these days will be accompanied by significant claims for aggravated and/or punitive damages. Given claims have steadily increased in frequency and amount claimed, it is important to understand when employers are actually at risk of having such damages awarded against them and what steps can be taken to avoid liability.

First, it is helpful to note the distinction between aggravated and punitive damages, as these damages are often conflated with one another. Punitive damages are aimed at punishing the employer and will only be awarded "in exceptional cases for malicious and high-handed misconduct that offends a court's sense of decency" [see: Elgert, 2011 ABCA 112]. As a result, punitive damages are less common than aggravated damages given the extremely high bar of misconduct required. Given the egregious type of conduct required for punitive damages is more obvious/apparent, our primary focus in this article will be the trends and conduct associated with aggravated damages. In order to receive aggravated damages, the employee must demonstrate they have suffered actual damages as a result of the unfair or bad faith conduct of the employer. In other words, they must prove they suffered mental distress which went beyond the normal hurt feelings that can result from dismissal.

More specifically, the mere fact of a termination alone will not give rise to aggravated damages, as termination itself is always a contemplated result of the employment contract. However, what is not contemplated is the manner in which termination is pursued by the employer, specifically in cases where the employer takes intentional steps to humiliate or acts unduly insensitive towards the employee. In reviewing such factors, it is relevant to note that Courts do not readily award aggravated damages, unless the conduct of the employer is "untruthful, misleading or unduly insensitive" [see: Elgert, para 75].

That said, when Courts do see fit to award aggravated damages, we have seen an increase in the dollar amount of these awards and therefore it is more important than ever for employers to be cognizant of such damages and the conduct that can potentially lead to liability risks.

Specifically, the following conduct has attracted aggravated damages awards from the Courts in recent years:

- Termination of an employee during a medical or other protected leave of absence;
- Providing misleading or inaccurate reasons for termination;
- Failing to clearly communicate that the employee has been terminated;
- Insensitive or disparaging public remarks about the employee, which may function to unnecessarily damage their reputation;
- Maintaining unsubstantiated allegations of cause and/or misconduct against the employee;
- Publicly escorting/removing an employee from the workplace without reasonable basis for doing so;
- Conducting a biased and inadequate investigation into unfounded allegations of misconduct.

As a result, once an employer has made the decision to terminate, it should take steps to provide this message to the employee in a clear and respectful manner. By failing to clearly indicate to the employee that he/she is terminated or by making hurtful comments about that employee in front of other coworkers,

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the employer is risking exposure to a successful claim for aggravated damages. Overall, most terminations will likely not rise to the level where a claim for aggravated damages is warranted, however employers should always strive to carry out terminations in a respectful and good faith manner in order to limit their liability.

Notably, aggravated damages awards can range widely from \$2,000 - \$75,000, depending on each case's specific circumstances. It is therefore important to seek legal advice prior to proceeding with a termination to ensure you have adequately mitigated your risk.

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